**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| v. | : | |
| RICKEY WASHINGTON | : | |
| Appellant | : | No. 128 EDA 2017 |

Appeal from the Judgment of Sentence November 28, 2016
In the Court of Common Pleas of Chester County
Criminal Division at No(s): CP-15-CR-0000335-2008,
CP-15-CR-0003534-2008

BEFORE: BENDER, P.J.E., OTT, J., and FITZGERALD, J.*

MEMORANDUM BY OTT, J.: **FILED NOVEMBER 03, 2017**

Rickey Washington appeals from the judgment of sentence entered November 28, 2016, in the Court of Common Pleas of Chester County, imposed following revocation of probation. The trial court imposed an aggregate revocation sentence of six to 23 months' imprisonment, and at the same time imposed a nine and one-half to 20 year aggregate sentence on new

---

* Former Justice specially assigned to the Superior Court.

convictions. [1, 2] Concomitant with this appeal, counsel has filed an ***Anders***[3] brief and petition for leave to withdraw from representation. Based upon the following, we affirm on the basis of the trial court's sound opinion, and grant the petition to withdraw.

The factual and procedural history of this case is set forth in the trial court's Pa.R.A.P. 1925(a) opinion, and there is no need to repeat it here. ***See*** Trial Court Opinion, 4/6/2017, at 1–12.

When counsel files a petition to withdraw and accompanying ***Anders*** brief, we must first examine the request to withdraw before addressing any of the substantive issues raised on appeal. ***Commonwealth v. Cartrette***, 83 A.3d 1030, 1032 (Pa. Super. 2013) (*en banc*). Our review of the record reveals counsel has complied with the requirements for withdrawal outlined in

---

[1] Only the revocation sentence is at issue in this appeal. The trial court imposed a sentence of six to 23 months' imprisonment at Docket No. 335-2008 and a concurrent term of six to 23 months' imprisonment at Docket No. 3534-2008, granted credit for time served, and immediately re-paroled Washington so that he could begin serving the sentence imposed on the new convictions.

[2] On September 13, 2016, at Docket No. 1193-2016, Washington entered an open plea to, *inter alia*, fleeing or attempting to elude a police officer. 75 Pa.C.S. § 3733(a), graded as a felony of the third degree. On September 15, 2016, at Docket No. 871-2016, Washington was found guilty by a jury of burglary, 18 Pa.C.S. § 3502(a)(1), criminal trespass, 18 Pa.C.S. § 3503(a)(1)(ii), aggravated assault, 18 Pa.C.S. § 2702(a)(4), and related offenses. ***See*** Trial Court Opinion, 4/6/2017, at 5–7.

[3] ***Anders v. California***, 386 U.S. 738 (1967). ***See also Commonwealth v. McClendon***, 434 A.2d 1185 (Pa. 1981).

***Anders, supra***, and its progeny. Notably, counsel completed the following: (1) she filed a petition for leave to withdraw, in which she states she has made a conscientious review of the record and concludes the appeal is wholly frivolous; (2) she filed an ***Anders*** brief pursuant to the dictates of ***Commonwealth v. Santiago***, 978 A.2d 349, 361 (Pa. 2009); (3) she furnished a copy of the ***Anders*** brief to Washington; and (4) she advised Washington of his right to retain new counsel or proceed *pro se.* ***See Cartrette, supra*** at 1032 (discussing procedural requirements counsel must satisfy in requesting to withdraw from representation and substantive requirements of ***Anders*** brief). Moreover, we have received no correspondence from Washington supplementing the ***Anders*** brief.[4]

Therefore, we proceed "to make a full examination of the proceedings and make an independent judgment to decide whether the appeal is in fact wholly frivolous." ***Commonwealth v. Flowers***, 113 A.3d 1246, 1248 (Pa. Super. 2015) (quotations and citation omitted). In so doing, we review not only the issues identified by counsel in the ***Anders*** brief, but examine all of the proceedings to "make certain that appointed counsel has not overlooked

---

[4] This Court, upon consideration of Washington's June 15, 2017 application for relief, entered an order permitting Washington to file a response to counsel's petition to withdraw and ***Anders*** brief, either *pro se* or via privately retained counsel, within 30 days of the date the order is filed. ***See*** Order, 7/10/2017. No response was received by this Court.

the existence of potentially non-frivolous issues." ***Id.*** at 1249 (footnote omitted).

The sole issue identified in the ***Anders*** brief is a challenge to the discretionary aspects of the revocation sentence. ***See Anders*** Brief at 5.

A challenge to the discretionary aspects of a sentence is not absolute, but rather, "must be considered a petition for permission to appeal." ***Commonwealth v. Simmons***, 56 A.3d 1280, 1286 (Pa. Super. 2012) (quotation and citation omitted). To reach the merits of a discretionary issue, this Court must determine:

> whether the appeal is timely; (2) whether Appellant preserved [the] issue; (3) whether Appellant's brief includes a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of sentence; and (4) whether the concise statement raises a substantial question that the sentence is appropriate under the sentencing code.

***Commonwealth v. Edwards***, 71 A.3d 323, 329–330 (Pa. Super. 2013) (citation omitted).

Counsel complied with the procedural requirements for this appeal by filing both a timely post-sentence motion for reconsideration of sentence and a timely notice of appeal. Counsel also included in the ***Anders*** brief a concise statement of reasons relied upon for appeal with respect to the discretionary aspects of the sentence, pursuant to ***Commonwealth v. Tuladziecki***, 522 A.2d 17 (Pa. 1987), and Pa.R.A.P. 2119(f). Therefore, we must consider whether Washington raised a substantial question justifying our review.

A substantial question exists when an appellant sets forth "a colorable argument that the sentence imposed is either inconsistent with a specific provision of the Sentencing Code or is contrary to the fundamental norms underlying the sentencing process." ***Commonwealth v. Bynum-Hamilton***, 135 A.3d 179, 184 (Pa. Super. 2016) (citation omitted).

Here, the Rule 2119(f) statement in the ***Anders*** brief declares, in pertinent part:

> Although the revocation sentences [on Docket Nos. 335-2008 and 3534-2008] were imposed prior to an aggregate sentence of nine and a half (9½) to twenty (20) years on docket numbers CP-15-CR-871-2016 and CP-15-CR-1193-2016, counsel is constrained to conclude the sentences were within the wide discretion of the sentencing court and, therefore, not improper.

***Anders*** Brief at 4. Notwithstanding the inadequacy of this statement, we will address the merits of the discretionary aspects of sentence claim. ***See Commonwealth v. Lilley***, 978 A.2d 995, 998 (Pa. Super. 2009) (stating that where counsel files an ***Anders*** brief and petition to withdraw, this Court will review the discretionary aspects of the sentence even though the claim is not properly preserved).

Based on our review of the ***Anders*** brief, the record, the applicable law, and the opinion of the trial court, we affirm on the basis of the thorough discussion of the Honorable Anthony A. Sarcione. ***See*** Trial Court Opinion, 4/6/2017, at 12–45 (finding, *inter alia*: (1) Washington's discretionary

aspects of sentencing claim[5] fails to demonstrate an abuse of discretion where the revocation sentence is an aggregate concurrent sentence, within the standard and mitigated range of the applicable sentencing guidelines,[6] and Washington received credit for time served and was immediately paroled on both dockets; (2) the trial court considered Washington's lengthy prior record and fact these were Washington's fourth probation violation (Docket No. 3534-2008) and fifth probation violation (Docket No. 335-2008), these probation violations stemmed from grave and violent new convictions, Washington's prior record is lengthy and disturbing, and Washington has anger and mental health issues, suffers from chronic substance abuse, and avoids responsibility for his actions as evidenced by his new conviction for fleeing or attempting to elude police officer and his prior status as a fugitive; and (3) the trial court structured Washington's sentence "so that Washington would be deemed to have served his revocation sentence first in order to begin serving his State sentence on the new convictions without a detainer on him, so that he would be immediately eligible to participate in the rehabilitative programs that are

---

[5] In the trial court, counsel filed a concise statement pursuant to Pa.R.A.P 1925(b), contending that the court failed to give appropriate weight to mitigating factors. ***See*** Concise Statement, 2/22/2017.

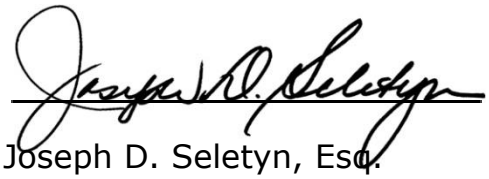
[6] We recognize that the sentencing guidelines do not apply to a revocation sentence. ***See*** 204 Pa. Code § 303.1(b); ***Commonwealth v. Pasture***, 107 A.3d 21, 27 (Pa. 2014).

available to him at the State Prison in order to address his personal issues….”[7]). We discern no abuse of discretion on the part of the trial court.[8]

Finally, our independent review discloses no other non-frivolous claim that Washington could raise on appeal.[9] Accordingly, we affirm and grant counsel’s petition to withdraw.

Judgment of sentence affirmed. Petition to withdraw granted.[10]

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/3/2017

---

[7] Trial Court Opinion, 4/10/2017, at 35.

[8] We review a sentence imposed following the revocation of probation for an abuse of discretion. ***Cartrette, supra***, 83 A.3d at 1041.

[9] When reviewing the outcome of a revocation proceeding, this Court is limited to determining the validity of the proceeding, the legality of the judgment of sentence imposed after probation revocation, and the discretionary aspects of sentencing. ***Cartrette, id.*** at 1035–1037.

[10] In the event of further proceedings, the parties are directed to attach a copy of the trial court’s April 6, 2017 opinion to this memorandum.

| | |
|---|---|
| **COMMONWEALTH OF PENNSYLVANIA** | **: IN THE COURT OF COMMON PLEAS** |
| **vs.** | **: CHESTER COUNTY, PENNSYLVANIA** |
| **RICKEY R. WASHINGTON** | **: NO. 15-CR-0003534-2008; 15-CR-000335-2008** |
| | **: CRIMINAL ACTION—LAW** |

*Nicholas J. Casenta, Jr., Esquire, Chief Deputy District Attorney, for the Commonwealth*
*Maria T. Heller, Esquire, for the Defendant*

## OPINION *SUR* RULE 1925(a)

Before the Court is Defendant Rickey R. Washington's counseled direct appeal from the violation of probation sentences imposed at the above-captioned docket numbers on November 28, 2016. Defendant filed his Notice of Appeal on December 28, 2016, exactly thirty (30) days after his VOP sentence was imposed;[1] consequently, Defendant's Notice of Appeal is timely. *See* Pa. R.A.P. 903(a)("Except as otherwise prescribed by this rule, the notice of appeal required by Rule 902 (manner of taking appeal) shall be filed within 30 days after the entry of the order from which the appeal is taken."); Pa. R.Crim.P. 708(E)(the filing of a motion to modify a VOP sentence "will not toll the 30-day appeal period.").



### I. Factual and Procedural History

#### A. No. 15-CR-0000335-2008

On May 23, 2008 Defendant tendered a negotiated guilty plea to two dockets, numbers 15-CR-0001165-2008 and 15-CR-0000335-2008. At docket number

[1] Defendant's Notice of Appeal states that he is appealing from the Judgment of Sentence entered on December 22, 2016. However, the above-captioned cases involve VOP sentences. Defendant's VOP sentences were entered on November 28, 2016. Defendant filed a post-sentence motion at each of the above-captioned VOP dockets, which we denied by Order dated December 22, 2016. Post-sentence motions following VOP sentences do not toll the thirty (30) day appeal period under Pa. R.Crim.P. 708(E). Defendant's Judgment of Sentence, for appeal purposes, was final on November 28, 2016. Regardless, Defendant's Notice of Appeal is timely either way.

15-CR-0001165-2008, Defendant pled guilty to Simple Assault (Count I), 18 Pa. C.S.A. § 2701, in connection with a victim by the name of Crystal Johns, that occurred on February 10, 2008. At docket number 15-CR-0000335-2008, Defendant pled guilty to one count of Possession[2] (Cocaine)(Count I), 35 P.S. § 780-113(A)(16), and one count of Driving Under Suspension (Count III), 75 Pa. C.S.A. § 1543(a), for offenses which occurred on January 14, 2008. In exchange for the tender of his negotiated plea, on May 27, 2008 Defendant was sentenced at docket number 15-CR-0001165-2008, the Simple Assault, to a term of eighty-six (86) days to twenty-three (23) months in prison, with credit for time served from March 3, 2008 through May 27, 2008. He was fined $10.00 and ordered to pay the costs of prosecution. At docket number 15-CR-0000335-2008, Defendant was sentenced in the standard range of the Statewide Sentencing Guidelines to three (3) years of probation for Count I, Possession (Cocaine), which his Guideline Sentence Form indicated was a second or subsequent offense, to run concurrently with the sentence imposed at Count I of docket number 15-CR-0001165-2008, and to pay a fine of $200.00 for his conviction at Count III, Driving Under Suspension. He was also ordered to pay the costs of prosecution at both counts of docket number 15-CR-0000335-2008. Defendant was granted immediate parole at both docket numbers 15-CR-0001165-2008 and 15-CR-0000335-2008 by Order dated May 27, 2008.

[2] The Written Guilty Plea Colloquy lists this offense as belonging to docket number 15-CR-0007476-2008. However, no case exists in Chester County at that docket number. Further, the caption reflects that docket number "CR-07476-2008" was crossed out and "00335" was added in its place. It appears from a perusal of the Magisterial District Court docket that number 7476-08 may refer to the OTN number associated with Common Pleas Docket number 3335-08. For all of these reasons, we conclude that the notation of "7476-08" with respect to the crime of Possession listed on the Written Guilty Plea Colloquy is a mistake and the proper docket number for this offense is 15-CR-0000335-2008.

On August 5, 2009, after incurring new charges at docket number 15-CR-0003534-2008, Defendant was found to be in violation of his probation. His three (3) years of probation at docket number 15-CR-0000335-2008 was revoked and reinstated.

On June 27, 2011, after again incurring new charges on or about March 29, 2011 including Aggravated Assault, Terroristic Threats, and Endangering Welfare of Children, and for technical non-compliance, Defendant was found to be in violation of his probation for a second time. Defendant's three (3) years of probation were revoked and reinstated, this time ordered to run concurrent with the sentence he received at docket number 15-CR-0003534-2008, discussed below.

On August 31, 2012, after yet again incurring new charges and for non-compliance, Defendant was found in violation of his probation. His three (3) years of probation were revoked and reinstated, this time ordered to run concurrent with the sentence imposed at docket number 15-CR-0000728-2012, a Possession With Intent to Deliver and related drug offenses case, effective August 31, 2012.

On March 26, 2014, Defendant was, for the fourth time, found to be in violation of his parole. The dockets do not reflect when he was paroled at docket number 15-CR-0000335-2008. No action was taken on the violation. The detainer was removed and Defendant was released from custody on docket number 15-CR-0000335-2008.

On May 29, 2015, a fifth Petition to Schedule Hearings and Find Probation Parole Violation was filed, charging Defendant with technical violations and drug use/possession. On September 21, 2015 a continuance was granted with respect to the hearing on these alleged violations for thirty (30) days. On October 22, 2015 a Bench Warrant was issued for Defendant's failure to appear in court at his Gag II hearing. In

November of 2015 Defendant became a fugitive when he learned from his Probation Officer that a Bench Warrant had been issued for him as a result of his failure to appear in court. (Sentencing Transcript, 11/28/16, N.T. 16).

B. No. 15-CR-0003534-2008

On June 13, 2008, Defendant assaulted a corrections officer during the performance of his or her duties. He was convicted at docket number 15-CR-0003534-2008 pursuant to a negotiated guilty plea on March 19, 2009 of one (1) count of Aggravated Assault (Count I), 18 Pa. C.S.A. § 2702(a)(3), graded as a Felony of the Second Degree (F-2) and sentenced in the mitigated range of the Guidelines to eleven and a half (11 ½) to twenty-three (23) months in Chester County Prison followed by two (2) years of consecutive probation. He was ordered to pay $25.00 in fines plus the costs of prosecution and a DNA testing fee of $250.00. He was given credit for time served from March 1, 2009 through March 19, 2009 but was denied good time and re-entry plan eligibility. Defendant was paroled from this sentence on February 15, 2010.

On June 27, 2011 Defendant was found to have violated his probation and parole technically and by incurring new charges including Aggravated Assault, Terroristic Threats, and Endangering Welfare of Children. He was sentenced on June 27, 2011 to the balance of the maximum, which was eleven (11) months, fifteen (15) days, in prison with credit for time served from April 11, 2011 through May 11, 2011. His two (2) year probation was revoked and reinstated consecutive to parole. He was reparoled on June 27, 2011.

On August 31, 2012 Defendant was found to have violated his probation and his parole a second time, again both technically and by incurring new charges. He

was sentenced to the balance of the maximum, which was eight (8) months and twenty-eight (28) days, in prison with credit for time served on August 31, 2012. His two (2) year probation was revoked and reinstated consecutive to parole. Defendant was ordered to serve his entire parole balance concurrently with a sentence imposed on him at another docket, No. 15-CR-0000728-2012, which involved drug offenses.

On March 26, 2014, Defendant was again found to be in violation of his parole a third time for technical violations and drug use/possession. No action was taken. His detainer was removed and he was released from custody.

On May 29, 2015 a fourth Petition to Schedule Hearings and Find Probation/Parole Violation was filed, charging Defendant with technical violations and drug use/possession. On September 21, 2015 a continuance was granted with respect to the hearing on these alleged violations for thirty (30) days. On October 22, 2015 a Bench Warrant was issued for Defendant's failure to appear in court at his Gag II hearing. In November of 2015 Defendant became a fugitive when he learned from his Probation Officer that a Bench Warrant had been issued for him as a result of his failure to appear in court. (Sentencing Transcript, 11/28/16, N.T. 16).

C. Shared History of Docket Nos. 15-CR-0000335-2008 and 15-CR-0003534-2008

In March of 2016, while not only on supervision but the subject of an active bench warrant for other violations, Defendant incurred new charges at docket numbers 15-CR-0000871-16 and 15-CR-0001193-2016 for new offenses committed in January and February, respectively, of 2016. The new offenses included, at docket number 15-CR-0001193-2016, Flight to Avoid Apprehension, Trial or Punishment (18 Pa. C.S.A. § 5126(a)), Fleeing or Attempting to Elude Police Officer (75 Pa. C.S.A. § 3733(a)),

Recklessly Endangering Another Person (18 Pa. C.S.A. § 2705), and various other drug and traffic offenses, and at docket number 15-CR-0000871-2016, Burglary (Person Present)(18 Pa. C.S.A. § 3502(a)(1)), Aggravated Assault (18 Pa. C.S.A. § 2702(a)(4)), and other related offenses. On May 9, 2016 the disposition of his fourth alleged probation/parole violation at docket number 15-CR-0003534-2008 and his fifth alleged parole/probation violation at docket number 15-CR-0000335-2008 was continued pending the disposition of these new charges.

On September 13, 2016, immediately prior to trial on the new charges at docket numbers 15-CR-0001193-2016 and 15-CR-0000871-2016, which were consolidated for purposes of trial, Defendant tendered an open plea at docket number 15-CR-0001193-2016 to the following offenses: Fleeing or Attempting to Elude a Police Officer (Count II), 75 Pa. C.S.A. § 3733(a), graded as a Felony of the Third Degree (F-3); Drug Paraphernalia (Count VIII), 35 P.S. § 780-113(A)(32), graded as a Misdemeanor; and Driving While Operating Privilege is Suspended/Revoked (Count XXV), 75 Pa. C.S.A. § 1543(a), graded as a Summary. Sentencing was deferred pending his trial on docket number 15-CR-0000871-2016.

Following a three (3) day jury trial that began with jury selection on the afternoon of September 13, 2016 and ended with a Verdict on September 15, 2016, Defendant was convicted of one (1) count of Burglary (Count I) (18 Pa. C.S.A. § 3502(a)(1)); one (1) count of Criminal Trespass (Count III) (18 Pa. C.S.A. § 3503(a)(1)(ii)); one (1) count of Aggravated Assault (Count IV) (18 Pa. C.S.A. § 2702(a)(4)); one (1) count of Possessing Instruments of Crime (Count V) (18 Pa. C.S.A. 907(a)); two (2) counts of Terroristic Threats (Counts VI and VII) (18 Pa. C.S.A. §

2706(a)(1)); two (2) counts of Simple Assault (Counts VIII and IX) (18 Pa. C.S.A. § 2701(a)(1)); and two (2) counts of Recklessly Endangering Another Person (Counts XII and XIII) (18 Pa. C.S.A. § 2705).

We sentenced Defendant, with the benefit of Pre-Sentencing Investigation Report, on his new charges at docket numbers 15-CR-0001193-2016 and 15-CR-0000871-2016, as well as on his fifth and fourth violations at docket numbers 15-CR-0000335-2008 and 15-CR-0003534-2008, respectively, on November 28, 2016. At docket number 15-CR-0000871-2016, the one for which Defendant stood trial, we sentenced Defendant on the Burglary conviction (Count I) to a term of five (5) to ten (10) years in a State Correctional Facility; on the Criminal Trespass conviction (Count III) to a term of one (1) to two (2) years to run consecutively to the sentence imposed on Count I (Burglary); on the Aggravated Assault conviction (Count IV) to a term of two and a half (2 ½) years to five (5) years, to run consecutively to the sentence imposed at Count III (Criminal Trespass); on the Possessing Instruments of Crime conviction (Count V) to a term of six (6) months' to twelve (12) months' incarceration, to run concurrently with the sentence imposed at Count IV (Aggravated Assault); on the first of the Terroristic Threats convictions (Count VI) to a term of six (6) months' to twelve (12) months' incarceration to run concurrently with the sentences imposed at Counts IV and V (Aggravated Assault and Possessing Instruments of Crime, respectively); on the second of the Terroristic Threats convictions (Count VII) to a term of six (6) months' to twelve (12) months' incarceration to run concurrently with the sentences imposed at Counts V and VI (Possessing Instruments of Crime and Terroristic Threats, respectively); on the first of the Recklessly Endangering Another Person convictions (Count XII) to a term of six (6)

months' to twelve (12) months' incarceration to run concurrently with the sentences imposed at Counts IV and VII (Aggravated Assault and Terroristic Threats, respectively) and on the second of the Recklessly Endangering Another Person convictions (Count XIII) to a term of six (6) months' to twelve (12) months' incarceration to run concurrently with the sentences imposed at Counts IV and XII (Aggravated Assault and Recklessly Endangering Another Person, respectively). We did not sentence on Counts VIII and IX (Simple Assault) because we determined that they merged with other Counts for sentencing purposes. We did not impose any fines but ordered Defendant to pay the costs of prosecution as well as a DNA testing fee of $250.00. We gave Defendant credit for time served from August 15, 2016 through November 28, 2016. We directed him to undergo a drug and alcohol evaluation as well as a mental health evaluation and to follow all recommended treatment. We ordered him to have no contact with the victims. Defendant's aggregate prison sentence at docket number 15-CR-0000871-2016 is eight and a half (8 ½) years' to seventeen (17) years' incarceration in a State Correctional Facility.

At docket number 15-CR-0001193-2016, the case for which Defendant tendered an open plea, we sentenced Defendant on November 28, 2016 on his conviction for Fleeing or Attempting to Elude Police Officer (Count II) to a term of one (1) year to three (3) years' incarceration in a State Correctional Facility, to run consecutively to the sentences imposed at docket number 15-CR-0000871-2016; on his conviction for Possession of Paraphernalia (Count VIII), to one (1) year of probation to run concurrent with the sentence imposed for Fleeing or Attempting to Elude Police Officer; and on his conviction for Driving Under Suspension (Count XXV), to pay a fine of $200.00. We

ordered Defendant to pay the costs of prosecution and determined that he was not eligible for the Recidivism Risk Reduction Incentive program. Defendant's aggregate sentence at docket number 15-CR-0001193-2016 is one (1) to three (3) years in a State Correctional Facility, to run consecutively to the sentences imposed at docket number 15-CR-0000871-2016, making his aggregate sentence at both dockets nine and a half (9 ½) to twenty (20) years in a State prison.

On his VOP dockets, which are the subject matter of the present appeal, we revoked Defendant's probation and sentenced Defendant on November 28, 2016 at docket number 15-CR-0000335-2008, for what amounted to his fifth violation, a term of six (6) months' to twenty-three (23) months' incarceration with credit for time served from February 18, 2016 through August 15, 2016. We re-paroled Defendant at this docket effective August 15, 2016. His detainer was removed, he was released from custody on this docket, and this case was closed. We structured this sentence so that he would be deemed to have served his VOP sentence first, in order to allow his detainer to be removed so that he could immediately participate in programming at the State prison to take into consideration the rehabilitative needs counsel outlined for this Honorable reviewing Court in Defendant's Concise Statement. (Sentencing Transcript, 11/28/16, N.T. 58-66; Deft.'s Concise Statement, 2/22/17, at 1).

At VOP docket number 15-CR-0003534-2008, after revoking Defendant's probation, we sentenced Defendant on November 28, 2016 for what amounted to his fourth violation to a term of six (6) months' to twenty-three (23) months' incarceration to run concurrently with the VOP sentence imposed at docket number 15-CR-0000335-2008, with credit for time served from February 18, 2016 through August 15, 2016. We

re-paroled Defendant effective August 15, 2016. His detainer was removed, he was released from custody on this docket, and this case was closed. Again, as with VOP docket number 15-CR-0000335-2008, we structured Defendant's VOP sentence at docket number 15-CR-0003534-2008 so that he would be deemed to have served his VOP sentence first, in order to allow his detainer to be removed so that he could immediately participate in programming at the State prison to take into consideration the rehabilitative needs counsel outlined for this Honorable reviewing Court in Defendant's Concise Statement. (Sentencing Transcript, 11/28/16, N.T. 58-62; Deft.'s Concise Statement, 2/22/17, at 1).

On December 5, 2016, at both of Defendant's above-captioned VOP dockets, Defendant filed a post-sentence Motion to Reconsider/Modify Sentence alleging that, when considered in the aggregate with the terms of incarceration imposed on his new convictions at docket numbers 15-CR-0000871-2016 and 15-CR-0001193-2016, Defendant's sentences are excessive and fail to address his rehabilitative needs and account for mitigating circumstances.

On December 5, 2016, at docket number 15-CR-0000871-2016 (the "trial case"), Defendant filed a Motion for Post-Sentence Relief, alleging that the evidence was insufficient to convict him and/or that the Verdict was against the weight of the evidence and challenging the sentences imposed as excessive, when considered in light of the VOP sentences at the above-captioned dockets, because they failed to address the Defendant's rehabilitative needs and account for mitigating circumstances.

On December 5, 2016, at docket number 15-CR-0001193-2016 (the "open

plea case"), Defendant filed a post-sentence Motion to Reconsider/Modify Sentence alleging that his sentence "individually, in the aggregate, and when considered in light of the consecutive sentences imposed at CP-15-CR-335-2008, CP-15-CR-3534-2008, and CP-15-CR-871-2016, are excessive" because "the sentences fail to address the rehabilitative needs of the defendant and account for mitigating circumstances."

We denied Defendant's VOP post-sentence Motions by Order dated December 22, 2016. In two separate Orders dated February 27, 2017, we denied Defendant's post-sentence Motions filed at docket numbers 15-CR-0000871-2016 and 15-CR-0001193-2016.

On December 28, 2016, Defendant filed a Notice of Appeal at both of the above-captioned VOP dockets. On January 4, 2017 we issued an Order directing Defendant to file within twenty-one (21) days a Concise Statement of Errors Complained of on Appeal, pursuant to Pa. R.A.P. 1925(b). Defendant's filing deadline was January 25, 2017. On January 25, 2017, Defendant filed an "Unopposed Motion for Extension to File Concise Statement of Errors Pursuant to Pa. R.A.P. § 1925(b)", seeking a twenty-one (21) day extension of his deadline for filing a Concise Statement due to the pending preparation of requested transcripts. On January 25, 2017, we granted Defendant's Motion, allowing Defendant to file his Concise Statement no later than twenty-one (21) days after the filing of the last requested transcript to be prepared. The last requested transcript to be prepared was filed on February 2, 2017, making Defendant's filing deadline February 23, 2017. Defendant timely filed his Concise Statement on February 22, 2017. Our Rule 1925(a) Opinion was due February 27, 2017. Because of the delayed filing, necessitated by the preparation of the transcripts, we wrote to this

Honorable reviewing Court on February 28, 2017 requesting a thirty (30) day extension of time in which to prepare our Rule 1925(a) Opinion. That deadline expired March 30, 2017. Due to an intervening matter that required prompt attention, we were unable to meet the March 30, 2017 deadline. However, we are endeavoring to prepare the present Opinion as close in time to that deadline as possible and would appreciate this Honorable reviewing Court's indulgence in this respect.

On March 17, 2017, Defendant filed a Notice of Appeal at both of the new conviction dockets (the "open plea" and "trial" cases). On March 20, 2017, we ordered Defendant to file within twenty-one (21) days a Concise Statement of Errors Complained of on Appeal. As of this writing, Defendant's twenty-one (21) day period for filing his Concise Statement with respect to these new conviction cases has not yet expired and we do not have a Concise Statement from him outlining the errors complained of on appeal, although counsel has indicated that she intends to argue Defendant's excessive sentence claim at the VOP dockets in the aggregate with respect to all four (4) dockets, these new conviction cases included.

On appeal at the VOP dockets, Defendant raises the following issue for consideration.

> The Court abused its discretion when it imposed a six (6) month to twenty-three (23) month sentence to precede an aggregate sentence of nine and a half (9 ½) years to twenty (20) years on Criminal Docket Numbers CP-15-CR-1193-2016 and CP-15-CR-871-2016. Appellant asserts the aggregate sentence imposed is unreasonable and excessive. The Court failed to give appropriate weight to the following mitigating factors:
>
> 1) Appellant's disruptive childhood

2) Appellant's family history of substance abuse

3) Appellant's struggles with addiction

4) Appellant's underlying mental health concerns

5) No prior incarceration in a state correctional institution

(Deft.'s Concise Statement, 2/22/17, at 1). Having reviewed the record in light of the relevant constitutional, statutory and decisional law, we are now prepared to issue the following recommendation with respect to the issue Defendant has raised on appeal pursuant to the mandate of Pa. R.A.P. 1925(a).

A challenge to an alleged excessive sentence, including a challenge based on the grounds that the sentencing court failed to adequately consider certain mitigating factors, is a challenge to the discretionary aspects of a sentence. *Commonwealth v. Ahmad*, 961 A.2d 884 (Pa. Super. 2008)(challenge to alleged excessiveness of sentence is a challenge to the discretionary aspects of a sentence); *Commonwealth v. Urrutia*, 653 A.2d 706 (Pa. Super. 1995), *appeal denied*, 661 A.2d 873 (Pa. 1995)(a challenge based on the sentencing court's alleged failure to adequately consider certain mitigating factors is a challenge to the discretionary aspects of a sentence). Issues challenging the discretionary aspects of a sentence must be raised in a post-sentence motion or by presenting the claim to the trial court during the sentencing proceedings; absence such efforts, an objection to a discretionary aspect of a sentence is waived. *Commonwealth v. Moury*, 992 A.2d 162 (Pa. Super. 2010); *Commonwealth v. Ahmad*, 961 A.2d 884 (Pa. Super. 2008). Defendant raised his appellate issue in a post-sentence motion filed to each of the above-captioned VOP dockets and therefore his issue is preserved for

appellate review. However, that does not mean that this Honorable reviewing Court must necessarily consider it on the merits.

A challenge to the discretionary aspects of a sentence must be considered a petition for permission to appeal, as the right to pursue such a claim is not absolute. 42 Pa. C.S.A. § 9781(b)("The defendant or the Commonwealth may file a petition for allowance of appeal of the discretionary aspects of a sentence for a felony or a misdemeanor to the appellate court that has initial jurisdiction for such appeals."); *Commonwealth v. Disalvo*, 70 A.3d 900 (Pa. Super. 2013); *Commonwealth v. Ahmad*, 961 A.2d 884 (Pa. Super. 2008).

Before an appellate court may reach the merits of a challenge to the discretionary aspects of a sentence, it must engage in a four-part analysis to determine: (1) whether the appeal is timely; (2) whether the defendant preserved his issue; (3) whether the defendant's brief includes a concise statement of the reasons relied upon for allowance of appeal with respect to the discretionary aspects of sentence; and (4) whether the concise statement raises a substantial question that the sentence is appropriate under the Sentencing Code. *Commonwealth v. Disalvo*, 70 A.3d 900 (Pa. Super. 2013). If the appeal satisfies each of these four (4) requirements, the appellate court will then proceed to decide the substantive merits of the case. *Commonwealth v. Disalvo*, 70 A.3d 900 (Pa. Super. 2013).

We have already demonstrated that Defendant's Notice of Appeal was timely filed. We have also already demonstrated that Defendant preserved his issue for purposes of appeal. We are not in a position to determine whether Defendant's brief includes a concise statement of the reasons relied upon for allowance of appeal, as we

do not have a copy of Defendant's brief; consequently, we must most respectfully leave that question in the hands of this Honorable reviewing Court for resolution, although we can certainly state that Defendant timely filed a Concise Statement setting forth his reasons for appeal with the undersigned pursuant to Pa. R.A.P. 1925(b). Thus, the only question left to address is whether Defendant has raised a substantial question that his sentence is inappropriate under the Sentencing Code.

"Allowance of appeal may be granted at the discretion of the appellate court where it appears that there is a substantial question that the sentence imposed is not appropriate under this chapter." 42 Pa. C.S.A. § 9781(b); *Commonwealth v. Ahmad*, 961 A.2d 884 (Pa. Super. 2008)(when challenging the discretionary aspects of the sentence imposed, an appellant must present a substantial question as to the inappropriateness of the sentence). As to what constitutes a substantial question for purposes of determining whether the discretionary aspects of a sentence may be appealed, the appellate court does not accept bald assertions of sentencing errors; an appellant must articulate the reasons the sentencing court's actions violated the Sentencing Code. *Commonwealth v. Moury*, 992 A.2d 162 (Pa. Super. 2010). A substantial question exists only when the appellant advances a colorable claim that the sentencing judge's actions were either (1) inconsistent with a specific provision of the Sentencing Code or (2) contrary to the fundamental norms which underlie the sentencing process. *Commonwealth v. Caldwell*, 117 A.3d 763 (Pa. Super. 2015), *appeal denied*, 126 A.3d 1282 (Pa. 2015); *Commonwealth v. Disalvo*, 70 A.3d 900 (Pa. Super. 2013); *Commonwealth v. Moury*, 992 A.2d 162 (Pa. Super. 2010). The Superior Court examines an appellant's Rule 2119(f) Statement to determine whether a substantial question exists. *Commonwealth v. Ahmad*,

961 A.2d 884 (Pa. Super. 2008). "The Superior Court's inquiry must focus on the *reasons* for which the appeal is sought, in contrast to the *facts* underlying the appeal, which are necessary only to decide the appeal on the merits." *Commonwealth v. Ahmad*, 961 A.2d 884 (Pa. Super. 2008). As this Honorable reviewing Court recently stated,

> In determining whether a substantial question exists, [the appellate court] does not examine the merits of whether the sentence is actually excessive. Rather, [the appellate court] look[s] to whether the appellant has forwarded a plausible argument that the sentence, when it is within the guideline ranges, is clearly unreasonable. Concomitantly, the substantial question determination does not require the court to decide the merits of whether the sentence is clearly unreasonable.

*Commonwealth v. Caldwell*, 117 A.3d 763, 769 (Pa. Super. 2015), *appeal denied*, 126 A.3d 1282 (Pa. 2015)(*quoting Commonwealth v. Dodge*, 77 A.3d 1263, 1270 (Pa. Super. 2013), *reargument denied* (November 21, 2013), *appeal denied*, 91 A.3d 161 (Pa. 2014)(internal citations omitted)). "'The appellate court cannot look beyond the statement of questions presented and the prefatory [Rule] 2119(f) Statement to determine whether a substantial question exists.'" *Commonwealth v. Shorter*, 2015 WL 6114594 (Pa. Super. 2015)(*quoting Commonwealth v. Christine*, 78 A.3d 1, 10 (Pa. Super. 2013)(*en banc*)(OISA), *aff'd*, 125 A.3d 394 (Pa. 2015)(citation omitted)). The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. *Commonwealth v. Disalvo*, 70 A.3d 900 (Pa. Super. 2013); *Commonwealth v. Moury*, 992 A.2d 162 (Pa. Super. 2010).

There is a plethora of decisional law holding that a claim that a sentence is excessive because the sentencing court failed to give "appropriate" weight, i.e., the weight that Defendant wished the sentencing court would give, to particular allegedly

mitigating factors does not raise a substantial question for purposes of appeal. *See Commonwealth v. Baez*, 2017 WL 781690 (Pa. Super. 2017); *Commonwealth v. Nichols*, 2016 WL 7048825 (Pa. Super. 2016); *Commonwealth v. Mathis*, 2016 WL 6635076 (Pa. Super. 2016); *Commonwealth v. Sipes*, 2016 WL 4965065 (Pa. Super. 2016); *Commonwealth v. Salmond*, 2015 WL 7185467 (Pa. Super. 2015); *Commonwealth v. Caldwell*, 117 A.3d 763 (Pa. Super. 2015), *appeal denied*, 126 A.3d 1282 (Pa. 2015); *Commonwealth v. Brown*, 2015 WL 6167466 (Pa. Super. 2015); *Commonwealth v. Zirkle*, 107 A.3d 127 (Pa. Super. 2014), *reargument denied* (February 17, 2015), *appeal denied*, 117 A.3d 297 (Pa. 2015); *Commonwealth v. Parker*, 2014 WL 10988526 (Pa. Super. 2014), *appeal denied*, 94 A.3d 1009 (Pa. 2014); *Commonwealth v. Disalvo*, 70 A.3d 900 (Pa. Super. 2013); *Commonwealth v. Fries*, 2013 WL 11261997 (Pa. Super. 2013); *Commonwealth v. Griffin*, 65 A.3d 932 (Pa. Super. 2013), *appeal denied*, 76 A.3d 538 (Pa. 2013); *Commonwealth v. Ratushny*, 17 A.3d 1269 (Pa. Super. 2011), *application for writ of habeas corpus held in abeyance by Ratushny v. Bickel*, 2014 WL 4198305 (E.D. Pa. 2014); *Commonwealth v. Rhoades*, 8 A.3d 912 (Pa. Super. 2010), *appeal denied*, 25 A.3d 328 (Pa. 2011), *cert. denied*, *Rhoades v. Pennsylvania*, 132 S.Ct. 1746 (U.S. Pa. 2012), *habeas corpus denied*, *Rhoades v. Superintendent*, 2015 WL 4976745 (E.D. Pa. 2015), *certificate of appealability denied* (3rd Cir. Pa. 15-3257)(March 18, 2016); *Commonwealth v. Johnson*, 961 A.2d 877 (Pa. Super. 2008), *appeal denied*, 968 A.2d 1280 (Pa. 2009); *Commonwealth v. Cannon*, 954 A.2d 1222 (Pa. Super. 2008), *appeal denied*, 964 A.2d 893 (Pa. 2009); *Commonwealth v. Lewis*, 911 A.2d 558 (Pa. Super. 2006); *Commonwealth v. Hanson*, 856 A.2d 1254 (Pa. Super. 2004); *Commonwealth v. Coolbaugh*, 770 A.2d 788 (Pa. Super. 2001); *Commonwealth v. Petaccio*, 764 A.2d 582

(Pa. Super. 2000), *overruled on other grounds by Commonwealth v. Mouzon*, 812 A.2d 617 (Pa. 2002); *Commonwealth v. Wellor*, 731 A.2d 152 (Pa. Super. 1999); *Commonwealth v. Bershad*, 693 A.2d 1303 (Pa. Super. 1997), *reargument denied* (June 16, 1997), *disapproved of on other grounds by Commonwealth v. Dixon*, 985 A.2d 720 (Pa. 2009); *Commonwealth v. Barzyk*, 692 A.2d 211 (Pa. Super. 1997); *Commonwealth v. Cruz-Centeno*, 668 A.2d 536 (Pa. Super. 1995), *appeal denied*, 676 A.2d 1195 (Pa. 1996), *habeas corpus denied*, *Cruz-Centeno v. Zimmerman*, 1997 WL 16626 (E.D. Pa. 1997), *aff'd, Cruz v. Commonwealth of Pennsylvania*, 142 F.3d 427 (3rd Cir. Pa. 1998); *Commonwealth v. Hoag*, 665 A.2d 1212 (Pa. Super. 1995); *Commonwealth v. Byrd*, 657 A.2d 961 (Pa. Super. 1995); *Commonwealth v. Dalberto*, 648 A.2d 16 (Pa. Super. 1994), *appeal denied*, 655 A.2d 983 (Pa. 1995), *cert. denied*, *Dalberto v. Pennsylvania*, 116 S.Ct. 75 (U.S. Pa. 1995), *rehearing denied*, 116 S.Ct. 550 (U.S. Pa. 1995); *Commonwealth v. Jones (Albert)*, 637 A.2d 1001 (Pa. Super. 1994); *Commonwealth v. Jones (Charles R.T.)*, 613 A.2d 587 (Pa. Super. 1992), *appeal denied*, 629 A.2d 1377 (Pa. 1993), *overruled on other grounds by Commonwealth v. Mouzon*, 812 A.2d 617 (Pa. 2002); *Commonwealth v. Mobley*, 581 A.2d 949 (Pa. Super. 1990); *Commonwealth v. Minott*, 577 A.2d 928 (Pa. Super. 1990); *Commonwealth v. Frank*, 577 A.2d 609 (Pa. Super. 1990), *appeal denied*, 584 A.2d 312 (Pa. 1990), *denial of post-conviction relief aff'd*, 640 A.2d 904 (Pa. Super. 1994), *appeal denied*, 649 A.2d 668 (Pa. 1994); *Commonwealth v. Smith*, 575 A.2d 150 (Pa. Super. 1990). This is because "[a]n allegation that the sentencing court did not adequately consider various factors is, in effect, a request that [the appellate court] substitute its judgment for that of the lower court in fashioning a defendant's sentence." *Commonwealth v. Ratushny*, 17 A.3d 1269

(Pa. Super. 2011), *application for writ of habeas corpus held in abeyance by Ratushny v. Bickel*, 2014 WL 4198305 (E.D. Pa. 2014)(*citing Commonwealth v. Griffin*, 804 A.2d 1, 9 (Pa. Super. 2002), *appeal denied*, 868 A.2d 1198 (Pa. 2005), *cert. denied*, *Griffin v. Pennsylvania*, 125 S.Ct. 2984 (U.S. Pa. 2005)(*citing Commonwealth v. Williams*, 562 A.2d 1385 (Pa. Super. 1989)(*en banc*))). "Such a challenge goes to the weight accorded the evidence and will not be considered absent extraordinary circumstances." *Commonwealth v. Urrutia*, 653 A.2d 706 (Pa. Super. 1995), *appeal denied*, 661 A.2d 873 (Pa. 1995). The appellate courts are reluctant to substitute their own judgment for that of the sentencing court because of the recognition that "'the sentencing court . . . is in the best position to view the defendant's character, displays of remorse, defiance or indifference, and the overall effect and nature of the crime.'" *Commonwealth v. Ahmad*, 961 A.2d 884, 887 (Pa. Super. 2008)(*quoting Commonwealth v. Fish*, 752 A.2d 921, 923 (Pa. Super. 2000)(citation and internal quotations omitted)); *Commonwealth v. Minott*, 577 A.2d 928 (Pa. Super. 1990). *See also Commonwealth v. Moury*, 992 A.2d 162 (Pa. Super. 2010)(the rationale behind broad discretion with regard to sentencing and the concomitantly deferential standard of appellate review is that the sentencing court is in the best position to determine the proper penalty for a particular offense based upon an evaluation of the individual circumstances before it). For this reason, the appellate courts give great deference to the sentencing court's judgment. *Commonwealth v. Ahmad*, 961 A.2d 884, 887 (Pa. Super. 2008).

In accordance with the authority cited above, we would respectfully submit that Defendant has failed to present a substantial question warranting appellate review of the merits of his appeal. We note, as the Pennsylvania Superior Court did in

*Commonwealth v. Salmond*, 2015 WL 7185467 (Pa. Super. 2015), wherein the Court determined that a defendant's claim that his sentence was manifestly excessive because the trial court failed to weigh certain factors more heavily than others did not raise a substantial question for purposes of appeal, that Defendant does not claim in his appeal that this court *failed* to consider the mitigating factors he lists in his Concise Statement. "Indeed, when combined with a claim of manifest excessiveness, that assertion, as opposed to a challenge to the weight the court assessed among the factors it considered, may raise a substantial question. *See Commonwealth v. Raven*, 97 A.3d 1244, 1253 (Pa. Super. 2014), *appeal denied*, 105 A.3d 736 (Pa. 2014)('an excessive sentence claim—in conjunction with an assertion that the court failed to consider mitigating factors—raises a substantial question.')." *Commonwealth v. Salmond*, 2015 WL 7185467 (Pa. Super. 2015). Nor is this a case in which the undersigned sentenced Defendant in the aggravated range without "adequately" considering allegedly mitigating factors. *Cf. Commonwealth v. Felmlee*, 828 A.2d 1105, 1107 (Pa. Super. 2003)(stating a substantial question is raised where appellant alleges the sentencing court imposed a sentence in the aggravated range without adequately considering mitigating circumstances). Instead, Defendant is only complaining that we did not, in our standard range (Docket No. 15-CR-0000335-2008) and mitigated range (Docket No. 15-CR-0003534-2008), respectively, VOP sentences of six (6) months' to twenty-three (23) months' in prison, for a fifth and fourth violation, respectively, stemming from grave and violent new convictions, a sentence for which we note he was given credit for time served in the amount of his minimum and released on both dockets, give "appropriate" weight to the mitigating factors he sets forth in his Concise Statement; that is, he contests our manner of

allocating the weight we attributed to the various factors we considered. This is a weight of the evidence argument and, as we stated above, the Superior Court will not substitute its judgment in this respect for that of the sentencing court absent extraordinary circumstances. No such circumstances have been pled here, nor do we find that any such extraordinary circumstances exist on the facts of record. Accordingly, we would respectfully submit that Defendant's claim that his sentence is excessive because this Court failed to give appropriate weight to the several mitigating factors he sets forth in his Concise Statement fails to raise a substantial question for purposes of triggering appellate review of the merits of his claim.

Notwithstanding the foregoing authority, this Honorable reviewing Court has characterized "'prior decisions from this Court involving whether a substantial question has been raised by claims that the sentencing court 'failed to consider' or 'failed to adequately consider' sentencing factors'" as "'less than a model of clarity and consistency.'" *Commonwealth v. Caldwell*, 117 A.3d 763, 769 (Pa. Super. 2015), *appeal denied*, 126 A.3d 1282 (Pa. 2015)(*quoting Commonwealth v. Seagraves*, 103 A.3d 839, 842 (Pa. Super. 2014), *appeal denied*, 116 A.3d 604 (Pa. 2015)). In light of this Honorable reviewing Court's characterization of prior precedent and/or in the event that this Honorable reviewing Court disagrees with our conclusion that Defendant has failed to raise a substantial question, we will in the alternative address the merits of Defendant's claim.

In considering an appeal from a sentence imposed following the revocation of probation, review is limited to determining the validity of the probation revocation proceedings and the authority of the sentencing court to consider the same sentencing

alternatives that it had at the time of the initial sentencing. *Commonwealth v. Ahmad*, 961 A.2d 884 (Pa. Super. 2008); *Commonwealth v. Hoover*, 909 A.2d 321 (Pa. Super. 2006). *See also Commonwealth v. Harris*, 2017 WL 203801 *2 (Pa. Super. 2017)(*quoting Commonwealth v. Wright*, 116 A.3d 133, 136 (Pa. Super. 2015))("'In an appeal from a sentence imposed after the court has revoked probation, we can review 'the validity of the revocation proceedings, the legality of the sentence imposed, and any challenge to the discretionary aspects of the sentence imposed.'").

Revocation of a probation sentence is a matter committed to the sound discretion of the trial court, whose discretion will not be disturbed on appeal in the absence of an error of law or an abuse of discretion. *Commonwealth v. Ahmad*, 961 A.2d 884 (Pa. Super. 2008); *Commonwealth v. Hoover*, 909 A.2d 321 (Pa. Super. 2006). *See also Commonwealth v. Disalvo*, 70 A.3d 900 (Pa. Super. 2013)(sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion). In the context of appellate review of a sentencing determination, abuse of discretion is not shown merely by an error in judgment; rather, the defendant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision. *Commonwealth v. Disalvo*, 70 A.3d 900 (Pa. Super. 2013). We would respectfully submit that there has been no abuse of discretion or error of law here.

Under section 9771(b) of the Sentencing Code, 42 Pa. C.S.A. § 9701 *et seq.*, "[t]he court may revoke an order of probation upon proof of the violation of specified conditions of the probation." 42 Pa. C.S.A. § 9771(b). The Commonwealth establishes a

probation violation meriting revocation when it shows, by a preponderance of the evidence, that the probationer's conduct violated the terms and conditions of his probation, and that probation has proven an ineffective rehabilitation tool incapable of deterring the probationer from future antisocial conduct; it is only when it becomes apparent that the probationary order is not serving this desired end of rehabilitation that the court's discretion to impose a more appropriate sanction should not be fettered. *Commonwealth v. Ahmad*, 961 A.2d 884 (Pa. Super. 2008).

Here, the Commonwealth met its burden. Defendant's new convictions, which violate the terms of his probation at both dockets, constitute his fifth violation at docket number 15-CR-0000335-2008 and his fourth violation at docket number 15-CR-0003534-2008. Defendant's convictions at docket numbers 15-CR-0001193-2016 and 15-CR-0000871-2016 are not Defendant's first new convictions since he was originally sentenced at the above-captioned dockets. Nor are they his only subsequent convictions for violent behavior. Further, Defendant has incurred technical violations at both of the above-captioned dockets as well. It is beyond peradventure that probation has had little impact upon deterring this Defendant from continuing his path of antisocial conduct. Probation has proven an ineffective tool for promoting this Defendant's rehabilitation.

"Upon revocation [of probation] the sentencing alternatives available to the court shall be the same as were available at the time of initial sentencing, due consideration being given to time spent serving the order of probation." 42 Pa. C.S.A. § 9771(b). These options include probation, guilt without further penalty, partial confinement, and total confinement. *Commonwealth v. Ahmad*, 961 A.2d 884 (Pa. Super. 2008). *See also Commonwealth v. Swope*, 123 A.3d 333 (Pa. Super. 2015)(upon

revoking probation, a sentencing court may choose from any of the sentencing options that existed at the time of the original sentencing, including incarceration).

In making this selection, the Sentencing Code offers general standards with respect to the imposition of sentence which require the sentence to be "'consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant.'" *Commonwealth v. Ahmad*, 961 A.2d 884, 888 (Pa. Super. 2008)(*quoting* 42 Pa. C.S.A. § 9721(b); *Commonwealth v. Walls*, 926 A.2d 957, 962 (Pa. 2007)). When imposing a sentence, a court is required to consider the particular circumstances of the offense and the character of the defendant; in particular, the court should refer to the defendant's prior criminal record, his age, personal characteristics, and his potential for rehabilitation. *Commonwealth v. Griffin*, 65 A.3d 932, 937 (Pa. Super. 2013), *appeal denied*, 76 A.3d 538 (Pa. 2013); *Commonwealth v. Moury*, 992 A.2d 162 (Pa. Super. 2010). "Where the sentencing court had the benefit of a pre-sentence investigation report ("PSI"), the Superior Court assumes the sentencing court 'was aware of relevant information regarding the defendant's character and weighed those considerations along with mitigating statutory factors.'" *Commonwealth v. Griffin*, 65 A.3d 932, 937 (Pa. Super. 2013), *appeal denied*, 76 A.3d 538 (Pa. 2013)(*quoting Commonwealth v. Devers*, 546 A.2d 12, 18 (Pa. 1988)). Although Pennsylvania's sentencing system stands for individualized sentencing, the court is not required to impose the "minimum possible" confinement permitted by law. *Commonwealth v. Moury*, 992 A.2d 162 (Pa. Super. 2010).

Turning to the factors this Court was required to consider before sentencing

this Defendant, starting with consideration of the time he has spent serving his prior Orders of probation, the record discloses that Defendant has historically been unable to complete even two (2) years of his probationary sentences at the above-captioned dockets without incurring new violations, including new, and often violent, charges. Examining his prior record, age, personal characteristics, and potential for rehabilitation, we observed that, at the time of his sentencing on the above-captioned VOP's, Defendant was a "hefty, strong looking" man (Sentencing Transcript, 11/28/16, N.T. 41), aged thirty-five (35) years old (*See* Nos. 15-CR-0000871-2016 and 15-CR-0001193-2016, Pre-Trial/Guilty Plea Transcript, 9/13/16, N.T. 36) and had a Prior Record Score of 5. (Sentencing Transcript, 11/28/16, N.T. 4). His prior record is lengthy and quite disturbing. As the prosecutor summarized from the PSI at sentencing,

> His first convictions occurred in 2004 for a possession offense and he got six of those between 2004 and 2008. After that, all of his convictions stem from multiple assaults and for drug dealing. He has been assaulting people since he was a child.
>
> As we learned in the pre-sentence investigation he was kicked out of Coatesville Area High School in the ninth grade for fighting. He then goes to Alabama. He's kicked out of Alabama in the tenth grade for fighting. And that, your Honor, we learned from the mental health evaluation included in the PSI.
>
> . . .
>
> In 2008 he has his first simple assault conviction. In that case he beat up the mother of his youngest child, Crystal Johns. He punched her in the face multiple times. Officers arrived on scene. They found her hysterically crying with a black eye and scratches on her face and neck. When she called the police, the defendant fled from the residence. . . . Then he, as police were on scene and he running, calls her and tells her that he's going to kill her for calling the cops.

> When he is imprisoned on that case, he gets his next aggravated assault. That was an extremely violent and scary situation. He was incarcerated at Chester County Prison. He was told by a correction officer to get back into his cell and he became combative and attacked the CO. He knocked the CO to the ground during the assault. The CO hit his head on the cement floor. [The Defendant] then climbed on top of him, straddled him, and choked him. He told him when they were finally able to get [the Defendant] off of the correctional officer he shouted out a bunch of racial slurs at the COs and told them that he was going to "F" him up. And he was going to come back when he got out of prison, find him, and kill him later.
>
> His next assault occurred in 2011. He, again, beat up Crystal Johns who was the victim of his 2008 assault and by that time had had his child. She had attempted to break up with him. He attacked her. H struck her in the face. At the time she was holding their infant baby who was only four months old. The attack on her caused her to drop her infant child. The child then suffered a laceration above the eye. The defendant then picked up the baby, struck Ms. Johns under her heart on her rib cage and her hip and said he would kill her. When officers arrived on scene and saw Ms. Johns she had injuries that corroborated all of this. She had injuries to her face. She had injuries under her heart to her chest and a dark bruise on her hip as well. The baby did have a laceration above the eye when the officer showed up.
>
> . . . When he's on parole form the 2011 simple assault, he is then convicted of possession with intent to deliver in 2012. He has a total of six prior possessions, two prior simple assaults, the prior aggravated assault on law enforcement, and a prior PWID.

(Sentencing Transcript, 11/28/16, N.T. 18-20). (*See also* Post-Sentence Motion Hearing, 12/20/16, N.T. 11-15, 36-38). Defendant, who has lost several people in his family and social circle to domestic violence, acknowledged during the Pre-Sentence Investigation that he has anger management issues. (Sentencing Transcript, 11/28/16, N.T. 21, 36). Although Defendant self-reports as suffering from bi-polar disorder, attention deficit

disorder and depression (Nos. 15-CR-0001193-2016; 15-CR-0000871-2016, Pre-Trial/Guilty Plea Transcript, 9/13/16, N.T. 37), the PSI records that he did not meet the clinical eligibility criteria for mental health court. (Sentencing Transcript, 11/28/16, N.T. 28). As can be seen from his prior record, Defendant comes from a family where substance abuse was a factor and he himself has substance abuse issues. (Sentencing Transcript, 11/28/16, N.T. 25, 41). Despite his appalling prior record, Defendant has never served a State prison sentence. (Sentencing Transcript, 11/28/16, N.T. 20). Given his lengthy violent prior record, his repeated violations of probation and parole, his anger and mental health issues, his chronic substance abuse, his avoidance of responsibility for his actions as evidenced by his Fleeing or Attempting to Elude Police Officer conviction and prior status as a fugitive, and the severity of his new convictions, his potential for rehabilitation, at least at the County level, is not promising.

Turning to the circumstances of the offenses, i.e., the present violations, the Adult Probation Officer who appeared at Defendant's November 28, 2016 sentencing hearing had the following to say about his conduct under supervision.

> Good morning, your Honor, Anthony Lauria with Adult Probation. The defendant under Case No. 3534 of 2008, aggravated assault, originally was sentenced in 2009 before your Honor on that term Number. Also in addition is 335 of 2008 it's a remaining three year probation for drug possession.
>
> In May of 2015 a violation petition was filed as Mr. Washington had been using drugs on the following dates: May 4, 2015; August 10, 2015; September 9, 2015. In May it was for marijuana, Oxycodone, and cocaine there was a positive drug test. He used marijuana in September and in August 2015.

In addition, he had failed to comply with outpatient treatment. Mr. Washington had been attending CAD, the Center for Addictive Diseases. In 2015 he was discharged due to poor behavior. After that he was discharged unsuccessfully from Coatesville Gaudenzia in July of 2015 for poor behavior as well. In September of 2015 he was attending Holcomb; however, he never followed through with outpatient treatment recommendations. Mr. Washington was under the CSAP supervision, the Chronic Substance Abuse Program with Adult Probation. He has failed to complete that program.

I want to amend the petition to include Mr. Washington leaving the State of Pennsylvania without permission as information was gathered by the DA's Office that he was in the State of Alabama.

A level two Gag 2 hearing was scheduled before Judge Shenkin on October 21, 2015. Mr. Washington was given notice of that hearing. He had failed to appear that day. A warrant was issued. A failure to appear warrant was issued by Judge Shenkin. It was signed October 22, 2015.

Mr. Washington at the time was being supervised by Luke Walker from our department. There was a phone conversation between Mr. Washington and Officer Walker where the defendant asked if he had an active warrant. Mr. Walker stated, yes, that he had failed to show up for his level two before Judge Shenkin. The defendant said okay and hung up the phone. That was two weeks after the scheduled Gag 2 hearing.

In addition, violations include a new criminal felony conviction and misdemeanor conviction as stated before the Court this morning, your Honor, including the burglary, aggravated assault, terroristic threats, possession of instrument of crime, simple assault, recklessly endangering another person, criminal trespass, fleeing and eluding an officer, possession of drug paraphernalia, and driving while under suspension. This is the 4th violation on term 3534 of 2008, which is the aggravated assault case, and the 5th violation of 335 of 2008, which is the drug possession case.

Some other background information: Mr. Washington has drug abuse issues with marijuana, PCP, and cocaine during the time of his supervision with the court. He does have a

> work history of construction work and other related labor jobs while under court supervision as recently as September 2015, the last time he reported to the court. As I stated before, he was residing in Coatesville and the defendant does have four children.

(Sentencing Hearing, 11/28/16, N.T. 53-55).

As the Adult Probation Officer related, Defendant, in addition to his technical violations and drug abuse, has incurred very serious and disturbing new convictions, the facts of which are quite heinous. On the night of January 19, 2016 at approximately 8:15 p.m., while not only under supervision at both of the above-captioned dockets but also while an active bench warrant had already been issued for pending probation violations, Defendant broke into the home of his female cousin, breaking down her back door, and beat her and her "god-sister" with his closed fists, delivering a couple of blows to his cousin's head, and the metal handle of a broom, with such force that the metal handle bent in multiple places; he then pushed his cousin down a flight of stairs and threatened to kill her, all while several young children were present in the home. (Trial Transcript, 9/14/16, N.T. 22-37, 69-70, 75-76, 81, 86-91, 105-109, 117-18, 134-35, 137). Defendant, who took the stand on his own behalf at trial, testified that his motive in breaking down his cousin's door and beating the women up was to recover some drugs he claimed were stolen from him. (Trial Transcript, 9/15/16, N.T. 196-98). One of the women he beat in the stomach with his fists had just gotten out of the hospital. (Trial Transcript, 9/14/16, N.T. 37). She went back in the next day. (Trial Transcript, 9/14/16, N.T. 122, 133). The other woman is heard vomiting in the background on the 9-1-1 call made January 19, 2016 that was played to the jury at trial. (9/14/16, Ex. C-4; Trial Transcript, 9/14/16, N.T. 45). Officer Benjamin Brown, one (1) of the two (2) officers who

responded to the scene following the 9-1-1 call (Trial Transcript, 9/14/16, N.T. 65-67, 79, 81-82), described both victims as "hysterical", "nervous", and "scared" when he encountered them that night. (Trial Transcript, 9/14/16, N.T. 83, 88).

An arrest warrant was issued for the Defendant. (Trial Transcript, 9/14/16, N.T. 101). On the morning of February 18, 2016, Coatesville Police Department Corporal Kenneth Michels, Jr. was on duty conducting a traffic detail. (Trial Transcript, 9/15/16, N.T. 150, 152-53). As Defendant's bluish-gray Chevrolet Malibu drove by, Corporal Michels's patrol vehicle's License Plate Reader ("LPR") alerted him to the outstanding warrant for Aggravated Assault associated with the Defendant. (Trial Transcript, 9/15/16, N.T. 153-55). Corporal Michels activated his overhead lights and attempted to initiate a traffic stop. (Trial Transcript, 9/15/16, N.T. 155). Defendant ignored the Corporal's lights and continued to flee at a high rate of speed. (Trial Transcript, 9/15/16, N.T. 155). Corporal Michels activated his sirens. (Trial Transcript, 9/15/16, N.T. 155). Defendant proceeded to lead Corporal Michels on a high speed chase through numerous residential streets in the City of Coatesville, including through a "very busy intersection with a lot of school children waiting for the school bus[.]" (Trial Transcript, 9/15/16, N.T. 155-56). Corporal Michels estimated that Defendant was traveling at a rate of speed between sixty (60) to eighty (80) miles per hour in a twenty-five (25) mile per hour speed zone. (Trial Transcript, 9/15/16, N.T. 156-57). Corporal Michels testified that "there was heavy foot traffic as well as vehicle traffic" in the neighborhood and that Defendant ignored several stop signs. (Trial Transcript 9/15/16, N.T. 157). When Defendant finally stopped his vehicle, he exited the vehicle and fled on foot. (Trial Transcript, 9/15/16, N.T. 156-58).

He was shortly thereafter apprehended by another officer. (Trial Transcript, 9/15/16, N.T 165).

Subsequent to his apprehension following this chase, Defendant made a recorded phone call to another male, wherein he told the male, in reference to the assault upon his cousin and her "god-sister",

> So I'm going to tell you anyway, I'm shaking, I'm shaking and moving and shit. So I go to mess with these thieves one night. They try to get fast on me. They try to get fast on me. *I fucked everybody up in the house.* You know how I roll. You know what I'm saying. So when I tell everybody, I'm like, yo, *I'm going to come up and knock all you off for the second shit you all tried to do. I'm going to come up and fuck you all up.*

(Trial Transcript, 9/15/16, N.T. 203-04)(emphasis added). The Commonwealth played this recorded phone call for the jury. (9/15/16, Ex. C-12).

The facts underlying Defendant's new convictions are quite grave. Defendant, while he was not only under court supervision at both of the above-captioned dockets but while an active bench warrant had already been issued for his arrest due to other pending violations of probation, engaged in a vicious forcible entry into an occupied structure late in the evening and beat two (2) defenseless women such that one vomited from the force of the beating, as can be heard on the 9-1-1 call, and the other had to go to the hospital with a head injury. Defendant fled from the scene on the night of this crime, and when he was ultimately discovered driving around Coatesville on February 18, 2016, he led police on a high speed chase through a residential neighborhood with heavy vehicle and pedestrian traffic, including children waiting for their school bus, in the area. His actions on both days demonstrate a callous disregard for the value of human life and,

as also supported by his own trial testimony, a pervasive inability or unwillingness to accept responsibility for his conduct.

For all of the foregoing reasons, we determined, for purposes of his VOP sentences, and choosing, as we are permitted to do, from among the same sentencing options as were available to the Court at Defendant's original sentencing hearing on the convictions which formed the basis of the above-captioned cases, that revocation of his probation and recommitment of this Defendant to prison were necessary.

It is the law of this Commonwealth that once probation has been revoked, a sentence of total confinement may be imposed if any of the following conditions exist in accordance with section 9771(c) of the Sentencing Code:

> (1) the defendant has been convicted of another crime; or
>
> (2) the conduct of the defendant indicates that it is likely that he will commit another crime if he is not imprisoned; or
>
> (3) such a sentence is essential to vindicate the authority of the court.

*Commonwealth v. Ahmad*, 961 A.2d 884 (Pa. Super. 2008)(*citing* 42 Pa. C.S.A. § 9771(c)).

Here, all three (3) of these prerequisites have been satisfied. Defendant has been convicted of new, serious, and violent criminal offenses, thereby satisfying the first of these three (3) prerequisites. Defendant's repetitive probation and parole violations, including his repetitive commission of new offenses, some of which have been grotesquely violent, leads this Court to conclude that his conduct demonstrates that it is likely that he will commit another crime if he is not incarcerated, thereby satisfying the second of these three (3) disjunctive prerequisites. Finally, as Defendant has never been

able to comply with the terms of his probation and/or parole for even two (2) consecutive years, and has incurred new, grave, and violent convictions, among which include Fleeing or Eluding Police Officer, an offense which shows disrespect for the authority of the law as well as for the authority of the Court, and has been a fugitive from justice in the past, Defendant's circumstances satisfy the third of these three (3) disjunctive prerequisites, leading this Court to determine that a VOP sentence of total confinement was necessary and appropriate in the above-captioned matters.

In terms of total incarceration, the sentencing options available to the Court at the time of Defendant's initial sentencing on the Possession (Second or Subsequent Offense) and Driving Under Suspension convictions at docket number 15-CR-0000335-2008 included a statutory maximum on the Possession conviction, for which Defendant had not yet served a day of prison, of one and a half (1 ½) to three (3) years in prison. *See* 35 P.S. § 780-113(b); *Commonwealth v. Wallace*, 870 A.2d 838 (Pa. 2005)(trial court re-sentencing a defendant after a probation revocation is not limited by the sentence imposed under the original plea agreement); *Commonwealth v. Tann*, 79 A.3d 1130 (Pa. Super. 2013), *reargument denied* (December 19, 2013), *appeal denied*, 94 A.3d 1009 (Pa. 2014)(same proposition). *See also Commonwealth v. Short*, 2016 WL 5857347 (Pa. Super. 2016)(*citing Commonwealth v. Coolbaugh*, 770 A.2d 788, 792 (Pa. Super. 2001))(at the time of re-sentencing following revocation of probation, the sentencing court is limited only by the maximum sentence it could have ordered at the time it imposed the original sentence of probation); *Commonwealth v. Crump*, 995 A.2d 1280, 1285 (Pa. Super. 2010), *appeal denied*, 13 A.3d 475 (Pa. 2010)(as long as the new sentence imposed does not exceed the statutory maximum when factoring in the

incarcerated time already served, the sentence is not illegal). The Driving Under Suspension conviction was only punishable by a fine of $200.00, which had already been assessed at Defendant's original sentence, so we did not impose that obligation again. *See* 75 Pa. C.S.A. § 1543(a). However, with respect to the Possession conviction, we could have sentenced Defendant, for his fifth VOP at this docket, to the maximum sentence permissible under law. However, considering the amount of time he would be serving on his new convictions, we sentenced him instead to a term of six (6) to twenty-three (23) months in prison, a sentence which falls within the standard range of the statewide Sentencing Guidelines and the mitigated range of the VOP sentencing guidelines.[3] (Sentencing Hearing, 11/28/16, N.T. 60; Post-Sentence Motion Hearing, 12/20/16, N.T. 34-35).

At docket number 15-CR-0003534-2008, regarding Defendant's Aggravated Assault conviction, the statutory maximum was five (5) to ten (10) years in prison. 18 Pa. C.S.A. § 1103(2). His statewide Sentencing Guidelines range was six (6) months mitigated, twelve (12) to eighteen (18) months in the standard range, and twenty-four (24) months in the aggravated range. Again, considering the amount of time he would be spending in prison on his new convictions, we sentenced Defendant on his fourth violation at this docket to a term of six (6) to twenty-three (23) months in prison, to run concurrent to the VOP sentence imposed at docket number 15-CR-0000335-2008, a sentence which reflects the mitigated range of both the statewide Sentencing Guidelines and the VOP sentencing guidelines. (Sentencing Hearing, 11/28/16, N.T. 60; Post-Sentence Motion Hearing, 12/20/16, N.T. 34-35). As mentioned, we ordered Defendant's

[3] The VOP sentencing guidelines were eight (8) to twelve (12) months. (Sentencing Hearing, 11/28/16, N.T. 60).

VOP sentences to run concurrently with each other, but consecutively to the sentences on his new charges at docket numbers 15-CR-0000871-2016 and 15-CR-0001193-2016. However, we structured Defendant's sentences such that he received credit for time served on his VOP's in the amount of six (6) months, allowing him thereby to be deemed to have already served his VOP sentences before serving the State sentence on his new convictions and paroling him immediately at the above-captioned dockets, which were then closed.

It is difficult to conceive how concurrent sentences of six (6) months to twenty-three (23) months for fourth and fifth VOPs, whether considered alone or in conjunction with the sentences imposed on his new convictions, which themselves were all standard range sentences (Sentencing Hearing, 11/28/16, N.T. 4-8, 40-66; Post-Sentence Motion Hearing, 12/20/16, N.T. 34), can be considered excessive on the facts of this record, particularly as we gave Defendant credit for six (6) months' time served on his VOP's and paroled him immediately at the above-captioned dockets, closing these cases. We structured his credit for time served such that he would be deemed to have served his VOP sentences first in order for Defendant to begin serving his State sentence on the new convictions without a detainer on him, so that he would be immediately eligible to participate in the rehabilitative programs that are available to him at the State Prison in order to address his personal issues concerning his disruptive childhood, his family's history of substance abuse, his own struggles with addiction, and his underlying mental health concerns, as listed in Defendant's Concise Statement of Errors Complained of on Appeal. (*See* Sentencing Transcript, 11/28/16, N.T. 52-66; Post-Sentence Motion Hearing, 12/20/16, N.T. 34-35). Far from failing to adequately consider

these alleged mitigating factors, they were given significant weight in the deliberation of the undersigned in order to fashion an individualized sentence accounting for all of the concerns reflected in the Sentencing Code. As we stated at Defendant's sentencing hearing,

> All right. Well, as I always say, sentencing is one of the most difficult aspects of being a judge. Anyone who has sat on the bench will state that. However, our legislature has given us factors for the Court to consider in fashioning the appropriate sentence. And it starts off with the following: the general principal of sentencing should it call for confinement is a system of protection of the public, the gravity of the offense as it relates to the impact on the life of the victim or victims, as well as on the community.
>
> Furthermore, you must also consider the rehabilitative needs of the defendant. And then the Court is required to consider the guidelines. I can deviate above or below or stay within the standard range. If I go above or below the guidelines, I have to designate the reasons why I did such.
>
> Furthermore, the Court has to—and this is the hardest part—consider the factors specified in my Sentencing Code, and then I have to balance those factors against the specific background, character, and circumstances of the defendant with the circumstances of the crime and whether there is a need to incarcerate him to prevent future offenses by him and the possibility of rehabilitation.
>
> As you can see, it's a mouthful. In doing my balance I'm going to put some things out here. He was exposed to substance abuse at a very young age, as well as domestic violence at a young age. He is the father of – is it four children, I believe?
>
> [DEFENSE COUNSEL]: Yes, your Honor.
>
> THE COURT: And then I balance that with the circumstances of the crime, as well as considering the recommendation from the prosecution, as well as the defense.

So here's what I'm going to do. I know it's difficult on the family members and Mr. Washington as well, but I'm going to sentence on Term No. – and for the clerk's sake, I want to make sure she knows I'm going not by the count numbers on the verdict slip, but the count numbers as they relate to the Information.

So on Count 1 charging Burglary, felony of the first degree, I'm sentencing him to within the standard range of the guidelines, which is – just give me a moment here. I want to make sure. I'm going to sentence him within the standard range of the guidelines. I could have easily deviated up or below.

Let me point out some of the things that stand out to me. I mentioned earlier hearing the 911 calls where you could actually hear one of the victims and it sounded like vomiting form the severity of the beating that was inflicted upon her by the defendant. The offense here of the burglary—I mean, most burglaries, as we all know, involve people going in to steal or to destroy, like a mischievous thing.

Here this was – the intended crimes the jury convicted this fellow of, being aggravated assault and/or simple assault, so they were violent crimes as the intended crime of the burglary, which is concerning to this Court. And Mr. Washington did this while out on an outstanding bench warrant for probation violations was in place and not executed upon. So he's committed this while under court supervision.

He has serious drug issues that don't seem – through all the sentences – these sentencings he's had to have been – he hasn't been rehabilitated as evidenced by the convictions. in fact, one of the drug convictions from 2012 was possession with intent to deliver. Before that the simple assault and the aggravated assault before that and a simple assault and then possession, then possession, possession, possession, possession, possession. So drugs have been I think his downfall, and yet there's no rehabilitation after all these drug convictions.

I've considered that the victims here were women. Mr. Washington is a pretty hefty, strong looking young man who is powerfully built who can inflict serious bodily harm upon someone. I know the jury convicted in this particular case on

> aggravated assault for attempting to cause or intentionally, not only causing bodily injury to Ms. Pate, but there was extreme physical cruelty inflicted on the victims here.
>
> I understand he cares about his children but he is in arrears for child support. He has a history, as I said earlier, of substance abuse beginning at the age of 14 and yet has not come up from it. His violence started at a young age. He was expelled from high school according to the PSI for fighting. So it's clear he has anger management issues which he, himself, mentioned in the PSI.
>
> So when you combine that instability that Mr. Washington has with the substance abuse and put on top of that anger issues, I have to consider the protection of the public as well as these offenses themselves that are quite serious. I could have easily gone aggravated.
>
> . . .
>
> All right. I've considered everything as I stated here, but the protection of the public from your violent behavior called for a state prison sentence, Mr. Washington. You were exposed to violence in the family and you continue to expose others to your own violent behavior which is quite shocking.

(Sentencing Hearing, 11/28/16, N.T. 38-42, 47). Specifically with regard to Defendant's VOP sentences, the following record colloquy is demonstrative of the consideration the undersigned gave to the individualized circumstances of this Defendant.

> THE COURT: . . . Now we have the violations of probation and/or parole.
>
> . . .
> THE COURT: I'm thinking if I give him consecutive time, there will be a detainer on him for his 9 and a half years. And if I recall correctly from Department of Corrections, if there is a detainer on the felony, he's not able to participate in any programs that the state correctional institution offers.
>
> Does anyone have a difference of opinion on that?
>
> [DEFENSE COUNSEL]: That is correct, your Honor.

[THE ADULT PROBATION OFFICER]: That could come into play in addition to each sentence your Honor aggregates. This violation will aggregate the new sentence though.
THE COURT: Here's my question, if I go along with the recommendation of consecutive time, will a detainer be lodged on him?

[DEFENSE COUNSEL]: That's typically what I see, your Honor.

[THE ADULT PROBATION OFFICER]: I am not sure, your Honor.

THE COURT: I think there will be. See that's the issue here.

[THE PROSECUTOR]: I honestly can't say either way, your Honor. I don't want to speak out of turn.

THE COURT: But it brought something to mind that I overlooked earlier today that I ordered on the aggravated assault—and let me go back to that for a moment and check back on the original sentence.

On the burglary charge, I have imposed a psychiatric evaluation and to follow all recommended treatment. I also want to include on that count of the burglary, which is Count I, a drug and alcohol evaluation and follow any and all recommended treatment for the state sentence.

It's problematic. I gave him sufficient time, I believe, on that because I don't know what it would serve, an extra 6 months that would prohibit him from—when you look at the scheme of things of 9 and a half years form any chance of rehabilitation. That's my concern.

I know it aggregates but there's still if he's paroled at the minimum when he's at the state prison unless there's a detainer on them, he's not going to serve the six months. So the question becomes could the six months be served first?

[THE PROSECUTOR]: He could get credit on the VOP. That would be the way to structure—

THE COURT: But I don't know if there was a detainer placed on him.

[THE PROSECUTOR]: There was, your Honor.

THE COURT: When?

[THE ADULT PROBATION OFFICER]: When he failed—

[DEFENSE COUNSEL]: February 18.

[THE PROSECUTOR]: So if your Honor was looking to give him six months—

THE COURT: February 18th of '16. *So I'm trying to fashion a sentence that allows you to better yourself while you are incarcerated in state prison versus just sitting there and rotting away. So you could take advantage of programs. You still have time, young man.* According to the PSI you are, what, 35?

[THE DEFENDANT]: Yes.

THE COURT: You still have time. So this is a county parole. February 18th, March, April, May, June, July, August, would be what? Anyone do the math about what, August 18? If I give him maybe this—I'm going to have the clerk correct the original sentencing that I imposed on the other two offenses because this impacts it, and I don't want to rub it in to this fella. He got what he deserved.

So here's what I'm going to do. Mr. Washington, it's time to change. It's your 4th violation on 3534 of '08 and your 5th violation on 335 of '08. I don't get you. What are the guidelines for this?

[THE ADULT PROBATION OFFICER]: 8 to 12 months.

THE COURT: 8 to 12, so you're recommending less.

Especially when you are running from the police. The bench warrant was out on you. One of these bench warrants, I should say. I understand what your lawyer is saying, but there has to be some component of punishment with this. And the reason being is you've committed new crimes, a very

serious one while under supervision. Your conduct indicates that it's likely you may commit another crime when not in prison and that's why I imprisoned you. And furthermore such a sentence is because you essentially you disregard the authority of this Court. I mean, you're running away from the police.

So here's what I'm going to do. I'll ask the clerk to correct it. The credit on 871 of '16 should run from August 18, 2016 until today. So I'm going give [sic] you 6 months credit on the violation that way you don't have a detainer. Understood? And you can participate in things. As you can see I've given this great thought.

On 3534 of '08 the Court finds he's on his 4th violation and there's two years probation. His probation is therefore revoked. He's sentenced to not less than 6 nor more than 23 months in Chester County Prison with credit for time served from February 18, 2016 until August 18, 2016. He's eligible for immediate parole. The parole will terminate while he's incarcerated.

[THE ADULT PROBATION OFFICER]: It will close the case.

THE COURT: Well, if I make it consecutive to 871 of '16—well, no, this sentence is being imposed first.

[THE ADULT PROBATION OFFICER]: Yeah, now.

THE COURT: This is being imposed first to avoid that issue. I should have thought of it beforehand. All terms and conditions to be reimposed.

On Term No. 335 of '08, 5th violation, the three year probation is revoked and he's sentenced to serve not less than 6 nor more than 23 months at Chester County Prison with credit from February 18, 2016 until August 18, 2016. He is eligible for immediate parole and that's running concurrently with 3534 of '08. All original terms and conditions reimposed.

[THE ADULT PROBATION OFFICER]: And that case will be closed as well.

THE COURT: That case is closed upon his—I guess now. Are you asking it to be closed now?

> [THE ADULT PROBATION OFFICER]: Yeah. He served his six months.
>
> THE COURT: Yeah. He's going to be under supervision for the next 20 years.
>
> Any objection?
>
> [THE PROSECUTOR]: No, your Honor.
>
> [DEFENSE COUNSEL]: No.
>
> THE COURT: All right. Those cases are now closed. So I didn't pile it on here, Mr. Washington. . . .

(Sentencing Hearing, 11/28/16, N.T. 52-62)(emphasis added).

As these excerpts from the sentencing transcript demonstrate, we fashioned an individualized sentence for this Defendant "consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and [his] rehabilitative needs." 42 Pa. C.S.A. § 9721(b). Further, while we have herein largely focused on Defendant's VOP sentences alone, because there has been no formal consolidation of the new convictions with the VOP cases for purposes of appeal nor have we yet received a Concise Statement of Errors Complained of on Appeal concerning the new convictions, we would respectfully submit, insofar as this Honorable reviewing Court may deem it appropriate to examine Defendant's sentences on his new convictions at this time as well, that our sentences at docket numbers 15-CR-000871-2016 and 15-CR-0001193-2016, the new conviction dockets, are also reasonable, necessary and justified, whether considered separately from the VOP sentences or in the aggregate, for all of the reasons state herein. Our rationale applies equally to both the VOP dockets and the new conviction dockets.

Finally, we would respectfully suggest that the fact that Defendant has never served State time before, a factor Defendant cites in support of his claim that Defendant's sentence is excessive, is of little moment to the reasonableness of Defendant's sentences. He has demonstrated time and time again that the leniency this Court has offered him by keeping him in the County for the last nine (9) years is unappreciated and has been consistently abused. It has done nothing to improve Defendant's conduct or promote his rehabilitation. It is time for a State sentence. While defense counsel suggested that running his six (6) month VOP sentences consecutively to his State sentence is akin to throwing "salt in the wound" (Sentencing Hearing, 11/28/16, N.T. 57), *but see Commonwealth v. Moury*, 992 A.2d 162 (Pa. Super. 2010)(a claim that the sentencing court erred in the exercise of its discretion to impose sentences consecutively or concurrently does not ordinarily present a substantial question for purposes of triggering appellate review),[4] Defendant's fourth and fifth probation violations, especially in light of the violent new offenses he committed, his flight from law

[4] "'The key to resolving the preliminary substantial question inquiry is whether the decision to sentence consecutively raises the aggregate sentence to, what appears upon its face to be, an excessive level in light of the criminal conduct at issue in the case.'" *Commonwealth v. Raven*, 97 A.3d 1244, 1253 (Pa. Super. 2014), *appeal denied*, 105 A.3d 736 (Pa. 2014)(*quoting Commonwealth v. Mastromarino*, 2 A.3d 581, 587 (Pa. Super. 2010), *appeal denied*, 14 A.3d 825 (Pa. 2011)). We would respectfully submit that our decision to run Defendant's VOP sentences of six (6) to twenty-three (23) months concurrently with each other and consecutively to the sentences imposed on his severe new convictions, does not raise Defendant's aggregate sentence to what appears, upon its face or even upon deeper examination, an excessive level in light of Defendant's criminal conduct, particularly when taking into consideration the number of probation violations Defendant has committed, the new and serious charges he has repeatedly incurred while on supervision at the above-captioned dockets, the gravity of the latest series of offenses he has committed, and the fact that, through the undersigned's structuring of Defendant's credit for time served, he is deemed to have already served his VOP sentences and has been released at those dockets and the cases have been closed. Consequently, we would respectfully submit that, to the extent this Honorable reviewing Court deems it appropriate to consider Defendant's claim, made at sentencing but not included in his Concise Statement, that running Defendant's VOP sentences consecutively to the sentences imposed on his new convictions is somehow unfair, Defendant has not raised a substantial question for purposes of appellate review. Should this Honorable reviewing Court disagree, we would respectfully submit, for all of the reasons set forth in the body of this Opinion, that Defendant's claim has no substantive merit.

enforcement as well as failure to appear at his Gag II hearing and his absconding to another State without permission, may also be deemed to be "salt in the wound" to the citizens of the Commonwealth of Pennsylvania, who have suffered with Defendant's disrespect for the rule of law for far too long. Accountability is required.

Under 42 Pa. C.S.A. § 9781, an appellate court is empowered to vacate a sentence and remand a case to the sentencing court with instructions if it finds:

> (1) the sentencing court purported to sentence within the sentencing guidelines but applied the guidelines erroneously;
>
> (2) the sentencing court sentenced within the sentencing guidelines but the case involves circumstances where the application of the guidelines would be clearly unreasonable; or
>
> (3) the sentencing court sentenced outside the sentencing guidelines and the sentence is unreasonable.

42 Pa. C.S.A. § 9781(c). "In all other cases the appellate court shall affirm the sentence imposed by the sentencing court." 42 Pa. C.S.A. § 9781(c).

We would respectfully submit, for all of the reasons stated above, that our decision to sentence Defendant to two (2) concurrent terms of six (6) to twenty (23) months' imprisonment on his fifth and fourth violations of probation, respectively, at the above-captioned dockets, to run consecutively to the sentences imposed on his new convictions at docket number 15-CR-0000871-2016 and 15-CR-0001193-2016, does not implicate any one (1) of the three bases for vacating a sentence and remanding the case back to the sentencing court outlined in the 42 Pa. C.S.A. § 9781(c). Nor do the sentences we imposed on Defendant's new convictions at docket number 15-CR-0000871-2016 and 15-CR-0001193-2016 offend any of the three (3) section 9781(c) bases for appellate relief. *See* 42 Pa. C.S.A. § 9781(c). Our sentences, whether viewed

separately as VOP sentences and new conviction sentences, or viewed together in the aggregate, are reasonable, necessary and appropriate under the circumstances. They are not manifestly excessive in any respect. Accordingly, we would respectfully submit that we did not commit an abuse of discretion or error of law by sentencing Defendant as discussed above, whether this Honorable reviewing Court deems it appropriate to consider only the VOP sentences imposed at the above-captioned dockets or to consider all of the sentences imposed upon this Defendant in the aggregate, his new conviction sentences included.

For all of the foregoing reasons, we would respectfully submit that Defendant's appeal from the Judgment of Sentence entered on November 28, 2016 at the above-captioned dockets has no merit and should be denied and dismissed.

BY THE COURT:

4/6/17
Date

Anthony A. Sarcione, J.

Certified From The Record
This 10 Day of April 2017
Deputy Clerk of Common Pleas Court