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3 WAP 2024

IN THE SUPREME COURT OF PENNSYLVANIA
NO. 3 WAP 2024

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

DEREK LEE,

Appellant.

BRIEF FOR APPELLANT

Appeal from the Judgment of the Superior Court of Pennsylvania at No. 1008 WDA 2021, dated June 13, 2023, Affirming the Judgment of Sentence of the Court of Common Pleas of Allegheny County at CP-02-CR-0016878-2014 dated December 19, 2016

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STATEMENT OF JURISDICTION

Jurisdiction of this Honorable Court is invoked pursuant to 42 Pa.C.S.A. § 724(a) (relating to allowance of appeals from Commonwealth and Superior Court).

ORDER IN QUESTION

This is an appeal from the judgment of sentence entered by the Honorable David R. Cashman in the Allegheny County Court of Common Pleas on December 19, 2016. The relevant text of the order states as follows:

> AND NOW, this 19th day of December, 2016, the defendant having been convicted in the above-captioned case is hereby sentenced by this Court as follows. The defendant is to pay all applicable fees and costs unless otherwise noted below:
>
> **Count 1 –** 18 § 2502 §§ B – Murder Of The Second Degree (H2)
>
> To be confined for Life at SCI Camp Hill.
>
> The following conditions are imposed:
>
> Other: Defendant is to RRRI INELIGIBLE
>
> Other: Defendant is INELIGIBLE FOR PAROLE
>
> This sentence shall commence on 12/19/2016.

Reproduced Record (hereafter "RR"), 121a.

The order of the Superior Court in affirming the judgment of sentence is as follows:

Judgment of sentence affirmed. Jurisdiction relinquished.

Superior Court Memorandum Opinion and Order, Appendix B, 9.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

This Court's standard of review for challenges to the legality of a sentence is *de novo,* and its scope of review is plenary. *Commonwealth v. Davidson,* 938 A.2d 198, 203 (Pa. 2007); *Commonwealth v. Batts,* 66 A.3d 286, 295 (Pa. 2013).

STATEMENT OF QUESTIONS PRESENTED

This Court granted Mr. Lee's Petition for Allowance of Appeal with respect to the following questions:

1. Is Mr. Lee's mandatory sentence of life imprisonment with no possibility of parole unconstitutional under Article I, § 13 of the Constitution of Pennsylvania where he was convicted of second-degree murder in which he did not kill or intend to kill and therefore had categorically-diminished culpability, and where Article I, § 13 should provide better protections in those circumstances than the Eighth Amendment to the U.S. Constitution?

   Answered in the negative by the Superior Court in reliance on prior authority.

2. Is Mr. Lee's mandatory sentence of life imprisonment with no possibility of parole unconstitutional under the Eighth Amendment to the U.S. Constitution

where he was convicted of second-degree murder in which he did not kill or intend to kill and therefore had categorically-diminished culpability under the Eighth Amendment?

Answered in the negative by the Superior Court in reliance on prior authority.

STATEMENT OF THE CASE

Appellant, Derek Lee, is proceeding on direct appeal in a challenge to the constitutionality of his mandatory life-without-parole sentence imposed upon his conviction for second-degree murder. Mr. Lee was convicted of second-degree murder, robbery, and conspiracy on September 26, 2016, following a jury trial in the Allegheny County Court of Common Pleas, presided over by Judge David Cashman. The jury verdict found Mr. Lee guilty of second-degree murder, one count of robbery, and conspiracy to commit robbery. The jury returned a verdict of not guilty of first-degree murder, one count of robbery, and burglary. Reproduced Record (hereinafter "RR"), 66a. Judge Cashman sentenced Mr. Lee on December 19, 2016, to the mandatory penalty of life imprisonment for second-degree murder and 10-20 years consecutive to life imprisonment for criminal conspiracy. No further penalty was imposed on Mr. Lee's robbery conviction. RR, 72a. Counsel for Mr. Lee did not file any post-sentence motions or a direct appeal. Mr. Lee then filed a *pro se* Post-Conviction Relief Act (PCRA) petition seeking reinstatement of his post-

sentence motion and appellate rights, which was granted by the trial court on November 4, 2020. RR, 185a.

Mr. Lee, through counsel, filed a post-sentence Motion for Modification of Sentence, in which he alleged that his mandatory sentence of life imprisonment with no possibility of parole was unconstitutional under the article I, section 13 of the Pennsylvania Constitution and the Eighth Amendment to the U.S. Constitution. RR, 192a. That motion was denied by operation of law on July 26, 2021. RR, 204a.

Mr. Lee filed an appeal to the Superior Court. RR, 205a. Following Judge Cashman's retirement, the trial court filed an opinion in support of the constitutionality of Mr. Lee's sentence on March 23, 2022. Appendix A. After briefing and oral argument, a three-judge panel of the Superior Court affirmed Mr. Lee's sentence in a Memorandum Opinion and Order authored by Judge Olson and joined by Judge Colins. Appendix B. The opinion held that the court was bound by prior Superior Court precedent and rulings of other panels of the same court in declining to find Mr. Lee's sentence unconstitutional. *Id.* at 6, 9. Judge Christine Dubow joined in the three-judge panel's judgment but wrote a separate concurring memorandum urging the Supreme Court to "revisit whether a mandatory minimum sentence of life-without-parole imposed for all second-degree murder convictions is constitutional under Article I, Section 13 of the Pennsylvania Constitution." Appendix C, 1.

Mr. Lee was convicted in relation to the robbery and shooting death of Leonard Butler on October 14, 2014, in Pittsburgh, PA. He was acquitted of first-degree murder. RR, 303a. The prosecution presented the eyewitness testimony of Tina Chapple. She testified that Mr. Lee and his co-defendant entered her home and attempted to rob her and Mr. Butler. RR, 248a-259a. Ms. Chapple testified that at the time of the shooting, she and Mr. Butler were in the basement of her home with a man later identified as Mr. Lee's co-defendant. RR, 260a-263a. Subsequently, Mr. Butler was shot during a struggle over the gun that Mr. Lee's co-defendant held. RR, 276a-279a. Derek Lee was not in the basement at the time of the shooting. RR, 275a-276a.

Mr. Lee is challenging the constitutionality of his mandatory life-without-parole sentence imposed upon his conviction for second-degree murder.

SUMMARY OF THE ARGUMENT

Derek Lee was convicted of second-degree murder and related offenses and sentenced to life-without-parole. Mr. Lee did not kill or intend to kill in the commission of this offense. He is challenging his sentence of life-without-parole as a violation of both the article I, section 13 of the Pennsylvania Constitution and the Eighth Amendment of the United States Constitution.

Mr. Lee's sentence is unconstitutional under the Pennsylvania Constitution's prohibition on cruel punishments, which can– and should– provide broader protections than its federal counterpart in this context. Under *Commonwealth v. Edmunds,* 586 A.2d 887 (Pa. 1991), courts must conduct a four-part analysis to determine whether a Pennsylvania constitutional provision should be interpreted more broadly than an analogous federal provision.

First, the text of article I, section 13 prohibits "cruel punishments" and is on its face broader than the Eighth Amendment, which prohibits "cruel *and unusual"* punishments. The U.S. Supreme Court has authoritatively construed the term "unusual" to have a distinct, substantive meaning for purposes of the Eighth Amendment, and its omission from the Pennsylvania Constitution is therefore meaningful. Additionally, the framers of the Pennsylvania and United States Constitutions understood "cruel" punishments as those that were excessive.

Second, the history of article I, section 13 shows that it was intended to prohibit punishments that are not necessary to further rehabilitative and deterrent goals. Rich historical evidence demonstrates that Pennsylvania's constitutional protection from cruel punishments had a distinctive meaning that was given effect in multiple penal reform efforts that centered the justice system on the goals of deterrence and rehabilitation. Severe punishments which are not necessary to public safety are excessive and unjust in violation of the cruel punishments clause.

Third, other states with similar provisions have interpreted their constitutional standards to be distinct from the Eighth Amendment. Washington, Massachusetts, Michigan, and North Carolina are among the state courts to have recognized that the differences in language are not trivial and cannot be ignored in interpreting the extent of the protections provided. Several states have applied such broader protections when considering the proportionality of life-without-parole sentences, providing persuasive reasoning for this Court to consider.

Fourth, Pennsylvania-specific policy considerations weigh strongly in favor of interpreting article I, section 13 to provide greater protection than the Eighth Amendment in the context of this case. Pennsylvania is an extreme outlier both nationally and globally in sentencing people to die in prison, particularly when convicted of felony-murder. This sentencing practice reflects substantial racial bias, as 70% of those serving life-without-parole for felony-murder convictions in Pennsylvania are Black despite Black people making up only about 11% of the overall population. Pennsylvania's mandatory life-without-parole scheme for all felony-murder convictions has contributed substantially to the creation of a growing aging and elderly population in prison that poses virtually no public safety risk at great cost to the state and the lives of those incarcerated.

Life-without-parole for felony-murder also violates the Eighth Amendment to the U.S. Constitution. The touchstone of the Eighth Amendment inquiry is whether

a punishment is proportionate to the offense and the offender. In the Court's death penalty jurisprudence, courts applied a categorical approach to determine whether death penalty was proportionate when imposed on certain categories of offenders or offenses, leading to bans on imposing capital punishment on children, people with intellectual disability, and people who did not kill or intend to kill, among other categorical prohibitions. In *Enmund v. Florida*, 458 U.S. 782 (1982), the Court recognized that defendants convicted of felony-murder who do not kill or intend to kill have categorically-diminished culpability and cannot be sentenced to death. Beginning with *Graham v. Florida*, 560 U.S. 48 (2010), the Court has applied its categorical approach previously reserved for the death penalty to life-without-parole sentences. The Court reasoned that life-without-parole is akin to the death penalty as one of the harshest punishments, and is sufficiently similar to the death penalty so as to require the same level of scrutiny and protection under the Eighth Amendment. Thus, like capital punishment, life sentences with no possibility of parole are now subjected to constitutional analysis under the Court's categorical approach.

Under the categorical approach, courts must analyze whether there is a national consensus, including recent trends and international practices, among states with respect to imposing a particular punishment on a certain category of offenders or offenses, then conduct an independent analysis as to whether the punishment

sufficiently serves legitimate penological goals when applied to the category of offenders or offenses. Pennsylvania's life-without-parole sentencing practices for felony-murder falls outside of a national consensus and fails to serve legitimate penological goals, thus violating the Eighth Amendment.

ARGUMENT

I. LIFE-WITHOUT-PAROLE FOR SECOND-DEGREE MURDER VIOLATES THE ANTI-CRUELTY PROVISION OF THE PENNSYLVANIA CONSTITUTION

A life-without-parole sentence for the crime of second-degree murder violates article I, section 13 of the Pennsylvania Constitution, which prohibits the infliction of "cruel punishments." Pa. Const. art. I, sec. 13. A textual, historical, comparative law, and policy analysis of the anticruelty provision of the Pennsylvania Constitution, as is required by this Court's jurisprudence, compels this Court to prohibit the permanent punishment of life-without-parole for a criminal defendant who does not possess any intent to take a life. Such a sentence violates the meaning and purpose of the distinct state constitutional right protected in article I, section 13, which was enshrined to prevent punishments that are excessive in regard to the interests of deterrence and rehabilitation.

Mr. Lee was convicted of felony-murder under Pennsylvania's second-degree murder statute at 18 Pa.C.S.A. § 2502(b) and sentenced to the mandatory punishment

of life imprisonment under 18 Pa.C.S.A. § 1102(b), which provides: "a person who has been convicted of murder of the second degree...shall be sentenced to a term of life imprisonment." Mr. Lee's sentence of life imprisonment automatically becomes a "life-without-parole" sentence as a function of the Parole Code, which prohibits the Board of Parole from considering anyone sentenced to life imprisonment for release on parole. 61 Pa.C.S.A. § 6137(a)(1); *see also Scott v. Pa. Bd. of Prob. & Parole,* 284 A.3d 178, 191 (Pa. 2022) (for people convicted of second-degree murder, "ineligibility for parole is a part of their sentence").

The offense of felony-murder does not require any level of criminal intent from the defendant with respect to the death that occurred during perpetration of the felony. Rather, "the malice essential to the crime of second-degree murder is imputed to the defendant from the intent to commit the underlying felony, regardless of whether the defendant actually intended to physically harm the victim." *Commonwealth v. Mikell,* 729 A.2d 566, 569 (Pa. 1999). Nor does a defendant need to directly cause the death of another in order to be found guilty of felony-murder. Instead, when a killing occurs during a predicate felony, "not only the actual killer but all who participated, including the driver of the getaway car, are equally guilty of [felony-murder]." *Commonwealth v. Melton*, 178 A.2d 728, 731 (Pa. 1962).

This Court has previously recognized that the felony-murder rule has faced "thoroughly warranted" harsh criticism. *Com. ex rel. Smith v. Myers,* 261 A.2d 550,

553 (Pa. 1970). The *Myers* Court noted that felony-murder has been criticized as "highly punitive and objectionable as imposing the consequences of murder upon a death wholly unintended;" a resulting death that is "wholly unexpected and unconnected with the intention and act of the party...is made the foundation of criminal responsibility." *Id.* (internal quotations and citations omitted). The felony-murder rule was not only described by the *Myers* Court as "non-essential," but the Court found it "very doubtful that it has the deterrent effects its proponents assert," and may even have the opposite effect. *Id.* The Court endeavored "to make clear how shaky are the basic premises on which [the felony-murder rule] rests." *Id.* at 555.

Mr. Lee asserts that his life-without-parole sentence for a felony-murder conviction violates the Pennsylvania Constitution. Article I, section 13 provides: "Excessive bail shall not be required, nor excessive fines imposed, **nor cruel punishments** inflicted." Pa. Const. Art. I, Sec. 13 (emphasis added). The relevant portion of article I, section 13 is textually distinct in relevant part from the Eighth Amendment to the U.S. Constitution, which provides: "...**nor cruel and unusual punishments** inflicted." U.S. Const. Amend. VIII (emphasis added). This Court has previously found that the state constitution's "cruel punishments" clause is "co-extensive" with the Eighth Amendment's "cruel and unusual punishments" clause when assessing the constitutionality of the death penalty in Pennsylvania.

Commonwealth v. Zettlemoyer, 454 A.2d 937, 967 (Pa. 1982). Subsequent to *Zettlemoyer*, however, this Court articulated several factors to consider in determining whether a provision of Pennsylvania's Constitution is co-extensive with an analogous provision of the federal constitution. *Commonwealth v. Edmunds*, 586 A.2d 887, 894 (Pa. 1991).

When a litigant asserts that a Pennsylvania state constitutional right provides greater protection than its federal counterpart, adjudication requires claim-specific briefing and analysis of the following four factors as outlined in *Edmunds*: "1) text of the Pennsylvania constitutional provision; 2) the history of the provision, including Pennsylvania case-law; 3) related case-law from other states; and 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence." *Id.* at 895.

In denying Mr. Lee's petition, the Superior Court relied on *Zettlemoyer* for the proposition that the Eighth Amendment is co-extensive with article I, section 13 of the Pennsylvania Constitution. However, subsequent to *Zettlemoyer*, this Court has repeatedly recognized that state constitutional claims require a *claim-specific* analysis of the *Edmunds* factors *each time they are raised*. *Commonwealth v. Baker*, 78 A.3d 1044, 1048 (Pa. 2013) (noting appellant failed to include requisite *Edmunds* analysis for state constitutional claim); *Batts*, 66 A.3d at 298 (finding "Appellant has not presented a fully developed analysis in accord with [*Edmunds*]"). Moreover,

Chief Justice Castille emphasized in his concurrence in *Baker* that *Zettlemoyer* was a claim-specific ruling, and that the court's decision did not foreclose the possibility that article I, section 13 may provide greater protection than its federal counterpart:

> This Court is not obliged by existing precedent to proceed in lockstep in approaching state constitutional "cruel punishment" claims. . . *Zettlemoyer* did not purport to establish that all claims arising under Article I, Section 13 should be treated as if they were subject to the same standards that would govern an equivalent Eighth Amendment claim.

Baker, 78 A. 3d at 1054, (Castille, C.J., concurring).

Similarly, in *Batts*, the state constitutional claim was rejected not because of *Zettlemoyer*, but because the appellant argued that "this Court should expand upon the United States Supreme Court's proportionality approach, not that it should derive new theoretical distinctions based on differences between the conceptions of 'cruel' and 'unusual.'" *Batts*, 66 A.3d at 298. This Court was unable to accord greater relief under the Pennsylvania Constitution because "nothing in the arguments presented suggests that Pennsylvania's history favors a broader proportionality rule than what is required by the United States Supreme Court." *Id.* at 299. This case presents precisely those textual and historical arguments that militate in favor of "deriv[ing] new theoretical distinctions based on differences between the conceptions of 'cruel and unusual,'" distinctions that were understood by the framers of the Pennsylvania Constitution when they enshrined a visionary protection against excessive punishment in this state's Constitution.

A. Application of the *Edmunds* factors to Appellant's claim requires construing the anti-cruelty provision of the Pennsylvania Constitution to provide broader protection than its federal counterpart in this case

1. Text of Pennsylvania's Cruel Punishments Clause

The textual difference between article I, section 13 of the Pennsylvania Constitution, declaring that "cruel punishments [shall not be] inflicted", and its federal counterpart in the Eighth Amendment, which protects against "cruel and unusual punishments," is substantive, each pointing to distinctive grounds for restraining state authority to inflict punishment. *C.f. Baker*, 78 A.3d at 1054–55 (Castille, J., concurring). The starting point for analyzing the distinction between the two provisions must begin with determining the meaning of the term "unusual" in the federal constitution to deduce the significance of its omission in the state constitution.

That the term "unusual" in the federal constitution's Eighth Amendment has a distinct meaning is recognized by the U.S. Supreme Court. Interpreting Pennsylvania's anti-cruelty provision as only co-extensive with the Eighth Amendment would, among other things, improperly render the term "unusual" in the federal constitution as "mere surplusage." *See Harmelin v. Michigan*, 501 U.S. 957, 967 (1991) (noting the difference between "cruel" and "unusual" in the federal constitution). In *Harmelin*, Justice Scalia explained that "[a] requirement that punishment not be 'unusual' . . . was primarily a requirement that judges

pronouncing sentence remain within the bounds of common-law tradition." *Id.* at 974. Justice Scalia also emphasized how the federal constitution "tracked Virginia's prohibition of 'cruel *and* unusual punishments,'" rather than other state constitutional antecedents, including those, such as Pennsylvania, that prohibited only "cruel" punishments. *Id*. at 966.

This understanding was explored at length in a comprehensive historical excavation on the meaning of the word "unusual" in the Eighth Amendment. Professor John Stinneford found:

> As used in the Eighth Amendment, the word "unusual" was a term of art that referred to government practices that are contrary to "long usage" or "immemorial usage." Under the common law ideology...the best way to discern whether a government practice comported with principles of justice was to determine whether it was continuously employed throughout the jurisdiction for a very long time, and thus enjoyed "long usage." The opposite of a practice that enjoyed "long usage" was an "unusual" practice, or in other words, an innovation.

John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment As A Bar to Cruel Innovation,* 102 Nw. U. L. Rev. 1739, 1745 (2008) (internal citations omitted).

More recently, this understanding of the constitutional meaning of "unusual" was recognized in a majority opinion authored by Justice Gorsuch that favorably cited Stinneford's scholarship on the subject. *Bucklew v. Precythe*, 587 U.S. 119, 130-31 (2019) (citing Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment As A Bar to Cruel Innovation,* 102 Nw. U. L. Rev. 1739, 1745 (2008)),

for the observation "that Americans in the late 18th and early 19th centuries described as "unusual" governmental actions that had "fall[en] completely out of usage for a long period of time"). Understood in this light, Pennsylvania's omission of "unusual" is substantive, broadening the anti-cruelty prohibition in the state constitution by leaving it unencumbered with a requirement that a challenged punishment be contrary to the common law. Instead, Pennsylvania's Constitution permits challenges to punishments that have been imposed continuously for a long time if there is a basis for determining that they are "cruel" in a constitutional sense, discussed *infra*.

2. History of Pennsylvania's Cruel Punishments Clause

That Pennsylvania's anti-cruelty provision supports an independent, more expansive reading than its federal counterpart is reinforced and given further content by exploring the history of that provision. A recently-published, comprehensive historical examination of the original meaning of Pennsylvania's prohibition on cruel punishments demonstrates that Pennsylvania's "citizens had a distinct understanding of 'cruelty.'" Kevin Bendesky, *"The Key-Stone to the Arch": Unlocking Section 13's Original Meaning*, 26 U. Pa. J. Const. L. 201, 204 (2023) (hereafter "Bendesky"). Pennsylvania's constitutional framers had this understanding of article I, section 13:

> They believed that only deterrence and reformation justified a punishment. They declared that only the least severe infliction for those purposes was permissible. They proscribed as cruel anything unnecessary for those aims. They preached that the assessment of a punishment's cruelty, defined by this specific meaning, must evolve alongside society's scientific understanding. And they distilled that philosophy into Section 13's textually distinct prohibition of every "cruel punishment"—whether unusual or not.

Id.

This scholarship accords with that of Professor Stinneford, cited as an authoritative source by the U.S. Supreme Court, on the understanding of cruel punishments in the late 18th century. Historical sources "are remarkably consistent in interpreting a cruel punishment as one whose effects are unduly harsh, not as one imposed with a cruel intent." John F. Stinneford, *The Original Meaning of "Cruel*", 105 Geo. L.J. 441, 473-74 (2017). A punishment that is "unduly harsh" is one that inflicts "excessive" or "unjust" "suffering." *Id*. at 448, 464, 494. The references to "unduly harsh" and "excessive" reinforce that prohibitions against "cruel punishments" are necessarily concerned with ensuring proportionality between offense and punishment.

Pennsylvania's penal reform in the wake of independence from Britain illustrates this constitutional mandate for proportionate punishment. In the Commonwealth's first Constitution of 1776, section 38 provided that, "[t]he penal laws as heretofore used shall be reformed by the legislature of this state, as soon as may be, and punishments made in some cases less sanguinary, and in general more

proportionate to the crimes." Pa Const. of 1776, sec. 38. The following section called for making "sanguinary punishments less necessary." *Id*. at section 39. Thus, the original Constitution of the state called to create "proportional punishments," to make punishments "less sanguinary," and "to make sanguinary punishments less necessary." Bendesky at 213. Pennsylvania's second chief justice at the time "urged the Legislature to fulfil these constitutional demands by implementing the most lenient means of achieving punishment's aims: deterrence." *Id*.

This constitutional mandate was enacted into law through the penal reform laws of 1786 and 1790. *Id*. at 214. The 1786 law limited the death penalty to four crimes, but was determined to need further reform due to it implementing public punishments that were deemed incongruous with "the ideals that inspired it." *Id*. Thus, when the Legislature passed the second penal reform law in 1790, it did so with a preamble which "explained that it was 'for the purpose of carrying the provisions of the constitution [of 1776] into effect,' noting that the previous measures had 'failed of success' and 'hop[ing]' that, "as far as it can be effected,' the bill 'w[ould] contribute as much to *reform* as to *deter*.'" *Id*. (emphasis added) (citing Act Of 5th Apr. 1790, reprinted in John W. Purdon, Digest of the Laws of Pennsylvania, 9 (M'Carty & Davis, 1831)).

In 1790, these principles became enshrined in the Pennsylvania Constitution's prohibition against "cruel punishments." Bendesky at 241. As explained by William

Bradford, who participated in the 1790 Constitutional Convention of Pennsylvania as the state's Attorney General, constitutions that declare "that cruel punishments ought not to be inflicted" serve to "prohibit every penalty which is not evidently necessary." *Id*. He added that "every punishment which is not absolutely necessary for that purpose is a cruel and tyrannical act." *Id*.

The Pennsylvania Legislature furthered these efforts with yet another enactment in 1794 "that restricted capital punishment to first degree murder." Bendesky at 214. That punishments must be exclusively concerned with deterrence and rehabilitation was recognized in the preamble to that law, which "confirms that Pennsylvanians believed it is 'the duty of every government to endeavor to reform, rather than exterminate offenders, and the punishment of death ought never to be inflicted, where it is not absolutely necessary to the public safety.'" *Id*. at 214-15. The rationale behind these early penal reform laws illuminates this Commonwealth's commitment to ensuring that punishments are proportionate to the needs of deterrence and rehabilitation, as the enactments of early legislatures "are of course persuasive evidence of what the Constitution means." *Harmelin,* 501 U.S. at 980.

A survey of leading figures in the early history of Pennsylvania establishes that this perspective was the consensus view animating the adoption of the constitutional right to be free from cruel punishments. James Wilson, a signatory of the Declaration of Independence and the U.S. Constitution, "must be regarded as the

father of the constitution in Pennsylvania." Bendesky at 222 (quoting *Pennsylvania and the Federal Constitution 1787–1788,* 699 (John Bach McMaster & Frederick D. Stone eds., 1888)). An avowed admirer of enlightenment-era philosophers Montesquieu and Beccaria, Wilson

> believed that criminal laws were the bedrock of liberty when they were lenient and proportionate to crimes. "It is on the excellence of the criminal laws, says the celebrated Montesquieu, that the liberty of the citizens principally depends." Specifically, "'[l]iberty,' says the celebrated Montesquieu, 'is in its highest perfection, when criminal laws derive each punishment from the particular nature of the crime.'" And quoting the "Marquis of Beccaria," Wilson "therefore" concluded that "'there ought to be a fixed proportion between punishments and crimes."

Bendesky at 223.

Thomas McKean, second governor of Pennsylvania and its first Chief Justice, held the same views. As Chief Justice, he and the other Justices of that Court authored "Representation" to the General Assembly in 1785, which noted that the purposes of punishment were "to correct and reform the offender, and to produce such strong impressions on the minds of others as to deter them from committing the like offence." *Id.* at 226-27.

The "quasi-official historian of the penal revolution," Jared Ingersoll, drafted a report to the Legislature in his role as Attorney General in 1812 in which he "explained that '[a] wiser policy' of criminal law 'determined to preserve' and "to reform,' 'rather than to destroy. '[T]he principle upon which all criminal law rests,'

he elaborated, 'is necessity.'" Bendesky at 229. That the state constitution's proscription against cruel punishments contained an exacting proportionality principle was also the understanding of Benjamin Rush, who "played an outsized role in Pennsylvania's penal revolution." *Id.* at 233. Rush wrote that "[T]he only design of punishment is the reformation of the criminal." *Id.*

Thus, leading framers of the Pennsylvania Constitution and early leaders in every branch of its government were of a common mind. The "distinctly Pennsylvanian emphasis on punishment's necessity defined the purpose and meaning of the legal texts, including the prohibition on 'cruel punishments." Bendesky at 244. "The lofty ideals pointed to a more humane criminal legal system: leniency preferred, severity limited, retribution discarded. Beyond that, any punishment was cruel. This was the principle that Section 13 codified." *Id.*

Furthermore, and critically, these same foundational figures understood that the social and legal standards of what was necessary to deter crime and reform the offender was evolving, not set in stone forever. As stated by Wilson, "[o]ur progress in virtue should certainly bear a just proportion to our progress in knowledge." Bendesky at 225 (internal punctuation omitted). Ingersoll believed the same, writing "that society is capable of amelioration, which will render that resort [i.e. the death penalty] unnecessary[.]" Bendesky at 229. That a punishment may become cruel –

and thus constitutionally prohibited – due to changing understandings of its necessity is part of the foundation of the constitutional right at issue in this appeal.

Early Pennsylvania case law also confirms that deterrence and reformation were the guiding principles of Pennsylvania criminal law. *See James v. Commonwealth*, 12 Serg. & Rawle 220 (Pa. 1825) (rejecting use of the "ducking stool" to punish "a common scold" as incompatible with goals of reformation and deterrence, which were "the just foundation and object of all punishments"); *Commonwealth v. Ritter*, 13 Pa. D. & C. 285 (Pa. 1930) (rejecting retribution as a justification for punishment because it "looks to the past, not the future, and rests solely upon the foundation of vindictive justice" and instead holding "the two elements which should be taken into consideration are those of restraint and deterrence"). The Pennsylvania Supreme Court later quoted with approval *Ritter*'s opinion that deterrence was a core concern for judicial analysis of criminal punishments. *Commonwealth v. Elliot*, 89 A.2d 782, 784 (Pa. 1952).

Even with respect to life-without-parole sentences, Pennsylvania's practices were long-aligned with this understanding that deterrence and rehabilitation are the primary aims of the criminal punishment system. While Pennsylvania's unique statutory construction has long-rendered all life sentences ineligible for parole consideration, life imprisonment did not always carry the expectation that a person would die in prison. Rather, commutation statistics demonstrate that clemency was

an oft-used mechanism of releasing people who had demonstrated rehabilitation. Through the late 1970's Pennsylvania governors regularly granted commutations to people serving life sentences upon recommendation of the Board of Pardons. During Governor Shapp's administration from 1971-1978, 251 people were granted commutations. Pennsylvania Board of Pardons, *Commutation of Life Sentences (1971-Present)* (2023).[1] This practice has only recently fallen out of favor. Shockingly, only 60 people have received commutations in the last 30 years. *Id.* The historical use of commutation to release people serving life sentences from prison underscores the essential values of deterrence and rehabilitation upon which Pennsylvania's system of punishment is based. An opportunity for release from a sentence of life imprisonment upon demonstrated rehabilitation and lack of danger to public safety was an inherent part of serving a life-without-parole sentence when commutation functioned as a release valve for those serving the sentence.

The foregoing historical and textual analysis compel an independent understanding of the distinctive Pennsylvania constitutional right to be free from cruel punishments. This right has an original meaning substantively distinct from its federal analog.

[1] Available at: https://www.bop.pa.gov/Statistics/Pages/Commutation-of-Life-Sentences.aspx. (last accessed: Apr. 18, 2024)

3. Related Case-Law From Other States

The third *Edmunds* factors requires consideration of related case-law from other states. *Edmunds,* 586 A.2d at 895. Numerous states interpret the anti-cruel punishment provisions of their state constitutions to be distinct and provide broader protection when compared to the anti-cruelty clause of the Eighth Amendment to the U.S. Constitution. The highest appellate courts of at least nine states with constitutional provisions that prohibit "cruel," "cruel or unusual," or some similar textual deviation from the Eighth Amendment's prohibition on "cruel and unusual" punishments have found the textual distinction to provide at least some level of different protection than the Eighth Amendment.[2] While some states' highest appellate courts have treated their state constitutional clauses to be only co-extensive with the Eighth Amendment, many of these have not engaged in a substantive analysis akin to what this Court requires under *Edmunds.*[3] Others have

[2] *See e.g. People v. Anderson,* 493 P.2d 880 (Cal. 1972); *Hale v. State,* 630 So. 2d 521 (Fla. 1993); *State v. Fleming,* 95 So. 3d 1125 (La. 2012); *State v. Lopez,* 184 A.3d 880, 885 (Me. 2018); *Commonwealth v. Mattis*, 224 N.E.3d 410 (Mass. 2024); *People v. Bullock,* 485 N.W.2d 866 (Mich. 1992) *State v. McDaniel,* 777 N.W.2d 739, 753 (Minn.2010); *State v. Kelliher,* 873 S.E.2d 366 (N.C. 2022); *State v. Bassett,* 428 P.3d 343 (Wash. 2018).

[3] *See e.g. Kelley v. Johnson,* 496 S.W.3d 346, 357 (Ark. 2016) ("We are not convinced that the slight variation in phraseology between the two constitutions denotes a substantive or conceptual difference in the two provisions that would compel us to disregard any part of the test governing a challenge to a method of execution."); *Riley v. Commonwealth*, 120 S.W.3d 622, 633 (Ky. 2003) ("We regard this variation in phraseology as a distinction without a difference."); *State v. Addison,* 87 A.3d 1, 155 (N.H. 2013) ("We need not decide [whether the state provision provides greater protection] because, even assuming [the state provision] affords greater protection than does the Eighth Amendment, application of settled principles for construing our State constitution leads us to reject the defendant's facial challenge[.]")

acknowledged that the textual differences may give rise to different protections under their state constitutions, but have found the provisions to be co-extensive under the particular circumstances of the case at hand.[4] Some states' highest courts have even interpreted their state constitutions to provide broader protections than the Eighth Amendment when the state and federal constitutional provisions are textually identical.[5]

As this Court acknowledged in *Edmunds*, a "mere scorecard" of how different states have interpreted their own state constitutional provisions is insufficient to fully inform how Pennsylvania's state constitutional provision should be interpreted. *Edmunds,* 586 A.2d at 900. Instead, the level of analysis and types of claims at issue in these other state court decisions should be considered and given substantial weight in this Court's analysis under the *Edmunds* factors. *Id.* ("the logic of those decisions" bears upon the analysis). Decisions by the state supreme courts of Washington,

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[4] *See e.g. Sanders v. State*, 585 A.2d 117, 146 (Del. 1990) (articulating factors for considering whether to provide broader protection under the state constitution); *Harris v. State*, 276 A.3d 1071, 1093 (Md. 2022) (finding that appellant provided no "compelling reason" to depart from precedent of interpreting state and federal provisions to be co-extensive).

[5] *Fletcher v. State of Alaska*, 532 P.3d 286 (Alaska 2023) (rejecting U.S. Supreme Court decision as binding on state constitutional claim); *State v. Zarate*, 249 N.J. 359 (N.J. 2022) (state's "cruel and unusual" punishments clause rendered sentencing framework for juveniles facing lengthy sentences unconstitutional); *Dawson v. State*, 554 S.E.2d 137 (Ga. 2001) (court looked to state-specific markers of evolving standards to find death-by-electrocution unconstitutional under state provision); *State v. Pearson*, 836 N.W.2d 88 (Iowa 2013) (cruel and unusual punishments clause in state constitution prohibits *de facto* mandatory LWOP for juveniles); *State v. Mata*, 745 N.W.2d 229 (Neb. 2008) (state constitution's "cruel and unusual" clause has separate but similar test to Eighth Amendment); *State v. Bartol*, 496 P.3d 1013 (Or. 2021) (state's "cruel and unusual" clause contains an additional proportionality requirement distinct from Eighth Amendment).

Massachusetts, Michigan, and North Carolina are particularly persuasive for this Court to consider in adjudicating Mr. Lee's claim. These courts' analyses of the textual distinctions between their own state constitutional provisions and the Eighth Amendment, their application of state-based historical factors and policy concerns, and their evaluation of claims challenging life-without-parole sentences, all should weigh heavily in favor of interpreting Pennsylvania's cruel punishments clause to provide broader protection than the Eighth Amendment in the context of Mr. Lee's claim.

In 2018, the Supreme Court of Washington held in *State v. Bassett,* 428 P.3d 343 (Wash. 2018), that Washington's prohibition on "cruel punishments" – a provision identical to article I, section 13 in Pennsylvania – provides broader protection than the Eighth Amendment in banning all life-without-parole sentences for juveniles under the state constitution. Although the Washington Supreme Court had previously found that its own cruel punishments clause provided broader protection than the Eighth Amendment, the court engaged in an extensive consideration of factors similar to those set forth by this Court in *Edmunds. Id.* at 349-350 (considering (1) the text of the state constitution, (2) textual differences with the federal constitutional provision, (3) state constitutional and common law history, (4) preexisting state law, (5) structural difference between the federal and state constitutions, and (6) matters of state and local interest).

With respect to the first three factors, the court found that Washington's prohibition on only "cruel" punishments was facially broader than the federal constitution's ban on "cruel and unusual" punishments and that the framers of Washington's constitution rejected an amendment to insert "unusual" into the constitutional provision. These factors weighed in favor of the state constitution providing broader protection than the Eighth Amendment. *Id.* at 349. In its discussion of specific state and local concerns, the court pointed to a trend in Washington of affording special protections to juveniles, in finding that this factor also supported a broader interpretation of Washington's state constitutional provision. *Id.* at 350.

The court then considered what standard to apply in adjudicating the claim that life-without-parole sentences for juveniles violated the state's cruel punishments clause. The court departed from its typical application of a "gross disproportionality" test to cruel punishment claims and adopted a standard based on the U.S. Supreme Court's categorical approach to Eighth Amendment claims. *Id.* at 350. Consideration of "culpability, the severity of the punishment, and whether penological goals are served" are better suited to evaluating a claim based on the characteristics of the offender class. *Id.* at 351. In applying this categorical approach to juvenile life-without-parole, the court found it unconstitutional because there was a trend of states moving away from the practice, that such a severe sentence was a mismatch with

juvenile offenders' diminished culpability, and that traditional penological goals were not served by permanent incarceration on juvenile offenders. *Id.* at 352-354.[6]

In 1975, the Supreme Judicial Court of Massachusetts held that a mandatory death penalty sentence for murder committed in the course of rape or attempted rape was unconstitutional under the Massachusetts Declaration of Rights. *Commonwealth v. O'Neal,* 339 N.E. 2d 676 (Mass. 1975). No majority opinion analyzing the constitutionality of the sentence was issued, however, in a concurring opinion, Chief Justice Tauro wrote in support of the judgment that Massachusetts' ban on "cruel or unusual" punishments prohibited the sentence at issue. *Id.* at 246 (Tauro, C.J., concurring). The concurrence's analysis of the word "cruel" found that when a punishment is not "necessary" and "does not serve the needs of society," it is "cruel" within the meaning of the state constitution. *Id.* at 247. The concurrence then found that a mandatory death penalty in that matter was not "necessary" to further the legitimate penological goals of deterrence, incapacitation, or retribution. *Id.* at 252-262.[7]

More recently, the Massachusetts Supreme Judicial Court ruled that life-without-parole for juveniles is unconstitutional under the state constitution in

[6] In *In re Pers. Restraint of Monschke*, 482 P.3d 276 (Wash. 2021), the Washington Supreme Court applied its ruling in *Bassett* by banning mandatory life-without-parole sentences for anyone younger than 21 years old at the time of their offense.

[7] The court later ruled that the death penalty is always "cruel" under the Massachusetts Declaration of Rights in *District Attorney for Suffolk Dist. v. Watson,* 411 N.E. 2d 1274 (Mass. 1980).

Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270 (Mass. 2013). The *Diatchenko* court noted the Massachusetts Declaration of Rights had been interpreted to provide broader protection than the Eighth Amendment. *Id.* at 283. The court analyzed the application of life-without-parole sentences to juveniles under a similar approach to that employed by the U.S. Supreme Court in *Graham* and *Miller v. Alabama*, 567 U.S. 460 (2012), finding that "a judge cannot find with confidence that a particular offender [younger than 18] is irretrievably depraved" based on current adolescent brain development research. *Id.* at 284. Furthermore, imposition of life-without-parole sentences do not serve legitimate penological interests. *Id.* at 284-85.[8]

The Supreme Court of Michigan has also found that its own state prohibition on "cruel or unusual" punishments provides distinct protections from the federal Eighth Amendment. In *People v. Bullock*, 485 N.W.2d 866 (Mich. 1992), the court expressly rejected that the U.S. Supreme Court's decision in *Harmelin*, 501 U.S. 957, was binding on its state constitutional analysis of the same statutes, which mandated life-without-parole for possession of certain quantities of cocaine. *Bullock*, 485 N.W.2d at 870. The *Bullock* court found that the textual differences between the state and federal provisions "does not appear to be accidental or

[8] In *Commonwealth v. Mattis*, 224 N.E.3d 410 (Mass. 2024), the Supreme Judicial Court of Massachusetts held that life-without-parole violated the state constitution's ban on "cruel or unusual" punishments for anyone younger than 21 at the time of the offense.

inadvertent" and that punishments which were unusually excessive, though not necessarily cruel, may violate the state constitution. *Id.* at 872. The court also noted historical factors such as the later adoption of Michigan's constitutional language and prior decisions under the state constitution which employed an analysis more protective than the U.S. Supreme Court's ruling in *Harmelin. Id.* at 872-74. The court concluded that under its own state constitutional standard, mandatory life-without-parole for mere possession of at least 650 grams of was disproportionate under the state constitution. *Id.* at 877. The Michigan Supreme Court has applied its own state constitutional standard in more recent cases barring life with the possibility of parole sentences for juveniles and requiring individualized sentencing for 18-year-olds facing potential life-without-parole sentences. *See People v. Stovall*, 987 N.W.2d 85, 94-95 (Mich. 2022), (penological purposes of punishment are not sufficiently served to justify life-with-parole sentences for juveniles convicted of second-degree murder under the state constitution.); *People v. Parks*, 987 N.W.2d 161, 169, 181-82 (Mich. 2022), (state's ban on "cruel or unusual" punishment is "broader than the federal Eighth Amendment counterpart," striking down mandatory life-without-parole for all 18-year-olds convicted of first-degree murder.).

The Supreme Court of North Carolina recently affirmed in two cases that its state constitutional ban on "cruel or unusual" punishments provided broader protection than the Eighth Amendment. *State v. Kelliher*, 873 S.E.2d 366 (N.C.

2022); *State v. Conner*, 873 S.E.2d 339 (N.C. 2022). In *Kelliher*, the court found that the state prohibition on "cruel or unusual" punishments provides "a distinct set of protections" from those encompassed by the Eighth Amendment. *Kelliher*, 873 S.E.2d at 382. The court utilized the basic framework of the U.S. Supreme Court's categorical approach, but exercised its own independent assessment of this framework in applying the state constitutional provision to a claim that a 40-year minimum sentence for juvenile offender was a *de facto* life-without-parole sentence and cruel or unusual punishment. *Id.* at 385-86. The court analyzed whether the sentence was "cruel" under the state constitution and held that "sentencing a juvenile who is neither incorrigible nor irredeemable to life without parole is cruel within the meaning of article I, section 27" of the state's constitution. *Id.* at 386. The court also held that a forty-year minimum sentence was the threshold at which a sentence became *de facto* life-without-parole. *Id.* at 390.

In addition to the persuasive substantive analyses provided by these courts in construing the significance of textual distinctions in their own state constitutional anti-cruel punishments provisions, these cases reflect a clear trend toward giving independent meaning to state constitutions in the context of assessing whether life-without-parole sentences imposed on certain categories of offenders or offenses are unconstitutional. Pennsylvania should join this growing list of states to find that its

cruel punishments clause provides broader protection than the Eighth Amendment in the context of sentencing people to life-without-parole.

4. Policy Considerations Unique to Pennsylvania

a. Pennsylvania is a National and International Outlier in Imposing Life-Without-Parole for Felony-Murder

The fourth prong in *Edmunds* requires this Court to analyze policy issues unique to Pennsylvania when considering Mr. Lee's claim that the anti-cruelty provision of the Pennsylvania constitution provides broader protections than its federal counterpart. *Edmunds*, 586 A.2d at 895. Pennsylvania's status as a national and international outlier when it comes to imposing life-without-parole sentences for felony-murder warrants consideration under this factor.

Compared to the rest of the United States, Pennsylvania sentences an extraordinary number of people to die in prison for any offense. With the exception of Florida, Pennsylvania incarcerates the highest number of people serving life-without-parole sentences. Of 55,595 people serving life without parole sentences across the United States in 2020, 5,375 – nearly 10% of the total – were in Pennsylvania. Ashley Nellis, *No End in Sight: American's Enduring Reliance on Life Imprisonment*, Sentencing Project 10 (2021) (hereinafter "Nellis, *No End in Sight*"). Only 16 jurisdictions have more than 1,000 people serving life-without-parole; only 6 have more than 3,000; and only 3 have more than 5,000. *Id*. In comparison, as of 2022, 1,063 people were serving life-without-parole in

Pennsylvania for a second-degree murder conviction. Pennsylvania Department of Corrections, 2022 Annual Statistical Report 21 Table 21 (2023).[9] This means that Pennsylvania sentences more people to life-without-parole for felony-murder than 35 jurisdictions sentence people to life-without-parole for any offense. And it is not just that Pennsylvania is an outlier in terms of the gross number of people sentenced to life-without-parole, as it also possesses the third highest percentage of individuals serving life-without-parole. Margaret E. Leigey, *The Forgotten Men*, Rutgers University Press 2-5 (2015).

These high sentencing rates for felony-murder flow in substantial part from the fact that Pennsylvania is also an outlier in terms of the mandatory nature of its sentencing scheme for second-degree murder. Pennsylvania is one of only nine states and the federal government that mandate life-without-parole for felony-murder. Nazgol Ghandnoosh, Emma Stammen & Connie Budaci, Sentencing Project, *Felony Murder: An On-Ramp for Extreme Sentencing*, 5, 24 (2022). Of those 10 jurisdictions mandating life-without-parole for felony-murder, only four of them sentence more people to life-without-parole for *any* offense than Pennsylvania, making it highly probable that Pennsylvania is in fact the world leader in sentencing

[9] Available at: https://www.cor.pa.gov/About%20Us/Statistics/Documents/Reports/2022%20Annual%20Statistical%20Report.pdf (last accessed Apr. 25, 2024)

people to life-without-parole for felony-murder. *Id* at 24; Nellis, *No End in Sight*, at 10.[10]

Moreover, Pennsylvania's sentencing regime is out of step with evolving standards in other states that are shifting even further away from the Pennsylvania approach. California, Colorado and Minnesota eliminated life without parole for felony-murder or required more intent or participation by the defendant in recent years. Nazgol Ghandnoosh, Emma Stammen & Connie Budaci, Sentencing Project, *Felony Murder: An On-Ramp for Extreme Sentencing*, 16 (2022); Deena Winter, "Minnesota lawmakers changed felony-murder laws, which could mean the release of prisoners," Minnesota Reformer (November 15, 2023).

These moves are in line with international condemnation of life without parole sentences in general. The United States is unique in terms of the number of people sentenced to life-without-parole. One study concluded that more people are serving life imprisonment sentences in the United States than in the other 113 surveyed countries combined, and that individuals serving life-without-parole in the United States made up more than 80 percent of those serving the sentence worldwide. Dirk

[10] Those four jurisdictions and their total life-without-parole population are as follows: Louisiana (4,377); Michigan (3,882); Mississippi (1,589); North Carolina (1,576), and Federal (3,536). Given these numbers, it is almost certain that Pennsylvania's 1,166 people serving life-without-parole for felony murder are higher than comparative figures from Mississippi and North Carolina. While it is possible, perhaps probable, that the same holds true for the remaining three jurisdictions, counsel have not been able to identify the total number of people serving life-without-parole for felony murder in those jurisdictions.

van Zyl Smit & Catherine Appleton, *Life Imprisonment: A Global Human Rights Analysis* 88, 94 (2019). This data reflects that "globally, there is a growing consensus that LWOP sentences that lack any possibility of review and release are cruel and unusual." Terrell Carter, Rachel López, Kempis Songster, *Redeeming Justice*, 116 Nw. U. L. Rev. 315, 373 (2021).

In 2013, the European Court of Human Rights ruled that life sentences were required to allow for the "reducibility of the sentence." *Vinter v. United Kingdom*, 2013-III Eur. Ct. H.R. 317, 347. This meant that "all life sentences must be regularly reviewed in order to take into account 'any changes in the life prisoner' and 'progress towards rehabilitation' so significant that 'detention can no longer be justified on legitimate penological grounds.'" Carter, et al., *Redeeming Justice* at 321-22 (quoting *Vinter*). Failure to provide such mechanisms for review and potential release from incarceration was held to constitute inhumane or degrading treatment or punishment. *Id*. This ruling is consistent with the criminal laws throughout most of Europe, as only 10 countries even permit life-without-parole. *Id*. at 374.[11]

Life sentences are imposed so sparingly in Latin America that it has been referred to as a "life imprisonment almost-free zone." *Id*. at 376 (quoting Francisco Javier de Leon Villalba, *Imprisonment and Human Rights in Latin America: An*

[11] There are 46 recognized countries in Europe according to the United Nations. *See* Eastern European States and Western European and Other States at this link: https://www.un.org/dgacm/en/content/regional-groups.

Introduction, 98 PRISON J. 17, 26 (2018)). Only seven countries permit life sentences in Latin America, and only four of those (Argentina, Cuba, Peru, and four states in Mexico) permit life-without-parole sentences. *Id.* at 376-77.

This "growing consensus" resulted in a historic recommendation from the United Nations Human Rights Committee in November 2023, when it called on the United States to "consider establishing a moratorium on the imposition of sentences to life imprisonment without parole." United Nations Human Rights Committee, *Concluding observations on the fifth periodic report of the United States of America*, CCPR/C/USA/CO/5, p. 11 (November 3, 2023). The Committee further called on the United States "to make parole available and more accessible to all prisoners, including those sentenced to life imprisonment." *Id.*

When the constitutional right to be free from cruel punishment was enacted in Pennsylvania in the late 18th century, this state placed itself at the forefront of an international movement to reform punishment along humane and rehabilitative bases. That Pennsylvania's sentencing scheme for felony-murder has made it an outlier within the United States, and that the United States is an outlier in the world in imposing life-without-parole, renders Pennsylvania an outlier within an outlier. Bringing Pennsylvania more in line with contemporary practices is an urgent policy concern and provides an opportunity for this Court to recognize and reinvigorate the root concerns of article I, section 13's proscription against cruel punishments.

b. Racial Disparity in Application of Felony-Murder Law in Pennsylvania

The imposition of felony-murder in Pennsylvania and beyond is also a racial justice issue. The wide-spread racial inequalities in Pennsylvania's scheme of life-without parole sentences, especially for felony-murder, demand further analysis under *Edmunds*. Racial inequalities among people serving life-without-parole sentences for felony-murder in Pennsylvania are exorbitant. Although Black people are only 12.2% of the state's population,[12] approximately 70 percent of the population serving life-without-parole sentences for felony-murder are Black. Andrea Lindsay & Clara Rawlings, Philadelphia Lawyers for Social Equity, *Life Without Parole for Second-Degree Murder in Pennsylvania: An Objective Assessment of Race*, 3 (2021)[13] (hereinafter "Lindsey, *Objective Assessment of Race*"); G. Ben Cohen, et al., *Racial Bias, Accomplice Liability, and the Felony Murder Rule: A National Empirical Study*, 101 Denver L. R. 65 (2024). Thus, Black people are 5.8 times overrepresented among the population convicted of felony-murder when compared to their percentage of the state population. Lindsey, *Objective Assessment of Race* at 4. Data also demonstrates that Black people have

[12] Available at: https://www.census.gov/quickfacts/fact/table/PA/PST045222 (last accessed Apr. 16, 2024).

[13] Available at: https://www.plsephilly.org/wp-content/uploads/2021/04/PLSE_SecondDegreeMurder_and_Race_Apr2021.pdf (last accessed Apr. 25, 2024).

been convicted of felony-murder in Pennsylvania at a rate that is 21.2 times higher than the rate for white people. *Id.* at 3, 23 n. 15.

That such racial disparities are indicative of racial discrimination is supported by the fact that white people are more likely to be involved in the most serious underlying felonies that allow for a felony-murder conviction in Pennsylvania, and Black people are more likely to have one or more co-defendants, thus increasing the possibility that they were a mere accomplice or had otherwise lesser culpability related to the killing. *Id*. at 16; Andrea Lindsay, Philadelphia Lawyers for Social Equity, *Life Without Parole for Second-Degree Murder in Pennsylvania: An Objective Assessment of Sentencing*, 11-27 (2021) (hereinafter "Lindsay, *Objective Assessment of Sentencing*").[14] White people convicted of felony-murder are 4.5 times more likely to be convicted of kidnapping, 4.9 times more likely to be convicted of sexual assault, and 6.0 times more likely to be convicted of arson as their respective predicate offenses for felony-murder than Black people in Pennsylvania. Lindsey, *Objective Assessment of Race* at 16. And white people are more likely to be principals who acted alone in the offense given that 40% of Black people were prosecuted with at least one co-defendant compared to only 15% of white people. Lindsay, *Objective Assessment of Sentencing* at 11-21.

[14] Available at: https://www.plsephilly.org/wp-content/uploads/2021/01/PLSE-Second-Degree-Murder-Audit-Jan-19-2021.pdf (last accessed: Apr. 20, 2024)

The severe racial disparities manifest in life-without-parole sentences for felony-murder in Pennsylvania warrant immediate attention from this Court. Pennsylvania's felony-murder sentencing scheme is so racially biased that failure to address it will ensure the perpetuation of punishment for already marginalized communities. Such harm is a basis for construing the Pennsylvania Constitution's cruel punishment clause in a manner that recognizes the inherent cruelty in life-without-parole sentences for second-degree murder.

c. Incarcerating the Elderly Wastes Resources and Does Not Further Public Safety

Older adults are one of the fastest growing demographics within jails and prisons in the United States. Between 1999 and 2016, the number of prisoners over 55 increased by 280 percent compared to 3 percent for younger people. *See* Matt McKillop & Alex Boucher, "Aging Prison Populations Drive Up Costs," Pew Charitable Trusts, (Feb. 20, 2018). Like the U.S. prison population generally, the population of people serving life imprisonment with no opportunity for parole in Pennsylvania is also rapidly aging. *See* Joshua Vaughn, "What Does Death By Incarceration Look Like in Pennsylvania? These Elderly, Disabled Men Housed in a State Prison," The Appeal (Nov. 20, 2019).[15] The increasingly aging population of

[15] Available at: https://theappeal.org/death-by-incarceration-pennsylvania-photo-essay/ (last accessed: Apr. 25, 2024)

the Pennsylvania Department of Corrections is driven in part by the increasing population of people serving life imprisonment sentences, which comes at a substantial cost to the Commonwealth. *See* Amicus Brief of Former Department of Corrections Secretaries John Wetzel and George Little as Amici Curiae Supporting Petitioner, 4-6. This cost results in significant allocations to incarcerating aging people who do not pose a public safety threat at the expense of increased or improved programming that would improve public safety, such as rehabilitative, vocational, and educational programs as well as reentry and transition services. *Id.* at 14-15.

Yet criminologists have long found that an individual's involvement in crime correlates strongly to age, and that older incarcerated people pose little public safety risk. Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, The Sentencing Project (November 5, 2018).[16] Research shows that older individuals who have been released from prison, including those convicted of homicide-related or other serious offences, have extremely low recidivism rates, Elizabeth Gaynes et al., *The High Costs of Low Risk: the Crisis of America's Aging Prison Population*, The Osborne Association 18 (May 2018) (hereinafter "*High Costs of Low Risk*"),[17] and that people tend to "age out" of crime in their 30s and

[16] Available at: https://www.sentencingproject.org/reports/long-term-sentences-time-to-reconsider-the-scale-of-punishment/ (last accessed: Apr. 25, 2024)

[17] Available at: https://www.osborneny.org/assets/files/Osborne_HighCostsofLowRisk.pdf (last accessed: Apr. 25, 2024)

40s, including those who have committed violent or more serious offenses. *See* Joshua Vaughn, "Aging into Crime: Pennsylvania Deals with Aging Prison Population," The Sentinel (Dec. 7, 2018);[18] Dana Goldstein, "Too Old to Commit Crime?", N.Y. Times (Mar. 20, 2015).[19]

The aging population of people sentenced to life imprisonment with no possibility of parole in Pennsylvania also presents serious and costly public health concerns. Many incarcerated people have physiological ages that are at least ten to 15 years older than their actual age, which has led many prisons to lower the age considered elderly to 50-55 years of age. *See* Meredith Greene et al., *Older Adults in Jail: High Rates and Early Onset of Geriatric Conditions,* 6:3 Health & Justice at 1, 4–5 (2018).[20] Aging people in prison are at heightened risk for the early onset of many chronic, debilitating, and/or geriatric conditions even as compared to the already at-risk general prison population. *See id.* at 4–7. This includes conditions like dementia and other cognitive impairments, incontinence, and multimorbidity—having two or more serious medical conditions, such as diabetes, hypertension, heart

[18] Available at: https://cumberlink.com/news/local/closer_look/aging-into-crime-pennsylvania-deals-with-aging-prison-population/article_3284ba88-8066-595c-a922-73b4327338f1.html (last accessed: Apr. 25, 2024)

[19] Available at: https://www.nytimes.com/2015/03/22/sunday-review/too-old-to-commit-crime.html (last accessed: Apr. 25, 2024)

[20] Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5816733/pdf/40352_2018_Article_62.pdf (last accessed: Apr. 25, 2024)

disease, lung disease, cancer, stroke, and Hepatitis C. *Id.*, *see also, High Costs of Low Risk* at 22–23. These poor health conditions, exacerbated by the conditions of incarceration, put the aging prison population at high risk of contracting infectious diseases that can lead to serious complications or death. *See* Andy and Gwen Stern Community Lawyering Clinic, *Pandemic in PA Prisons*, Drexel University Thomas R. Kline School of Law & Amistad Law Project (2020).[21]

The specialized medical care needs of the aging prison population also account for a highly disproportionate portion of prison expenditures. "At America's Expense: The Mass Incarceration of the Elderly," ACLU 26–29 (2012).[22] Pennsylvania, for example, spent an estimated $66,000 a year to incarcerate an older person in 2019, a number that has certainly increased since then. Ashley Nellis, "Pennsylvania Is Poised for Much-needed Criminal Justice Reform, but Can We Abolish Life Without Parole?", Philadelphia Inquirer (Jan. 28, 2019).[23] Yet, the specialized needs of an increasing aging prison population have grown past the prison system's capability to provide effective and humane care. *High Costs of Low*

[21] Available at: https://www.drexel.edu/~/media/Files/law/academics/clinical/clc/CLC-pandemic-pa-prisons-report.ashx?la=en (last accessed: Apr. 25, 2024)

[22] Available at: https://www.aclu.org/sites/default/files/field_document/elderlyprisonreport_20120613_1.pdf (last accessed: Apr. 25, 2024)

[23] Available at: https://www.inquirer.com/opinion/commentary/pennsylvania-incarceration-life-without-parole-prison-sentencing-20190128.html (last accessed: Apr. 25, 2024)

Risk at 22. Pennsylvania's practice of unnecessarily incarcerating elderly individuals sentenced to life-without-parole for felony-murder is cruel—most of these individuals will likely die in prison—and should move this Court to act.

B. This Court should adopt a proportionality standard under the state constitution that prohibits punishments that are excessive in relation to deterrence and rehabilitation

Pennsylvania constitutional law – especially law surrounding evolving standards of proportionality – is not stuck in amber. In *Edmunds*, the Pennsylvania Supreme Court underscored: "we have stated with increasing frequency that it is both important and necessary that we undertake an independent analysis of the Pennsylvania Constitution, *each time* a provision of that fundamental document is implicated." 586 A.2d at 894–95 (emphasis added). As detailed *supra*, the prohibition on "cruel punishments" under article I, section 13 can and should be interpreted to afford broader protection than the Eighth Amendment's prohibition on "cruel and unusual punishments." This is especially so given the distinctive text and the historical context in which Pennsylvania's anti-cruelty provision was drafted, strongly anchoring this constitutional right in a conception of justice that understood that the outer limits of punishment must be demarcated by what was necessary to further rehabilitation and deterrence. A lifetime preclusion from parole

eligibility for individuals like Derek Lee, who did not take a life or intend to take a life, fails to further rehabilitative ends and is grossly excessive vis-à-vis deterrence.

The Pennsylvania-specific factors outlined *supra* in the *Edmunds* analysis show that our Commonwealth's cruel punishments clause, along with statutorily-mandated life imprisonment sentences, counsel in favor of this Court adopting a proportionality principle for evaluating the constitutionality of life-without-parole sentences which evaluates whether the sentence furthers deterrence and rehabilitative goals. The text and history of Pennsylvania's cruel punishments clause reveal an overriding concern with prohibiting punishments which are not necessary for public safety and do not primarily aim to rehabilitate. Life-without-parole for those such as Mr. Lee who have been convicted of felony-murder in Pennsylvania is excessive in regard to the traditional purposes of punishment under the Pennsylvania Constitution's cruel punishments clause. The goals of deterrence and rehabilitation are not served by sentencing individuals like Mr. Lee to a lifetime of incarceration with no meaningful opportunity for release.

C. Life-without-parole for felony-murder is excessive in relation to deterrence and rehabilitation goals

1. Life-without-parole for felony-murder does not further deterrence goals

There is an overwhelming consensus in criminological literature that lengthy sentences do not deter crime. Comprehensive meta-analysis of empirical research on

the effect of sentence enhancements shows that "the incremental deterrent effect of increases in lengthy prison sentences is modest at best." National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, The National Academies Press 131 (2014); *see also* Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 Crime & Justice 143 (2003) ("Sentence severity has no effect on the level of crime in society").

Other meta-analyses confirm that "certainty of apprehension, not the severity of the ensuing legal consequence, is the more effective deterrent," leading to the conclusion that "lengthy prison sentences and mandatory minimum sentencing cannot be justified on deterrence" grounds. Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 Crime and Justice 199 (2013); *see also* Roger Pryzybylski et al., *The Impact of Long Sentences on Public Safety: A Complex Relationship*, Council on Criminal Justice 2 (2022) ("The certainty and swiftness of consequences function as a more effective crime deterrent than their severity").

Consistent with the broader consensus on the ineffectiveness of harsh sentencing, there is no empirical evidence that life-without-parole sentences have deterrent effect. One recent study, the "first to empirically assess the crime-reducing potential of LWOP sentences," concludes that life without parole sentencing is no more effective in reducing violent crime than sentences that offer parole eligibility.

Ross Kleinstuber & Jeremiah Coldsmith, *Is life without parole an effective way to reduce violent crime? An empirical assessment*, 19 Crim. & Pub. Pol. 617, 626 (2020).

A study conducting a thorough empirical analysis of the felony-murder rule's deterrent effect found it unlikely that there is a correlation between the felony-murder rule and deterrence, and "may have the perverse effect of increasing the number of robbery homicides." Anup Malani, *Does the Felony-Murder Rule Deter? Evidence from FBI Crime Data*, Working Paper, 2 University of Chicago (2002).[24] Other scholars concur that "robust empirical support for the deterrence hypothesis does not exist" for the felony-murder rule. Nuno Garoupa & Jonathan Klick, *Differential Victimization: Efficiency and Fairness Justifications for the Felony Murder Rule*, 4 Rev. of Law & Econ. 407, 417 (2008); *see also* Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 Oxford J. of Legal Studies 173, 203 (2004); Stuti S. Kokkalera et al., *Too Young for the Crime, Yet Old Enough to do Life: A Critical Review of How State Felony Murder Laws Apply to Juvenile Defendants*, 4 J. of Crim. Law and Justice 90 (2021); Michael Serota, *Strict Liability Abolition*, 98 N.Y.U. Law Rev. 112, 147-148 (2023).

[24] Available at: https://graphics8.nytimes.com/packages/pdf/national/malani.pdf (last accessed: Apr. 25, 2024)

For felony-murder specifically, even executions were found to have no significant impact in deterring felony-murders in a study examining felony-murder rates between 1976-1987. Peterson & Bailey, *Felony murder and capital punishment: An examination of the deterrence question*, Criminology, 29(3), 367-395 (1991). At a minimum, for deterrence to have any effect, individuals must be aware of the penalty associated with their contemplated criminal act. This basic requirement is absent in Mr. Lee's case, as he is being punished for an unintended albeit tragic consequence of the robbery which served as the basis for his conviction. The concept of deterrence does not align with punishing people for the unintended consequences of their actions.

2. Life-without-parole for felony-murder undermines rehabilitative ends

As for rehabilitation, as the U.S. Supreme Court has recognized, life-without-parole "forswears altogether the rehabilitative ideal." *Graham v. Florida*, 560 U.S. at 74. Permanent punishment, by its very nature, rejects rehabilitation as a penological goal. As discussed *infra*, people who have the chance at release after serving a life sentence are among the least likely demographic to commit further criminal offenses and people "age out" of crime, demonstrating their capacity for rehabilitation. Even those who never have a meaningful opportunity for release often demonstrate their rehabilitation from behind prison walls. People serving life sentences frequently serve as mentors to other incarcerated people and contribute

positively to their communities. Ashley Nellis, *A New Lease on Life*, The Sentencing Project (2021). By sentencing someone to permanent incarceration, "the State makes an irrevocable judgment about that person's value and place in society." *Graham*, 560 U.S. at 74. Regardless of Mr. Lee's future behavior and conduct, he will still be provided no meaningful opportunity for release from prison. Life-without-parole sentences are not only unnecessary to further rehabilitative ends, but such sentences actively undermine this "rehabilitative ideal."

Forcing people to spend the rest of their natural lives in prison invariably means they become elderly during their incarceration. Aging and rehabilitated people who have spent decades in prison, especially for violent crime, present a statistically low risk for re-offending on any offense. People who were convicted of a violent offense and served a long sentence are among the least likely to be arrested or convicted of new criminal offenses after their release. Alper, Durose, & Markman, Bureau of Justice Statistics, *2018 update on prisoner recidivism: A 9-year follow-up period (2005-2014)* (2018). One national study found that among individuals previously convicted of a crime, those older than 55 were ten times less likely to commit a further criminal offense as compared to those in their early 20s. James Austin & Lauren-Brooke Eisen, *How Many Americans are Unnecessarily Incarcerated?*, Brennan Institute for Justice at 36 (2016). Many people who are released home to their communities provide valuable contributions to those

communities. *See e.g.* Issie Lapowsky, "Sentenced to Life as Boys, They Made Their Case for Release," N.Y. Times (August 15, 2023).[25]

That life-without-parole sentences are excessive in regard to the rehabilitative purpose of punishment is reinforced by the fact that such sentences also contravene the logic of incapacitation, holding people in prison well past the age that they "age out" of a propensity to commit crime. The "observation that criminal behavior increases in adolescence and decreases in adulthood" is "one of the most consistent findings in developmental criminology." Elizabeth P. Shulman et al., *The Age-Crime Curve in Adolescence and Early Adulthood is Not Due to Age Differences in Economic Status*, 42 Empirical Research 848, 848 (2013). Often referred to as the "age-crime curve," decades of research have rendered this finding a "criminological fact:" "as people grow older, they are less likely to engage in criminal behavior." Roger Pryzybylski et al., *The Impact of Long Sentences on Public Safety: A Complex Relationship,* Council on Criminal Justice, 1, 6 (2022). *See also* Rolf Loeber & David P. Farrington, *Age-crime Curve*, in Gerben Bruinsma & David Weisburd (Eds.), *Encyclopedia of Criminology and Criminal Justice* (New York, NY: Springer, 2014) (describing the "age-crime curve" as "one of the most consistent findings across studies on offending"); Gary Sweeten et al., *Age and the Explanation*

[25] Available at: https://www.nytimes.com/2023/08/15/headway/prison-life-sentence-release.html (last accessed: Apr. 25, 2024)

of Crime, Revisited, 42 J. Youth Adolescence 921, 921 (2013) ("It is well established that antisocial and criminal activity increases during adolescence … and declines as individuals enter adulthood," a finding consistent "across samples that vary in their ethnicity, national origin, and historical era"); David P. Farrington, *Age and Crime*, 7 Crime and Justice 189 (1986) ("the age-crime curve, increasing to a peak in the teenage years and then decreasing, is well-known").

These trends hold fast for people convicted of homicide as well, as they are not more likely to commit violent acts or any other crime when released from incarceration. One study of over 270,000 people released from prison in 15 states found that those convicted of homicide offenses had the *lowest* rates of rearrest. Patrick A. Langan & David J. Levin, *Recidivism of Prisoners Released in 1994*, U.S. Department of Justice Office of Justice Programs (2002). This finding has been replicated; a later study of over 400,000 people released from 30 states also showed that those convicted of homicide offenses had the lowest rates of rearrest. Matthew R. Durose et al., U.S. Department of Justice Office of Justice Programs, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, 8 (2014). "The vast majority of individuals released after serving a sentence for homicide are not dangerous." J.J. Prescott et al., *Understanding Violent-Crime Recidivism*, 95 Notre Dame Law Review 1644, 1647 (2020). "Most people who commit homicide are unlikely to do so again and overall rates of violent offending of any type among

people released from a life sentence are rare." Ashley Nellis, *A New Lease on Life*, The Sentencing Project, 4 (2021).

Data on release of juvenile lifers in the wake of *Miller v. Alabama* shows strikingly low rates of rearrest. A 2020 study of people from Philadelphia formerly sentenced to life-without-parole as juveniles found a recidivism rate of 1.14%. Tarika Daftary-Kapur & Tina M. Zottoli, *Resentencing of Juvenile Lifers: The Philadelphia Experience*, Montclair State University Department of Justice Studies (2020). As of 2021, only one of 142 former juvenile lifers released in Michigan and *none* of the 68 former juvenile lifers released in Louisiana had been re-arrested. Susan Samples, *Crime by 'juvenile lifers' after prison 'very rare,' state says*, WOOD Target 8 Television Michigan (2021); DeMario Davis & Stan Van Gundy, "It's time for Louisiana to end juvenile life without parole," Louisiana Illuminator (2021). In California, less than one percent of 860 people who were paroled between 1995-2011 after serving sentences for murder, were re-incarcerated for a new felony conviction, and none were convicted of crimes eligible for a life sentence. Nazgol Ghandnoosh, *Delaying a Second Chance: The Declining Prospects for Parole on Life Sentences*, The Sentencing Project, 29 (2017). A study of 368 people convicted of murder in New York found that none were incarcerated for a new violent offense within three years of their release from prison. Marie Gottschalk, *Days Without End: Life Sentences and Penal Reform*, Prison Legal News (January 15, 2012).

This dynamic has also been apparent in Pennsylvania where, through 2005, only 2.5% of people who were paroled after commutation of a life had ever been re-incarcerated for a new criminal conviction on any offense. Advisory Committee on Geriatric and Seriously Ill Inmates, *A Report of the Advisory Committee on Geriatric and Seriously Ill Inmates*, Joint State Government Commission of the General Assembly of the Commonwealth of Pennsylvania, 82 (2005). Out of 99 people whose life sentences were commuted and released on parole when they were older than 50, only one was recommitted to prison for a criminal offense. *Id.* at 81.

Life-without-parole for felony-murder cannot be reconciled with those purposes of punishment that animate the anticruelty provision of the Pennsylvania Constitution. Permanent incarceration until death does not deter crime, it is excessive in regard to preventing further offenses by aging individuals, and it actively "forswears the rehabilitative ideal." Life-without-parole sentences are not only unnecessary to further rehabilitative ends, which should be recognized as a constitutionally-mandated purpose of punishment in Pennsylvania, but such sentences actively undermine this "rehabilitative ideal."

For the preceding reasons, Mr. Lee's sentence is a cruel punishment for purposes of article, I, section 13 and should be struck down by this Court.

II. LIFE-WITHOUT-PAROLE FOR FELONY-MURDER VIOLATES THE EIGHTH AMENDMENT BECAUSE OF THE DIMINISHED CULPABILITY OF DEFENDANTS WHO LACK A SPECIFIC INTENT TO TAKE A LIFE

The Eighth Amendment to the U.S. Constitution prohibits "cruel and unusual punishments." U.S. Const. Amend. XIII. Under the U.S. Supreme Court's Eighth Amendment jurisprudence, the Court has set forth two distinct lines of analysis to determine whether a sentencing practice is disproportionate and therefore violates the Eighth Amendment. Under one analytical framework, courts assess whether a term-of-years sentence is grossly disproportionate to the offense. *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) ("A gross disproportionality principle is applicable to sentences for terms of years"). Under the second analytical framework, which controls in this case, courts assess whether a capital punishment or life-without-parole sentencing practice is excessive as applied to a category of offenders or offenses. *Graham*, 560 U.S. at 60.

A. Life-without-parole sentences are subject to heightened proportionality review under the federal constitution after *Graham* and *Miller*

When considering the most severe punishments, the Court applies its categorical approach to determine whether the punishment is excessive. Under this categorical jurisprudence, courts must assess whether a punishment is excessive when applied to a particular class of offenders or offenses. *Graham*, 560 U.S. at 60. In the death penalty context, the Court has ruled that people convicted of non-

homicide offenses, including felony-murder where the defendant did not kill or intend to kill, cannot be sentenced to death. *See e.g. Kennedy v. Louisiana*, 554 U.S. 407 (2008) (barring death penalty for rape of a child); *Enmund*, 458 U.S. 782 (barring death penalty for person convicted of felony-murder where the person did not kill or intend to kill). The Court has also ruled that the death penalty cannot be imposed on juveniles or people with intellectual disabilities. *See e.g. Roper v. Simmons*, 543 U.S. 551 (2005) (barring death penalty for juveniles); *Atkins v. Virginia*, 536 U.S. 304 (2002) (barring death penalty for people with intellectual disabilities). Under this categorical approach, courts must first consider "'objective indicia of society's standards, as expressed in legislative enactments and state practice,' to determine whether there is a national consensus" rejecting the punishment as excessive. *Graham*, 560 U.S. at 61 (quoting *Roper*, 543 U.S. at 563). Next, courts must assess whether the punishment is categorically disproportionate when comparing the culpability of the class of offenders with the severity of the punishment. *Id.* This assessment considers whether the sentencing practice serves legitimate penological interests. *Id.* at 67.

In *Enmund*, the U.S. Supreme Court held that the death penalty is unconstitutional when imposed on the category of people convicted of felony-murder who did not kill or intend to kill. 458 U.S. at 797. The Court reasoned that robbery is not "'so grievous an affront to humanity that the only adequate response

may be ... death'." *Id.* (quoting *Gregg v. Georgia,* 428 U.S. 153, 184 (1976)). The Court emphasized that the focus on determining whether the penalty was proportionate must be on the culpability of the defendant, "not that of those who committed the robbery and shot the victims." *Id.* at 798. The defendant's specific intent is critical to the degree of criminal culpability, and therefore to the proportionality of a punishment. *Id.* at 800. Defendants who do not kill, attempt to kill, or intend to kill are therefore less morally culpable than those who do, and are therefore less deserving of the most severe punishments. The Court again recognized and reinforced that this category of offenses does not warrant the most severe punishments in *Graham,* holding that juveniles convicted of non-homicide offenses cannot be sentenced to life-without-parole. The Court reasoned that "a juvenile offender who did not kill or intend to kill has a *twice* diminished moral culpability," first by virtue of youth, and second by virtue of the nature of the offense. *Graham,* 560 U.S. at 69 (emphasis added).

In *Graham* and *Miller,* the Court held that life-without-parole sentences implicate the same concerns—and are thus entitled to the same scrutiny and Eighth Amendment protections—as the death penalty. For the first time in *Graham,* the Court applied its categorical approach to life-without-parole sentences due to their similarity to the death penalty. *Graham,* 560 U.S. at 61, 69. The Court followed suit in *Miller,* reasoning that life sentences with no meaningful opportunity for release

are "akin to the death penalty" and should be treated similarly. *Miller*, 567 U.S. at 475. These rulings established that the Court's jurisprudence prohibiting the harshest punishments for categories of offenders with diminished culpability are applicable when someone is sentenced to life imprisonment with no meaningful opportunity for release.

Under the Court's long-standing proportionality framework, a punishment is categorically disproportionate to the offense if there are "mismatches between the culpability of a class of offenders and the severity of a penalty." *Miller*, 567 U.S. at 461. To assess whether that is the case, courts must first consider whether there is an "objective indicia of national consensus" against the punishment. *Graham*, 560 U.S. at 62. Then they must exercise "independent judgment" to determine whether the punishment is categorically disproportionate in light of the culpability of the class of offenders as compared with "the severity of the punishment in question." *Id.* at 67. This analysis further requires the Court to consider "whether the challenged sentencing practice serves legitimate penological goals." *Id.*

Mr. Lee was sentenced to life-without-parole mandatorily upon his conviction for second-degree murder. The *mens rea* required to be convicted of second-degree murder is merely the intent to engage in the underlying felony. *Id*; *Myers*, 261 A.2d at 553 ("the malice necessary to make a killing, even an accidental one, murder, is constructively inferred from the malice incident to the perpetration of the initial

felony."). In Mr. Lee's case, there can be no argument that he killed or intended to kill. Mr. Lee was found not guilty of first-degree murder, establishing as a legal matter that he did not have any intent to kill. RR, 66a. Mr. Lee's culpability falls well within the category established by *Enmund*: those who, though involved in a felony which ultimately resulted in a person's death, do not kill or intend to kill have categorically diminished culpability for Eighth Amendment purposes. *Enmund,* 458 U.S. at 797.

Applying the categorical approach to Mr. Lee's case, as courts must following *Graham* and *Miller,* the mandatory imposition of a life-without-parole sentence violates the Eighth Amendment. The Court has already established that 1) individuals who do not kill or intend to kill fall into a category of diminished culpability for Eighth Amendment purposes, *Enmund,* 458 U.S. 782; and 2) life-without-parole punishments share sufficiently similar characteristics to the death penalty to apply the categorical approach to Eighth Amendment disproportionate punishments analysis. *Graham,* 560 U.S. at 61; *Miller*, 567 U.S. at 475. That Pennsylvania is a national and global outlier in imposing life-without-parole for felony-murder and the compelling evidence that this punishment is unduly harsh in relation to legitimate penological purposes render its imposition a violation of the Eighth Amendment.

B. Life-without-parole for felony-murder violates the evolving standards of decency that govern the Eighth Amendment

Under the U.S. Supreme Court's categorical approach, a punishment is categorically disproportionate to the offense if there are "mismatches between the culpability of a class of offenders and the severity of a penalty." *Miller*, 567 U.S. at 461. To assess whether that is the case, courts must first consider whether there is an "objective indicia of national consensus" against the punishment. *Graham*, 560 U.S. at 62. International standards and opinion regarding the imposition of a certain punishment is also relevant to this inquiry. *Id.* at 80. Then they must exercise "independent judgment" to determine whether the punishment is categorically disproportionate in light of the culpability of the class of offenders as compared with "the severity of the punishment in question." *Id.* at 67. This analysis further requires the Court to consider "whether the challenged sentencing practice serves legitimate penological goals." *Id*.

As explicated earlier, *see supra* §. I.A.1, Pennsylvania's sentencing practices for felony-murder are severe by national and international comparison. Such an outlier status also supports a finding that the punishment is cruel and unusual under the Eighth Amendment.

An assessment of the penological goals served by life-without-parole sentences for felony-murder likewise counsels in favor of finding this punishment unconstitutional under the Eighth Amendment. As discussed in detail *supra* in

analyzing Mr. Lee's sentence under Pennsylvania's Constitution, deterrence and rehabilitation are not sufficiently served by imposing mandatory life-without-parole sentences for felony-murder. Appellant has detailed how this sentence does not further deterrence, incapacitation, or rehabilitation above. *See supra* § I.C. Under the Eighth Amendment's categorical approach, courts must also consider the penological purposes of retribution.

Life sentences with no possibility of parole for those who did not kill or intend to kill are disproportionate according to retributivist logic as well, evidenced by the fact that this penalty is identical to that imposed on more than 3,500 people convicted of first degree murder in Pennsylvania. Pennsylvania Department of Corrections, 2022 Annual Statistical Report 21 Table 21 (2023). Retribution, the penological concept of punishment in proportion to the heinousness of the criminal act committed, is rather vengeance without principle in Mr. Lee' case, since the punishment is identical to that imposed on people whose culpability is greater under the Eighth Amendment.

CONCLUSION

For all the foregoing reasons, this Court should rule that Mr. Lee's mandatory life-without-parole sentence for second-degree murder is unconstitutional because under Pennsylvania law such an offense lacks an intent to take a life. Accordingly, this Court should vacate Mr. Lee's conviction and remand to the trial court for

resentencing Mr. Lee to a sentence that will allow him a meaningful opportunity to obtain release from incarceration through the parole system.

Additionally, this Court should explicitly hold that a new rule of constitutional law requiring parole eligibility for second-degree murder convictions in Pennsylvania applies retroactively. Announcing that such a substantive rule applies retroactively will ensure equitable treatment to the approximately 1,100 people serving this unconstitutional sentence, and it will avoid protracted litigation on this issue. [26]

Respectfully submitted,

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[26] In the instant matter, this Court may elect to stay implementation of its ruling and allow the legislature the opportunity to fashion a remedy. The legislature could do so by alleviating the need for resentencing proceedings by amending the Parole Code to provide eligibility for parole to people convicted of felony-murder and sentenced to life imprisonment. 61 Pa.C.S.A.6137(a)(1).

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APPENDIX A

Trial Court Opinion

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

VS.

DEREK LEE,
DEFENDANT

CRIMINAL DIVISION

CP-02-CR-0016878-2014

OPINION

Judge Elliot C. Howsie **March 3, 2022**

Appellant, Derek Lee (hereinafter referred to as "Lee"), was charged with Homicide, Burglary, Robbery – Serious Bodily Injury, and Criminal Conspiracy. The charges stemmed from the shooting death of Leonard Butler on October 14, 2014. The relevant facts on the record are as follows:

On October 14, 2014, at approximately three o'clock in the afternoon, two men entered the residence shared by Leonard Butler, Tina Chapple, and their young son. While Chapple was upstairs, she was called to come down from the second-floor bedroom to the living room by Butler. When she got to the living room, she observed two males with guns and partially covered faces. Both Butler and Chapple were forced into the basement of the home, and then were forced to kneel. Both males were yelling at Butler to give up his money and one used a taser on Butler several times during the attack. One of the men, referred to by Chapple in interviews with police as "the meaner one," pistol whipped Butler in the face before taking his watch and running up

the stairs. The second male remained with the couple and when Butler began to struggle with him over the gun, a shot was fired killing Butler.

During the investigation, it was determined that a rental vehicle under Lee's name had been present outside of the home around the time of the shooting. Additionally, on October 29, 2014, Chapple was shown a photo array by police and positively identified Lee as the male involved in the incident that was not the shooter. Following a jury trial, Lee was convicted on October 31, 2014 of Murder of the Second Degree, Robbery – Inflict Serious Bodily Injury, and Conspiracy. On December 19, 2016, the trial court[1] sentenced Lee as follows: life imprisonment for Criminal Homicide in the second degree, no further penalty on the Robbery charge, and ten (10) to twenty (20) years of incarceration for the Conspiracy charge.

Following the sentencing, the trial court granted a Motion for Leave to Withdraw as Counsel filed by trial counsel on December 20, 2016, and appointed the Office of the Public Defender to represent Lee for Post-Sentence Motions and appeal. Lee was granted permission to file his Post-Sentence Motions *nunc pro tunc*, allowing Appellate Counsel until March 6, 2017 to file said motions. During that time, Lee filed two (2) *pro se* Petitions for Writ of Mandamus on January 23, 2017 and February 27, 2017 respectively. Lee repeatedly requested the dismissal of appellate counsel, resulting in the dismissal of both Writs of Mandamus and a granting of a Motion to Withdraw and Request for a Grazier Hearing.

On June 29, 2018, Lee filed a *pro se* Petition for Post-Conviction Collateral Relief ("PCRA") and Motion for the Appointment of Counsel. An Order was issued by the Honorable Judge David R. Cashman appointing Joseph R. Rewis, Esquire on July 27, 2018. On November 26, 2018, Attorney Rewis filed a Motion to Withdraw Counsel accompanied by a *Finley/Turner*

[1] The Honorable David R. Cashman (ret.) presided over Lee's jury trial. Lee's case was transferred to this Court upon Judge Cashman's retirement.

letter stating that Lee's PCRA claims were without merit. This Motion was granted on December 7, 2018. After the trial court granted Lee an extension of time to file a response to the no-merit letter, Lee provided a response to the Court on March 19, 2019. The Petition was ultimately dismissed.

Lee filed a second *pro se* PCRA on June 30, 2020. On August 17, 2020, Judge Cashman issued a Notice of Intent to Dismiss the PCRA Petition pursuant to Pa.R.Crim.P. 907. Following an Order granting an extension of time to respond, Lee filed a Motion for Leave to File an Amended PCRA Petition *Nunc Pro Tunc* on October 22, 2020. On November 4, 2020, Judge Cashman granted the motion and reinstated Lee's appellate and Post-Sentence motion rights.

On November 30, 2020 and December 1, 2020 respectively, Bret Grote, Esquire and Quinn Cozzens, Esquire from the Abolitionist Law Center respectively entered their appearances on Lee's behalf. On March 4, 2021, Lee filed a Motion for Modification of Sentence arguing that his sentence is unconstitutional because "it deprives him of a meaningful opportunity for release from prison, despite his categorically-diminished culpability because he neither killed nor intended to kill." The motion was denied on July 26, 2021 and the instant appeal followed.

In his Concise Statement of Matters Complaint of On Appeal, Lee raises the following issues:

1. Did the trial court err in denying Defendant's motion for modification of his mandatorily-imposed life without parole sentence and request for an evidentiary hearing where Defendant, by virtue of his conviction for second-degree murder in which he did not kill or intend to kill, had categorically diminished culpability under the Eighth Amendment to the U.S. Constitution and therefore cannot be sentenced to mandatory life-without-parole?

2. Did the trial court err in denying Defendant's motion for modification of his mandatorily-imposed life without parole sentence and request for an evidentiary hearing where Defendant, by virtue of his conviction for second-degree murder in which he did not kill or intend to kill, had categorically-diminished culpability under the Article I, Section 13 of the Pennsylvania Constitution and therefore cannot be sentenced to mandatory life-without-parole?

While both of Lee's claims of error point to the unconstitutionality of his life without parole sentence, each of his claims are based upon the contention that his sentence is illegal under Miller v. Alabama, Graham v. Florida, and Montgomery v. Louisiana. However, because the dictates of these cases do not apply in Lee's case, the claims are without merit and do not warrant consideration.

Lee claims that his sentence should be found unconstitutional under both the U.S. Constitution and Pennsylvania Constitution, because he was deprived of the ability to be released from prison "despite his categorically-diminished culpability because he neither killed nor intended to kill." To support this claim, Lee only cites cases with facts dissimilar to his own. The law cited by Lee points to cases where the Defendant was given a life without parole sentence for a crime that was committed while the Defendant was a juvenile. In addition, Lee mentions case law in which the Supreme Court prohibited a life sentence for Defendants with certain categories of diminished capacity. These cases only referred to capital punishment cases, specifically for juveniles;[2] individuals with intellectual disabilities;[3] and for individuals who did not kill, attempt to kill, or intend to kill.[4] Lee asks the Court to read Enmund in conjunction with

[2] *See* Roper v. Simmons, 543 U.S. 551 (2005).
[3] *See* Atkins v. Virginia, 536 U.S. 304 (2002).
[4] *See* Enmund v. Florida, 458 U.S. 782 (1982).

Graham, Miller and Montgomery to find that life sentences without the possible of parole are unconstitutional when imposed on defendants who did not kill nor intend to kill as part of their crime.

Under 18 Pa. C.S.A. § 1102(b), a person who has been convicted of murder of the second degree shall be sentenced to a term of life imprisonment. Pursuant to 61 Pa. C.S.A. § 6137(a), someone serving a term of life imprisonment is not eligible for parole. The case law is clear that while Miller and related cases held that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition against "cruel and unusual punishment," this holding does *not* create a newly-recognized constitutional right that can serve as the basis for relief for those over the age of 18 at the time of the murder.[5] Similarly, while Edmund recognized that the *death penalty* is unconstitutional when imposed on defendants who did not kill or intend to take a life, the same has not been provided for sentences of life without the possibility of parole.

Lee focuses much of his argument on how life without parole serves no penological interest making it disproportionate and excessive to the crimes he committed. Lee suggests that this Court interpret the Pennsylvania Constitution more broadly than the Eighth Amendment to find that life imprisonment without the possibility of parole for second-degree murder unconstitutional. However, as provided in cases such as Gore v. United States: "Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility ... these are peculiarly questions of legislative policy."[6] Therefore, it is not the place of this Honorable Court to issue a sentence contrary to those that the legislature has provided.

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[5] Commonwealth v. Cintora, 69 A.3d 759 (Pa. Super. 2013).
[6] Gore v. United States, 357 U.S. 386, 393 (1958).

In conclusion, Lee's sentence did not violate the United States Constitution nor the Pennsylvania Constitution, and therefore shall be upheld.

BY THE COURT:

, J.
ELLIOT C. HOWSIE

APPENDIX B

Superior Court Opinion

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT OP 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
DEREK LEE	:	
Appellant	:	No. 1008 WDA 2021

Appeal from the Judgment of Sentence Entered December 19, 2016
In the Court of Common Pleas of Allegheny County Criminal Division at
No(s): CP-02-CR-0016878-2014

BEFORE: OLSON, J., DUBOW, J., and COLINS, J.*

MEMORANDUM BY OLSON, J.: **FILED: JUNE 13, 2023**

Appellant, Derek Lee, appeals from the judgment of sentence entered on December 19, 2016. We affirm.

The trial court ably summarized the underlying facts of this case:

> On October 14, 2014, at approximately three o'clock in the afternoon, two men entered the residence shared by Leonard Butler, Tina Chapple, and their young son. While Chapple was upstairs, she was called to come down . . . to the living room by Butler. When she got to the living room, she observed two males with guns and partially covered faces. Both Butler and Chapple were forced into the basement of the home, and then were forced to kneel. Both males were yelling at Butler to give up his money and one used a taser on Butler several times during the attack. One of the men, referred to by Chapple in interviews with police as "the meaner one," pistol whipped Butler in the face before taking his watch and running up the stairs. The second male remained with the couple and when Butler began to struggle with him over the gun, a shot was fired killing Butler.

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* Retired Senior Judge assigned to the Superior Court.

> During the investigation, it was determined that a rental vehicle under [Appellant's] name had been present outside of the home around the time of the shooting. Additionally, on October 29, 2014, Chapple was shown a photo array by police and positively identified [Appellant] as the male involved in the incident that was not the shooter.

Trial Court Opinion, 3/23/22, at 1-2.

Following trial, the jury found Appellant guilty of second-degree murder, robbery, and conspiracy.[1] On December 19, 2016, the trial court sentenced Appellant to serve a mandatory term of life in prison without the possibility of parole for his second-degree murder conviction[2] and to serve a consecutive term of ten to 20 years in prison for his criminal conspiracy conviction.[3] Appellant did not file an immediate appeal to this Court.

On November 5, 2020, after proceedings under the Post Conviction Relief Act ("PCRA"), the PCRA court reinstated Appellant's post-sentence and appellate rights. ***See*** PCRA Court Order, 11/5/20, at 1. Appellant's post-sentence motion was denied by operation of law on July 26, 2021 and Appellant filed a timely notice of appeal on August 25, 2021. Appellant raises the following claims to this Court:

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[1] 18 Pa.C.S.A. §§ 2502(b), 3701(a)(1)(i), and 903, respectively.

[2] 18 Pa.C.S.A. § 1102(b) provides a mandatory sentence of life imprisonment for second-degree murder. 61 Pa.C.S.A. § 6137(a)(1) then declares that offenders serving life imprisonment are ineligible for parole.

[3] The trial court imposed no further penalty for Appellant's robbery conviction.

> 1. Is [Appellant's] mandatory sentence of life imprisonment with no possibility of parole unconstitutional under the Eighth Amendment to the [United States] Constitution where he was convicted of second-degree murder in which he did not kill or intend to kill and therefore had categorically-diminished culpability under the Eighth Amendment?
>
> 2. Is [Appellant's] mandatory sentence of life imprisonment with no possibility of parole unconstitutional under Article I, § 13 of the Constitution of Pennsylvania where he was convicted of second-degree murder in which he did not kill or intend to kill and therefore had categorically-diminished culpability and where Article I, § 13 should provide greater protections in these circumstances than the Eighth Amendment?

Appellant's Brief at 2.

Both of Appellant's claims challenge the legality of his sentence. "We note that legality of sentence questions are not waivable and may be raised *sua sponte* on direct review by this Court." ***Commonwealth v. Wright***, 276 A.3d 821, 827 (Pa. Super. 2022) (quotation marks, citations, and corrections omitted). "Further, since Appellant's claim implicates the legality of his sentence, the claim presents a pure question of law. As such, our scope of review is plenary and our standard of review *de novo*." ***Id.*** (quotation marks and citations omitted).

First, Appellant claims that his mandatory sentence of life imprisonment without the possibility of parole is unconstitutional under the Eighth Amendment to the United States Constitution,[4] as he was convicted of

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[4] The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. viii.

second-degree murder and did not kill or intend to kill anyone during the commission of a robbery, the underlying predicate felony. Specifically, Appellant argues, his sentence violates the Eighth Amendment because: he did not kill or intend to kill anyone and, thus, he has diminished culpability; a mandatory sentence of life imprisonment without the possibility of parole for individuals who did not kill or intend to kill is unduly harsh in relation to legitimate penological purposes; and, "Pennsylvania's mandatory life-without-parole sentencing scheme is objectively out of step with contemporary" national and global standards. Appellant's Brief at 22.

Appellant acknowledges our recent opinion in ***Commonwealth v. Rivera***, 238 A.3d 482 (Pa. Super. 2020), where this Court rejected the precise claims that Appellant raises on appeal. ***See Rivera***, 238 A.3d at 501-503 (rejecting the appellant's claims that his sentence of life in prison without the possibility of parole for second-degree murder "constitutes cruel and unusual punishment because under the felony-murder rule, no regard is given to the culpability or the mental state of a defendant who causes the death of another person, and thus the rule dictates a punishment that is without proportionality between the crime and has little legitimate deterrent or retributive rationale") (quotation marks, citations, and corrections omitted). However, Appellant argues that ***Rivera*** was wrongly decided because:

> this Court analyzed the proportionality of the sentence under ***Solem v. Helm***, 463 U.S. 277 (1983), and relied on this Court's prior decision in ***Commonwealth v. Middleton***, 467 A.2d 841 (Pa. Super. 1983). Under this line of Eighth Amendment analysis, courts assess whether a punishment is

> grossly disproportionate to the offense and apply a different standard than that which was previously applied only in the death penalty context.

Appellant's Brief at 14-15.

According to Appellant, ***Rivera's*** analysis was incorrect because, in ***Graham v. Florida***, 560 U.S. 48 (2010), ***Miller v. Alabama***, 567 U.S. 460 (2012), and ***Montgomery v. Louisiana***, 577 U.S. 190 (2016), the United States Supreme Court "instruct[ed] that life-without-parole sentences are sufficiently similar to the death penalty that they may be unconstitutional when applied to people with categorically-diminished culpability based on their offense or characteristics." Appellant's Brief at 15.

Appellant is entitled to no relief. At the outset, the Eighth Amendment does not require uniformity in penological approaches across the States. Hence, Pennsylvania's mandatory scheme of punishment for second-degree murder does not run afoul of the Constitution simply because it differs from that of other States. Also, Appellant concedes there is no authority which raises doubts about the constitutional validity of any specific feature of the challenged scheme. ***See*** Appellant's Brief at 14 (conceding that no precedent holds that Eighth Amendment forbids a mandatory sentence of life without parole for an adult second-degree murder defendant). Thus, Appellant cites no decision which has ever concluded that an individual, charged with homicide and who has attained the age of majority, may be viewed as having categorically-diminished culpability for purposes of considering whether the

Eighth Amendment proscribes the imposition of a life-without-parole sentence.

Appellant questions the precedential value of our prior decision in ***Rivera***. However, this Court decided ***Rivera*** in 2020 – which is after ***Graham***, ***Miller***, and ***Montgomery*** were decided. Thus, in the absence of intervening precedent from a higher court, we are bound by ***Rivera***, regardless of whether Appellant believes ***Rivera*** was wrongly decided. ***See Commonwealth v. Taggart***, 997 A.2d 1189, 1201 n.16 (Pa. Super. 2010) ("one three-judge panel of [the Superior] Court cannot overrule another" three-judge panel); ***see also Rummel v. Estelle***, 445 U.S. 263 (1980) (the petitioner was convicted of three felony theft crimes and sentenced, under a recidivist sentencing statute, to a mandatory term of life in prison; the United States Supreme Court held that this punishment "does not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments"); ***Commonwealth v. Henkel***, 938 A.2d 433, 446-447 (Pa. Super. 2007) (rejecting the appellant's claim that "imposition of a life sentence for second-degree murder is 'cruel and unusual punishment' under both the United States and Pennsylvania Constitutions"); ***Commonwealth v. Middleton***, 467 A.2d 841 (Pa. Super. 1983) (rejecting the appellant's claim that "the imposition of a mandatory life sentence on one convicted of felony-murder constitutes cruel and unusual punishment in derogation of the Eighth and Fourteenth Amendments to the United States Constitution"); ***Commonwealth v. Cornish***, 370 A.2d 291, 293 and 293 n.4 (Pa. 1977) (rejecting the appellant's

challenge to the mandatory nature of his sentence of life imprisonment for second-degree murder because "[i]t can hardly be said that the circumstances wherein a murder is committed during the commission of a felony vary to such an extent that the legislative determination to mandate one penalty is unreasonable"); ***Commonwealth v. Howie***, 229 A.3d 372 (Pa. Super. 2020) (non-precedential decision), at *2 (rejecting the appellant's claim that his mandatory punishment of life in prison for second-degree murder constituted cruel and unusual punishment);[5] ***Commonwealth v. Michaels***, 224 A.3d 798 (Pa. Super. 2019) (non-precedential decision), at **2-3 (rejecting the appellant's claim "that a mandatory sentence of life without the possibility of parole violates the United States and Pennsylvania Constitutions' proscription against cruel and unusual punishment").

We also note that ***Graham***, ***Miller***, and ***Montgomery*** were all concerned with juveniles and, as the United States Supreme Court held, "children are constitutionally different from adults for purposes of sentencing." ***Miller***, 567 U.S. at 471. Appellant, on the other hand, was 26 years old at the time he committed his crimes. Further, in ***Jones v. Mississippi***, 141 S.Ct. 1307 (2021), the United States Supreme Court limited the holdings of ***Miller*** and ***Montgomery***. As the Pennsylvania Supreme Court summarized, under ***Jones***, "[a] life-without-parole sentence for a juvenile murderer is []

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[5] ***See*** Pa.R.A.P. 126(b) (unpublished non-precedential decisions of the Superior Court filed after May 1, 2019 may be cited for their persuasive value).

constitutional, and hence no viable ***Miller*** claim exists, 'so long as the sentence is not mandatory — that is, [] so long as the sentencer has discretion to consider the mitigating qualities of youth and impose a lesser punishment.'" ***Commonwealth v. Felder***, 269 A.3d 1232, 1243 (Pa. 2022), *quoting* ***Jones***, 141 S.Ct. at 1314. However, as noted above, Appellant was not a juvenile at the time he committed his crimes and, thus, the specific holdings of ***Miller***, ***Montgomery***, and ***Jones*** do not apply to him. Appellant's first claim on appeal thus fails.

Next, Appellant claims that his mandatory sentence of life imprisonment without the possibility of parole is unconstitutional under Article I, § 13 of the Constitution of Pennsylvania.[6] As Appellant argues:

> the prohibition on "cruel punishments" under Article I, § 13 can and should be interpreted to afford broader protection than the Eighth Amendment's prohibition on "cruel and unusual punishments." This is especially so given the distinctive text and historical context in which Pennsylvania's anti-cruelty provision was drafted, strongly anchoring this constitutional right in a conception of justice that understood that the outer limits of punishment must be demarcated by what was necessary to further rehabilitation and deterrence.

Appellant's Brief at 52.

Again, Appellant's claim on appeal fails because this Court has specifically rejected the claim in a prior opinion. ***See Henkel***, 938 A.2d at

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[6] Article I, Section 13 of the Pennsylvania Constitution declares: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." Pa.Const.Art. I, § 13.

446-447 (rejecting the appellant's claim that "imposition of a life sentence for second-degree murder is 'cruel and unusual punishment' **under both** the United States **and Pennsylvania** Constitutions") (emphasis added). As noted above, "one three-judge panel of [the Superior] Court cannot overrule another" three-judge panel. ***Taggart***, 997 A.2d at 1201 n.16. Thus, we are bound by ***Henkel's*** holding and Appellant's claim on appeal immediately fails.

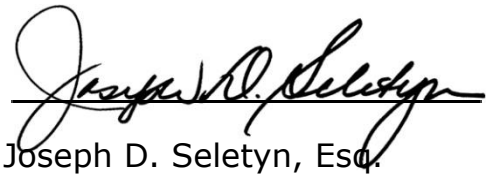
Further, as the Pennsylvania Supreme Court expressly held, "the rights secured by the Pennsylvania prohibition against 'cruel punishments' are co-extensive with those secured by the Eighth and Fourteenth Amendments." ***Commonwealth v. Zettlemoyer***, 454 A.2d 937, 967 (Pa. 1982), *overruled on other grounds by* ***Commonwealth v. Freeman***, 827 A.2d 385 (Pa. 2003); ***see also Commonwealth v. Elia***, 83 A.3d 254, 267 (Pa. Super. 2013) ("Pennsylvania courts have repeatedly and unanimously held that the Pennsylvania prohibition against cruel and unusual punishment is coextensive with the Eighth and Fourteenth Amendments to the United States Constitution, and that the Pennsylvania Constitution affords no broader protection against excessive sentences than that provided by the Eighth Amendment to the United States Constitution") (quotation marks, citations, and corrections omitted). Therefore, since Appellant's Eighth Amendment claim fails, Appellant's Article I, Section 13 claim likewise fails. ***See Zettlemoyer***, 454 A.2d at 967; ***Elia***, 83 A.3d at 267.

Judgment of sentence affirmed. Jurisdiction relinquished.

Judge Colins joins this Memorandum.

Judge Dubow files a Concurring Memorandum.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/13/2023

APPENDIX C

Superior Court Concurring Opinion

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

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
DEREK LEE	:	
Appellant	:	No. 1008 WDA 2021

Appeal from the Judgment of Sentence Entered December 19, 2016
In the Court of Common Pleas of Allegheny County Criminal Division at
No(s): CP-02-CR-0016878-2014

BEFORE: OLSON, J., DUBOW, J., and COLINS, J.*

CONCURRING MEMORANDUM BY DUBOW, J.: **FILED: JUNE 13, 2023**

I agree with the well-reasoned Majority Memorandum finding that we are bound by existing case law that holds that the mandatory imposition of life without parole for a defendant convicted of second-degree murder is constitutional under both the U.S. Constitution and the Pennsylvania Constitution.

I write separately only to suggest that the Pennsylvania Supreme Court revisit whether a mandatory minimum sentence of life without parole imposed for all second-degree murder convictions is constitutional under Article I, Section 13 of the Pennsylvania Constitution. In light of changes in related case law from other states and research and policy concerns regarding the criminal justice system, it is important to revisit the factors set forth in

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* Retired Senior Judge assigned to the Superior Court.

Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991), to determine whether the rights that the Pennsylvania Constitution grants to defendants are still coextensive to the rights that Eighth Amendment grants to defendants, especially in light of the mandatory nature of the life without parole sentence.

If I were not bound by existing case law, I would have remanded the case to the trial court to hold an evidentiary hearing on the ***Edmunds*** factors.

CERTIFICATE OF COMPLIANCE: LENGTH OF BRIEF

I hereby certify that the foregoing Brief for Appellant consists of 13,546 words based on the word count function of the word processing program on which it was prepared, excluding the title page, table of contents, table of citations, and signature blocks, and thus complies with the requirement of Pennsylvania Rule of Appellate Procedure 2135 that principal briefs shall not exceed 14,000 words.

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Dated: April 26, 2024

CERTIFICATE OF COMPLIANCE: PUBLIC ACCESS POLICY

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

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 2024, I caused the foregoing Brief for Appellant to be served on the District Attorney of Allegheny County by electronic filing at the following:

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