IN THE

SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

_____

NO. 3 WAP 2024

_____

COMMONWEALTH OF PENNSYLVANIA,
Appellee

V.

DEREK LEE,
Appellant

_____

BRIEF FOR APPELLEE

_____

Appeal from the Opinion and Order of the Superior Court entered June 13, 2023, at No. 1008 WDA 2021 affirming the judgment of sentence entered in the Court of Common Pleas, Allegheny County, entered December 19, 2016, at No. CP-02-CR-0016878-2014.

_____

STEPHEN A. ZAPPALA, JR.
District Attorney

RONALD MICHAEL WABBY, JR.
Deputy District Attorney

KEVIN F. MCCARTHY*
Assistant District Attorney
PA. I.D. NO. 47254

Office of the District Attorney
401 Allegheny County Courthouse
Pittsburgh, Pennsylvania 15219-2489
(412) 350-4377

Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

COUNTER-STATEMENT OF THE QUESTION INVOLVED

I. Whether a mandatory sentence of life imprisonment with no possibility of parole is unconstitutional under Article I, § 13 of the Pennsylvania Constitution where the defendant was convicted of second-degree murder and was not the slayer, and whether Article I, § 13 should provide greater protections in those circumstances than the Eighth Amendment to the U.S. Constitution?

II. Whether a mandatory sentence of life imprisonment with no possibility of parole is unconstitutional under the Eighth Amendment to the U.S. Constitution where the defendant was convicted of second-degree murder and was not the slayer?

COUNTER-STATEMENT OF THE CASE

This is an appeal from the Opinion and Order of the Superior Court entered June 13, 2023, at No. 1008 WDA 2021, affirming the judgment of sentence entered in the Court of Common Pleas, Allegheny County, entered December 19, 2016, at No. CP-02-CR-0016878-2014.

A. Procedural History

The Commonwealth agrees to the procedural history set forth in appellant's Statement of the Case. Appellant's Brief at pp 3-4.

.

B. Factual History

The facts underlying appellant's conviction were summarized by the trial court in its Opinion 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 courts 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.

Slip Op. at p. 1.

SUMMARY OF THE ARGUMENT

The Eighth Amendment does not require strict proportionality between crime and sentence; instead, it forbids only extreme sentences which are grossly disproportionate to the crime. To determine whether a sentence is grossly disproportionate, a three factor test is used; courts should consider: (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions. The Crimes Code specifically provides that an accomplice to an enumerated felony resulting in a death is equally as responsible as the principle. It cannot be said that the penalty of life without parole for a conviction of second-degree murder, even for the non-slayer, is grossly disproportionate. Appellant's reliance on *Miller v Alabama, infra*, undermines his very argument, as the Court did not invalidate life without parole altogether, but focused solely on the fact that juveniles do not have the mental capacity to appreciate their actions compared to adults.

Article I, Section 13, offers no greater protections than that afforded by the Eighth Amendment to the United States Constitution.

Appellant's *Edmunds* analysis does not alter this conclusion. Neither the history of the text nor historical analysis support appellant's claims. More importantly, the experiences of our sister states in moving away from life without parole sentences were accomplished by those states' legislatures. Similarly, appellant's policy arguments are for our General Assembly and the Governor to resolve as they are political questions, and do not support the claim that the Pennsylvania Constitution affords greater protections against cruel punishments than the Eighth Amendment.

ARGUMENT

I. THE EIGHTH AMENDMENT DOES NOT REQUIRE STRICT PROPORTIONALITY BETWEEN CRIME AND SENTENCE; INSTEAD, IT FORBIDS ONLY EXTREME SENTENCES WHICH ARE GROSSLY DISPROPORTIONATE TO THE CRIME, AND THE CRIMES CODE SPECIFICALLY PROVIDES THAT AN ACCOMPLICE TO AN ENUMERATED FELONY RESULTING IN A DEATH IS EQUALLY RESPONSIBLE AS THE PRINCIPLE. THEREFORE, A SENTENCE FOR LIFE WITHOUT PAROLE FOR A CONVICTION OF SECOND-DEGREE MURDER, EVEN FOR THE NON-SLAYER, IS NOT GROSSLY DISPROPORTIONATE, AND DOES NOT VIOLATE THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS.

Appellant contends that his sentence of life without the opportunity for parole is unconstitutional under the Eighth Amendment to the federal Constitution. Specifically, he argues that life without parole for a person convicted of second degree murder who was not the slayer is disproportionate to the offense and serves no legitimate penological interest. Appellant's brief at pp. 53, 59. The Commonwealth submits that appellant's claim is meritless.[1]

---

[1] The Commonwealth joins in the amicus briefs filed on its behalf by the Office of Attorney General and the Pennsylvania District Attorneys Association.

> Notably, a statute will not be declared unconstitutional:
>
> "unless it clearly, palpably, and plainly violates the Constitution. All doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster. Thus, there is a very heavy burden of persuasion upon one who challenges the constitutionality of a statute."

Commonwealth v. Baker, 24 A.3d 1006, 1026 (Pa.Super. 2011). The Crimes Code provides that a "criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony", and defines "perpetration of a felony" as the "act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping." 18 Pa.C.S.A. § 2502 (b) and (d). The Crimes Code further provides that those convicted of second degree murder shall be sentenced to a term of life imprisonment. 18 Pa.C.S.A. § 1102. As appellant correctly states, this sentence is without the possibility of parole as the Parole Code expressly prohibits the Board of Parole from considering anyone serving a life sentence for parole. See 61 Pa.C.S.A. § 6137(a)(1).

The Eighth Amendment does not require strict proportionality between crime and sentence; instead, it forbids only extreme sentences which are grossly disproportionate to the crime. *Commonwealth v. Hall*, 549 Pa. 269, 307, 701 A.2d 190, 209 (1997) *quoting Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 S.Ct. 2680, 2705, 115 L.Ed.2d 836 (1991). To determine whether a sentence is grossly disproportionate, a three factor test is used; courts should consider: (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions. *Commonwealth v. Proctor*, 156 A.3d 261, 275 (Pa.Super. 2017), *citing Commonwealth v. Spells*, 612 A.2d 458, 462 (Pa.Super. 1992), and *Solem v. Helm*, 463 U.S. 277, 292, 103 S.Ct. 300, 301, 177 L.Ed.2d 637, ___ (1983). Notably, a court "is not obligated to reach the second and third prongs of the test unless a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Id*.

In *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 2460, 183 L.Ed.2d 407 (2012), the Supreme Court held that a sentence of life imprisonment without the possibility of parole is unconstitutionally cruel and unusual punishment when imposed upon defendants convicted of murder

who were "under the age of 18 at the time of their crimes." Appellant's reliance on *Miller*, however, undermines his very argument. While *Miller* may have altered the analysis to some degree, the Court did not invalidate life without parole altogether, but focused solely on the fact that juveniles do not have the mental capacity to appreciate their actions. Though the Court may have been applying a categorical approach, the Court certainly recognized that life without the possibility of parole is not cruel or unusual as applied to adults. Time and again, our courts have recognized that *Miller* does not apply to those over 18 who claim to possess the same or similar cognitive disabilities as minors.[2] *See e.g., Commonwealth v. Lee*, 206 A.3d 1, 9 (Pa.Super. 2019) (*en banc*); *Commonwealth v. Montgomery*,

---

[2] As the Supreme Court explained in *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 2026, 176 L. Ed. 2d 825 (2010), as modified (July 6, 2010): "compared to adults, juveniles have a " 'lack of maturity and an underdeveloped sense of responsibility' "; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are " not as well formed." *Id*., at 569–570, 125 S.Ct. 1183. These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.*, at 573, 125 S.Ct. 1183. Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id*., at 569, 125 S.Ct. 1183. A juvenile is not absolved of responsibility for his actions, but his transgression "is not as morally reprehensible as that of an adult." *Thompson, supra*, at 835, 108 S.Ct. 2687 (plurality opinion)."

181 A.3d 349 (Pa.Super. 2018) (*en banc*); *Commonwealth v. Furgess,* 149 A.3d 90, 93 (Pa.Super. 2016); and *Commonwealth v. Cintora,* 69 A.3d 759, 764 (Pa.Super. 2013). As the Superior Court has observed:

> *Graham* makes clear that "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants ... some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at 75, 130 S.Ct. 2011. In other words, consistent with the Eighth Amendment, a state can set a mandatory maximum term of life imprisonment, even for nonhomicide offenses, so long as it grants defendants the opportunity for parole based upon demonstrated maturity and rehabilitation.

Commonwealth v. Olds, 192 A.3d 1188, 1196 (Pa.Super. 2018).

It cannot, therefore, be said that the penalty of life without parole for a conviction of second-degree murder, even for the non-slayer, is grossly disproportionate. The Crimes Code specifically provides that an accomplice to an enumerated felony resulting in a death is equally responsible as the principle. *See* 18 Pa.C.S.A. § 2502 (b) and (d); *Commonwealth v. Middleton*, 320 Pa.Super. 533, 467 A.2d 841 (1983); *Commonwealth v. Smith*, 313 Pa.Super. 138, 459 A.2d 777 (1983); *see also Commonwealth v. Knox*, 629 Pa. 467, 472, n. 3, 105 A.3d 1194, 1197, n. 3 (2014).

In support of his argument that life without parole is disproportionate, appellant relies upon the Supreme Court's decisions in *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed. 2d 825 (2010); *Kennedy v. Louisiana*, 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed. 2d 525 (2008), (barring capital punishment for rape of a child)[3]; *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed. 2d 982 (1977) (barring death penalty for rape of an adult)[4]; and *Enmund v. Fla.,* 458 U.S. 782, 102 S.Ct. 3368, 3377, 73 L.Ed. 2d 1140 (1982) (barring death penalty for person convicted

---

[3] "Evolving standards of decency that mark the progress of a maturing society counsel us to be most hesitant before interpreting the Eighth Amendment to allow the extension of the death penalty, a hesitation that has special force where no life was taken in the commission of the crime. It is an established principle that decency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of capital punishment." *Kennedy v. Louisiana*, 554 U.S. at 435, 128 S. Ct. at 2658, 171 L. Ed. 2d at ___.

[4] "Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which 'is unique in its severity and irrevocability,' *Gregg v. Georgia*, 428 U.S., at 187, 96 S.Ct., at 2931, is an excessive penalty for the rapist who, as such, does not take human life." *Coker v. Georgia*, 433 U.S. at 598, 97 S. Ct. at 2869, 53 L. Ed. 2d at ___.

of felony murder who was not the slayer).[5] Central to these decisions is the fact that capital punishment stands alone as the most severe punishment and requiring special considerations regarding its application to a category of offenders. The second set of cases appellant relies upon, *Graham* and *Miller,* found that juveniles were of such a unique category of offenders that based upon their lack of development that they should not be treated the same as adults, and on this basis found that life without parole violated the Eight Amendment's prohibition against cruel and unusual punishments. As previously noted, however, the Court found nothing wrong with life without parole otherwise. More importantly, however, is that appellant's argument attempts to present persons such as him, convicted of felony murder but not the actual slayer, as a special class akin to juveniles, having lesser

---

[5] "The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on his culpability, not on that of those who committed the robbery and shot the victims, for we insist on "individualized consideration as a constitutional requirement in imposing the death sentence." *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978) (footnote omitted), which means that we must focus on "relevant facets of the character and record of the individual offender." *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). Enmund himself did not kill or attempt to kill; and, as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder." *Enmund v. Fla.*, 458 U.S. at 798, 102 S. Ct. at 3377, 73 L. Ed. 2d at ___.

culpability because they were not the killer and did not have any intention to do so. Although appellant argues that the sentence provided for by statute is disproportionate to their culpability, his argument is really a challenge to the felony murder rule which rests culpability on each participant in the underlying felony equally. What appellant is really doing is trying to escape the consequences attendant to being an accomplice.

Nothing could be clearer that when an actor engages in one of the statutorily enumerated felonies and a killing occurs, the law, via the felony-murder rule, allows the finder of fact to infer the killing was malicious from the fact that the actor engaged in a felony of such a dangerous nature to human life because the actor, as held to a standard of a reasonable man, knew or should have known that death might result from the felony. *Commonwealth v. Yuknavich,* 448 Pa. 502, 295 A.2d 290 (1972). "Clearly, where a killing occurs in the commission of a felony, all who participate therein are equally guilty of murder." *Id. See also Commonwealth ex rel. Smith v. Myers,* 438 Pa. 218, 224-225, 261 A.2d 550, 553 (1970). (Common law felony-murder "is a means of imputing malice where it may not exist expressly. Under this rule, 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."); *Commonwealth v. Batley,*

436 Pa. 377, 260 A.2d 793 (1970) (Evidence disclosing that, prior to the killing of victim, at least three other felonies were committed with defendant's active or passive participation therein, supported the defendant's conviction of first-degree murder under the felony-murder statute. 18 P.S. § 4701.); *Commonwealth v. Redline,* 391 Pa. 486, 495, 496, 137 A.2d 472, 476 (1958), ("In order to convict for felony-murder, the killing must have been done by the defendant or by an accomplice or confederate or by one acting in furtherance of the felonious undertaking"; "the thing which is imputed to a felon for a killing incidental to his felony is malice and not the act of killing."); and *Commonwealth v. Allen*, 475 Pa. 165, 171, 379 A.2d 1335, 1338 (1977) (plurality) collecting cases.

Additionally, a greater penalty is imposed for murder of the second degree, or felony murder, than that imposed for murder of the third degree even though the latter is malicious. See 18 Pa.C.S.A. §§ 2502, 1102, and 1103. "In so providing, the law seeks to add a greater deterrent to engaging in particularly dangerous felonies." *Commonwealth v. Legg*, 491 Pa. 78, 82, 417 A.2d 1152, 1154 (1980). It is here where appellant's argument that he and others like him are less culpable than their principles and deserving of a lesser sentence is truly exposed. When this Honorable Court wrote these words forty plus years ago, the maximum sentence for

murder of the third degree was only 10 to 20 years incarceration, yet life without parole for second degree murder was the standard. The very nature of the felony murder rule is that those involved in the felony had no intent to kill, which of course had they, they would have been guilty of first degree murder. Yet the General Assembly imposed the sentence of life without parole on those convicted of second degree murder and only a term of years on those who were convicted of an intentional killing with malice. As this Court has explained:

> The nature of the felony in this case is such that it should be obvious to anyone about to embark on such a venture that the lives of the victims may be sacrificed in accomplishing the end. A reasonable man can be properly charged with the knowledge that the natural and probable consequences of such an act may well result in death or grievous bodily harm to those involved. It is not unrealistic to ascribe to one who willfully engages in a plan to commit armed robbery, a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, or a mind regardless of social duty. Thus, when dealing with the felony of armed robbery we are merely saying that it is the same malice that is required for common law murder.

Yuknavich, supra, at 508, 295 A.2d at 293. *See also Commonwealth v. Guida*, 341 Pa. 305, 310, 19 A.2d 98, 100 (1941) ("It makes no difference that Guida and the other conspirators could not know in advance the

precise course of events that would follow when they attempted to complete their evil designs.").

This Court long ago recognized the right of the General Assembly to define the grades of murder and to assign sentences attendant to each including life without parole and death. Accordingly, the Commonwealth submits appellant's argument is meritless. Appellant's arguments are no more than old arguments in new dressing. While there are many appealing arguments why a non-slayer should not be held to the same level of culpability as the slayer, and the same fate, these are policy determinations for the General Assembly. They do not, however, render the sentence imposed unduly disproportional, and therefore, are not cruel and unusual.

II. ARTICLE I, SECTION 13, OFFERS NO GREATER PROTECTIONS THAN THAT AFFORDED BY THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION; THEREFORE, A SENTENCE FOR LIFE WITHOUT PAROLE FOR A CONVICTION OF SECOND-DEGREE MURDER, EVEN FOR THE NON-SLAYER, IS NOT GROSSLY DISPROPORTIONATE, AND DOES NOT VIOLATE THE PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENTS.

Appellant argues that his sentence of life without parole imposed because he was convicted of second degree murder, but not the actual killer, is violative of the Pennsylvania Constitution's prohibition on cruel punishments and provides an *Edmunds*[6] analysis in support. The Commonwealth submits that notwithstanding this analysis, there is no viable reason to conclude that the Pennsylvania Constitution provides any greater protections than that afforded under the Eighth Amendment of the United States Constitution.

Appellant's arguments notwithstanding, it has long been accepted that Pennsylvania's Constitution provides no greater protection than the federal Constitution regarding the prohibitions against cruel and unusual punishments. *Commonwealth v. Zettlemoyer*, 500 Pa. 16, 73–74,

---

6 *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (1991).

454 A.2d 937, 967 (1982), *overruled on other grounds Commonwealth v. Freeman*, 573 Pa. 532, 827 A.2d 385 (2003) (holding that the rights secured by the Pennsylvania prohibition against "cruel punishments" are co-extensive with those secured by the Eighth and Fourteenth Amendments); *see also Commonwealth v. Baker*, 24 A.3d 1006, 1026, n. 20 (Pa.Super. 2011). Whether this will continue to be the case is now before the Court for its determination.

1. TEXT OF THE PENNSYLVANIA CONSTITUTIONAL PROVISION

Article 1, Section 13 of the Pennsylvania Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." Pa.Const. Art. 1, § 13. Similarly, the Eighth Amendment to the United States Constitution states that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII. Appellant argues that the two provisions are not equal as the Eighth Amendment requires a provision to be both "cruel" and "unusual", whereas Article 1, Section 13, only requires that the provision be "cruel". The Commonwealth submits that this is a distinction without a difference. As appellant correctly notes, the meaning of "unusual" in the history of the Eighth Amendment is that it referred to practices that had fallen out of favor for a long period of time.

However, appellant concludes from this that the Eight Amendment then has nothing to say about cruel punishments that have been continuously applied, whereas Pennsylvania's Constitution does. See Appellant's Brief at pp. 16. That conclusion is clearly wrong in light of the Supreme Court's treatment in the very cases appellant relies on. To wit: *Graham v. Florida, supra*, (Eighth Amendment prohibits imposition of life without parole sentence on juvenile offender who did not commit homicide); *Kennedy v. Louisiana, supra*, (barring capital punishment for rape of a child); *Coker v. Georgia*, (barring death penalty for rape of an adult); and *Enmund v. Florida, supra* (barring death penalty for person convicted of felony murder who was not the slayer). In all these cases the defendants were challenging punishments that had been continuously used for years before they were successfully challenged and held violative of the Eighth Amendment. Accordingly, the text of the two constitutional provisions offers no basis to find that Article 1, Section 13, offers any greater protection than the Eighth Amendment.

2. HISTORY OF THE PROVISION

Appellant offers a scholarly analysis of the early history of the of prohibitions against cruel punishments, none of which, however, advances the argument that Pennsylvania sought to limit the use of cruel

punishments anymore than the Eighth Amendment. The fact that the framers sought to make punishments for criminal convictions more proportional and implementing more lenient penalties does not mean that other alternatives were in violation of the constitutional prohibition, but an exercise of an enlightened political will. As appellant states, "Pennsylvania's second chief justice at the time 'urged the Legislature to fulfill these constitutional demands by implementing the most lenient means of achieving punishment's aims: deterrence." Appellant's Brief at p. 18 (citation omitted). He further recognizes that it was the Pennsylvania Legislature in 1794 that restricted use of capital punishment solely for first degree murder. *Id.* at 19. Indeed, most of appellant's analysis demonstrates that Pennsylvania was progressive in its views towards punishment of criminals, but that only further demonstrates the political will of the people acting through their elected legislators. In *Commonwealth v. Sourbeer*, 492 Pa. 17, 33–34, 422 A.2d 116, 124 (1980) this Court cited with approval the comments of the Superior Court in *Commonwealth v. Dessus*, 262 Pa.Super. 443, 450, 396 A.2d 1254, 1257 (1978), quoting from *Commonwealth v. Bryant*, 239 Pa.Super. 43, 361 A.2d 350 (1976), which upheld mandatory life sentences imposed on life prisoners for conviction of assault and finding no violation of Article 1, Section 13:

> ". . . the legislature has sought (sic) fit to specify mandatory life imprisonment as punishment for assaults committed by prisoners already serving life terms. We do not believe that such punishment is so disproportionate to the offense as to amount to cruel and unusual punishment. Such punishment is clearly intended to serve as a deterrent, and it is not the province of this Court to substitute its judgment for the judgment of an assembly properly exercising its legislative powers. 239 Pa.Super. at 46, 361 A.2d at 352."

Contrary to appellant's assertions, the history of our constitutional prohibition against cruel punishments offers no evidence to support the conclusion that it was intended to afford greater protection than its federal corollary.

3. RELATED CASE LAW FROM OTHER STATES

Appellant cites several states that have held that their state constitutions do give greater protection against cruel punishments than the Eighth Amendment: Washington, Massachusetts, Michigan and North Carolina. Notably, most of these examples deal with how their states treat juvenile lifers post *Miller, supra*; none address adults convicted of felony murder and sentenced to life without parole. *See e.g., State v. Bassett*, 192 Wash.2d 67, 428 P.3d 343 (2018) (holding that the statute that allowed sentencing juvenile offenders to life without parole or early release constitutes cruel punishment pursuant to Article I, Section 14 of

Washington Constitution); *Diatchenko v. Dist. Att'y for Suffolk Dist*., 466 Mass. 655, 1 N.E.3d 270 (2013) (legislative enactment that imposes a sentence of life in prison without the possibility of parole on juvenile homicide offenders does not pass constitutional muster under Massachusetts' Constitution); *People v. Stovall*, 510 Mich. 301, 307–08, 987 N.W.2d 85, 87 (2022) (finding life sentence with the possibility of parole for second-degree murder, imposed for a crime committed when he was a juvenile, violated the Michigan Constitution, because it was not proportional to the sentences of fixed years imposed on juveniles who committed first-degree murder); *State v. Kelliher*, 381 N.C. 558, 873 S.E.2d 366 (2022)(holding that any sentence or combination of sentences which, considered together, requires juvenile offender to serve more than 40 years in prison before becoming eligible for parole is *de facto* sentence of life without parole within meaning of North Carolina Constitution's prohibition against cruel or unusual punishments because it deprives juvenile of genuine opportunity to demonstrate he or she has been rehabilitated and to establish meaningful life outside of prison).

While these cases may be demonstrative of other states finding greater protections under their own constitution's prohibition against cruel punishments imposed upon juveniles, none address the issue before this

Court. Notably, in 2021, the State of Washington became the first and only state to prohibit mandatory life-without-parole sentences for offenders aged 18-20 at the time of the offense. The Supreme Court of Washington ruled that its state constitutional provision prohibiting cruel punishment prohibited mandatory life sentences extended to those under the age of 21. *See Matter of Monschke,* 197 Wash. 2d 305, 482 P.3d 276 (2021). In doing so, it recognized that the concerns that those under the age of 21 still had not reached the level of intellectual maturity to allow them to be treated as adults in sentencing.

Nonetheless, appellant is not wrong to suggest that other jurisdictions have moved away from automatic sentences of life without parole for adults; however, that has not been because the courts of those states have found it to be in violation of their constitutions. Rather, those states ended the practice of life without parole through legislative enactment.

In 2018, the California legislature passed SB 1437, altering the requirements for which an accomplice may be convicted of felony murder. See Cal. Penal Code Ann. § 188 (stating that "malice shall not be imputed to a person based solely on his or her participation in a crime"). See also Cal. Penal Code Ann. § 189 (restricting liability for felony murder to

situations wherein the person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree, or was a major participant in the underlying felony and acted with reckless indifference to human life).

In 2021, the Colorado legislature passed SB 21-124, reclassifying felony murder as second degree, whereas it was previously classified as first degree. In Colorado, the mandatory sentence for first-degree murder is life imprisonment without the possibility of parole. The sentencing range for second-degree murder is a minimum of 8 and a maximum of 24 years. See Colo. Rev. Stat. Ann. § 18-1.3-401.

In 2023, the Minnesota legislature passed SF 2909, preventing an accomplice from being convicted of felony murder unless they were a major participant in the underlying felony and acted with extreme indifference to human life. See Minn. Stat. Ann. § 609.05.

4. POLICY CONSIDERATIONS UNIQUE TO PENNSYLVANIA

Appellant argues that Pennsylvania is an outlier among our sister states, with the second highest number of persons serving life without parole in the nation, Florida being higher. But that is a function of our sentencing scheme for murder generally. Appellant's argument lumps

all persons serving life without parole sentences together. Of the 5,375 persons serving life without parole in Pennsylvania, 1,063 were serving their sentences for second degree murder. (Appellant's brief at pp. 32-33, citation omitted). Notably, appellant fails to account for how many of these persons were non-slayers, which is odd given that he is attempting to demonstrate that he is part of a class of offenders who are suffering a disproportionately cruel punishment. Moreover, in support of his argument that Pennsylvania is lagging behind its sister states in turning away from life sentences, appellant points to California, Colorado and Minnesota as examples of states that have either ended altogether or required greater participation or intent by the defendant in order to be sentenced to life without parole. But again, these reforms were enacted by the legislatures of those states which were expressing the will of their citizens, not by their courts striking down those sentences as violative of any state constitutional protection.

Furthermore, appellant's arguments regarding the costs associated with incarcerating an ever aging population is certainly a matter for the General Assembly and not this Honorable Court. Yes, housing

prisoners in state correctional facilities is costly.[7] But that, along with other budgetary priorities, is for the legislature and executive to resolve. They are the elected representatives of the people, and faced with ever rising costs associated with corrections and prisons, it is for them to decide how to address the problem. And on this point there has been some movement. See Act of 2023, Dec. 14, P.L. 381, No. 44, which instituted major probation reforms. Moreover, this problem extends beyond those serving life sentences, as many persons serving long aggregate sentences present the same problem: an older prison population that ages and in some cases die before they are even eligible for parole.

Finally, it must be noted that life without parole is not the final word on a person's sentence. Our constitution provides for executive clemency, and the governor has the power to commute a life sentence to a term of years which then places the person within the jurisdiction of the parole board. It has been argued by some, including appellant, that this system is broken. As recounted in appellant's brief, Pennsylvania's governors regularly granted commutations to people serving life sentences

---

[7] *See Estelle v. Gamble,* 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976) (Government has obligation to provide medical care for those whom it is punishing by incarceration pursuant to the Eighth Amendment.).

upon the recommendations of the Board of Pardons historically, with 251 people granted commutations during the Governor Shapp administration. Appellant's Brief at p. 23. Beginning with Governor Thornburg that process was severely curtailed. Governor Wolfe dramatically changed course and 101 commutation hearings were held during his administration, beginning in September of 2015, and a total of 53 commutations granted.[8] Significantly, the drastic change in the number of commutations reviewed and granted was the result of the public voting to amend the Constitution. Pursuant to Article IV, § 9(a) of the Constitution, a 1997 constitutional amendment established the requirement for a unanimous, instead of the previous majority, vote by the Board of Pardons to recommend a commutation of a life or death sentence to the Governor. This was an act of political will by the citizens of Pennsylvania and can be done again to undo that requirement. More importantly, however, even with the requirement that the Board of Pardons be unanimous in its recommendation, Governor Wolfe still granted 53 commutations, more than

---

[8] See https://www.bop.pa.gov/Statistics/Pages/Lifers-Granted-Public-Hearings.aspx; and https://www.bop.pa.gov/Statistics/Pages/Statistics-by-Year.aspx.

all those granted in the previous 5 administrations. *Id*. While Governor Shapiro only granted three commutations in 2023, he granted 139 pardons in the same time period suggesting that he is not opposed to continuing the trend begun by his predecessor. More importantly, however, the Governor has filed an *amicus* brief on appellant's behalf and has recognized many of the policy concerns previously stated. Obviously, the Governor is sympathetic to appellant's cause, and would be instrumental in enacting the reforms necessary to fix this "failed" system. Again, the issues being advanced in support of finding a sentence of life without parole violative of the prohibition against cruel punishments are actually public policy decisions that are most appropriately addressed to the people of Pennsylvania through their elected representatives in the General Assembly. For these reasons, the Commonwealth submits that this Court should not find that Article 1, Section 13, offers any greater protection than the Eighth Amendment of the United States Constitution.

CONCLUSION

WHEREFORE, the Commonwealth respectfully requests that the order of the Superior Court be affirmed.

Respectfully submitted,

STEPHEN A. ZAPPALA, JR.
DISTRICT ATTORNEY

RONALD MICHAEL WABBY, JR.
DEPUTY DISTRICT ATTORNEY

_/s/ KEVIN F. McCARTHY_____
KEVIN F. MCCARTHY
ASSISTANT DISTRICT ATTORNEY
PA I.D. NO. 47254

Attorneys for Appellee

CERTIFICATE OF COMPLIANCE

I certify that this filing 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.

Submitted by: Kevin F. McCarthy

Signature: /s/ Kevin F. McCarthy

Name: Kevin F. McCarthy

Attorney No.: 47254

PROOF OF SERVICE

I hereby certify that I am this day serving one copy of the within Brief for Appellant upon Counsel for Appellant in the manner indicated below which service satisfies the requirements of Pa.R.A.P 121:

Electronic filing by PACFile addressed as follows:

Bret Grote, Esq.
Quinn Cozzens, Esq.
P.O. Box 8654
Pittsburgh, PA 15221
412.654.9070

Dated: June 28, 2024

/S/ KEVIN F. MCCARTHY
KEVIN F. MCCARTHY
ASSISTANT DISTRICT ATTORNEY
PA. I.D. NO. 47254

Office of the District Attorney
401 Allegheny County Courthouse
Pittsburgh, PA 15219