

**IN THE SUPREME COURT OF PENNSYLVANIA  
WESTERN DISTRICT**

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COMMONWEALTH OF	:	
PENNSYLVANIA,	:	
	:	
	:	
<i>Appellee,</i>	:	
	:	No. 3 WAP 2024
v.	:	
	:	
DEREK LEE,	:	
	:	
	:	
<i>Appellant.</i>	:	
	:	

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**ANSWER IN OPPOSITION TO *AMICUS* OFFICE OF ATTORNEY  
GENERAL’S APPLICATION TO FILE SUPPLEMENTAL BRIEF**

Appellant, Derek Lee, by and through undersigned counsel, respectfully submits this answer in opposition to the Application to File Supplemental Brief by *amicus curiae* Office of Attorney General as follows:

1. Appellant, Derek Lee, is proceeding on direct appeal in a challenge to the constitutionality of his life-without-parole sentence imposed mandatorily upon his conviction for second-degree murder.

2. This Court granted allowance of appeal to address this challenge on February 16, 2024, and Mr. Lee, along with seventeen supporting *amici*, filed principal briefs on or before April 24, 2024.

3. This Court set a deadline of June 28, 2024 for Appellee, the

Commonwealth, to file its principal brief. *Amicus curiae* briefs are due on the same date of the party for which whose position the brief supports. Pa. R.A.P. 531(b)(4).

4. On that date, the Commonwealth and *amicus curiae* Pennsylvania District Attorneys Association timely filed principal briefs in support of Appellee’s position. Pennsylvania Office of Attorney General (“OAG”) did not file an *amicus* brief at that time.

5. Mr. Lee filed his reply brief on July 12, 2024.

6. *Amicus* OAG sought leave to file a *nunc pro tunc* brief in support of Appellee on July 1, 2024, and this Court granted that application on July 15, 2024.

7. *Amicus* Office of Attorney General eventually filed a brief on July 26, 2024.

8. On October 8, 2024, this Court heard oral argument on Mr. Lee’s appeal. Counsel for Mr. Lee and counsel for the Commonwealth argued before the Court.

9. This Court has not ordered or requested supplemental briefing from any party or *amicus*.

10. On October 30, 2024, *amicus* OAG filed a motion for leave to submit a supplemental *amicus* brief along with a proposed brief.

11. OAG’s motion and proposed brief do not meet relevant standards permitting supplemental briefing and do not offer any substantive assistance to this Court in deciding the matters presented in Mr. Lee’s appeal. Mr. Lee respectfully requests that this Court deny *amicus* OAG’s motion to file a supplemental brief.

12. The OAG asserts in its motion that the Court focused questioning during oral argument on the scope of the remedy if relief is granted in this matter, implying that this should permit the OAG to weigh in on this matter post-argument. Motion of Office of Attorney General for Leave to File Supplemental Brief, ¶¶ 2-4.

13. First, the issues in this matter were fully briefed on the merits and this Court has the discretion to conduct oral argument in the manner that it sees fit, including, if it so chooses, by focusing on the scope of any remedy. Thus, it was entirely foreseeable that the Court would have questions related to all aspects of this matter, including potential remedies. Pa. R.A.P. 2315(a) instructs that oral argument is only necessary “to enable the appellate court to acquire an understanding of the issues presented.” The remedy to a violation of a constitutional right is well within the expected purview of oral argument.

14. Pa. R.A.P. 531(c) permits *amici* to seek leave to present oral argument. The OAG did not seek leave to participate in oral argument.

15. The OAG’s motion and proposed brief do not present any compelling reason to permit a supplemental brief or explanation of why the argument contained in that supplemental brief could not have been included in the brief filed by OAG in July of 2024.

16. The Pennsylvania Rules of Appellate Procedure address participation by *amicus curiae* on appeal at Pa. R.A.P. 531. This Rule does not countenance *amicus*

briefs submitted after the merits briefing stage or after conclusion of oral argument and when the case has been submitted.

17. Pa. R.A.P. 531 repeatedly refers to the filing permitted by *amicus* in the singular. No provision is made for *amicus* to file multiple briefs, such as a reply or supplemental brief.

18. Pa. R.A.P. 531(b)(4) tethers the time for filing an *amicus* brief to the party which *amicus* seeks to support or, if *amicus* is not supporting a particular position, to the deadline for the appellant's brief.

19. The OAG is supporting Appellee's position in this matter. Appellee has not sought leave to file supplemental briefing, and this Court has not ordered supplemental briefing to be filed. The OAG has already submitted a brief in support of Appellee and required leave of court to do so because it missed its filing deadline. OAG presents no compelling reason why this Court should deviate from standard practice and permit the OAG to file a second *amicus* brief in support of a position on which it has already submitted briefing.

20. The OAG's proposed brief purportedly seeks to address the issue of the proper remedy if this Court grants relief to Mr. Lee. The remedy at issue is comprised within the issues presented in this appeal, and thus should have been addressed during merits briefing if the OAG desired to do so. The OAG should not be permitted a second chance simply because it failed to address a topic which it had the

opportunity to address previously.

21. The OAG's proposed brief cites no new authority or changes in authority. Despite purporting to submit a supplemental brief in order to address "significant issues of law," Motion of Office of Attorney General for Leave to File Supplemental Brief, ¶ 3, the OAG's proposed brief offers virtually no legal analysis. OAG cites only one case, no statutory authorities, no regulatory authorities, and no secondary sources. Proposed Supplemental Brief, Table of Citations. The OAG's single citation to a constitutional authority is the constitutional provision under which Mr. Lee's appeal was argued, and it is cited only in a quote from this Court's order granting allowance of appeal. *Id.* at 1 n. 1.

22. The substance of the OAG's proposed brief offers little assistance to this Court in adjudicating Mr. Lee's appeal or fashioning a remedy. The OAG's proposed brief presents a series of untenable and legally unsupported assertions regarding what must follow from striking down the lifetime prohibition on parole eligibility challenged by Mr. Lee in an attempt to dissuade this Court from ruling in Mr. Lee's favor.

23. Neither the OAG's application nor its proposed brief present any compelling reason for this Court to grant supplemental briefing to an *amicus* who has already submitted a brief supporting a party's position. This Court should deny the OAG's application.

24. Furthermore, the substance of the OAG’s proposed brief does not offer assistance to this Court in adjudicating the issues presented by Mr. Lee’s appeal. The OAG asserts in its proposed brief that “the only way for this Court to grant relief on the only question before it is to vacate sentence and remand for a new proceeding to determine whether the defendant killed or intended to kill the victim.” Proposed Supplemental Brief, 2. The OAG asserts that, under *Alleyne v. United States*, 570 U.S. 99 (2013), this factual finding must be made by a jury and proven beyond a reasonable doubt, and therefore new trials must be granted to all 1,100 people serving sentences for second-degree murder. *Id.* at 2-3. This argument is frivolous.

25. The OAG continues to assert, without citation, that this will result in the creation of new crimes which are “arguably *ex post facto*” and thus will not just result in new trials, but the release of everyone serving sentences for second-degree murder. *Id.* at 3. This is also inaccurate.

26. OAG’s argument is wrong on several fronts:

a. As discussed in Appellant’s briefing and at oral argument, the lack of a specific intent to take a life is a sufficient basis upon which this Court may grant relief and find Mr. Lee’s sentence unconstitutional. *See e.g.* Brief for Appellant, 9; Reply Brief for Appellant, 15. As a matter of law, no person convicted of second-degree murder had the specific intent to kill. Mr. Lee was already put on trial for first-degree murder and found not guilty of that offense. Reproduced

Record, 303a. If this Court finds that this lack of specific intent renders a life-without-parole sentence unconstitutional, then any second-degree murder conviction cannot be subject to a life-without-parole sentence.

b. That Mr. Lee has also argued that the fact that he did not take a life further diminishes his culpability such that life-without-parole is an excessive sentence is an additional factor this Court may consider in striking down his sentence. It is also a factor that is appropriate to consider in a facial challenge to a life-without-parole sentence for a crime in which taking a life is not an element of the offense. Highlighting the lack of intent to take a life and the lack of actually taking a life in the questions presented and at various points in the briefing are logical and legally supportable bases for a categorical challenge to a sentence for a criminal offense that requires neither of those factors. *See e.g. Enmund v. Florida*, 458 U.S. 782, 797-800 (1982) (holding that the death penalty is unconstitutional under the Eighth Amendment for those convicted of felony-murder who did not take a life or intend to take a life).

c. *Commonwealth v. Batts*, 163 A.3d 410 (Pa. 2017) (“*Batts II*”), provides the roadmap for precisely what portion of the statutory code must be severed if this Court finds Mr. Lee’s sentence unconstitutional. As in *Batts II*, the portion of the statutory scheme which would be struck down is the Parole Code at 61 Pa. C.S. § 6137(a)(1), which prohibits the Parole Board from considering people

sentenced to life imprisonment for release on parole.

d. Alternatively, as discussed at oral argument and suggested in Appellant's opening brief, this Court could, out of respect for a coequal branch of government, defer the implementation of a remedy until the legislature has an opportunity to act. Brief for Appellant, 60 n. 26. The General Assembly could simply amend the Parole Code to permit parole eligibility to people convicted of second-degree murder. This amendment to the Parole Code would merely allow eventual parole eligibility, not mandate release. This is not nearly as complicated as the OAG wants this Court to believe.

e. If the legislature opts not to pass a remedial statute, this Court can still order a remedy similar to that provided in *Batts II*, whereby the statutory provisions at 61 Pa. C.S. § 6137(a)(1) and 42 Pa. C.S. § 9756(b)(1) are severed and a sentencing court may "exercise its discretion to find the appropriate, individualized sentence in each case, just as it would when fashioning the minimum sentence for any other defendant before it." *Batts II*, 163 A.3d at 443.<sup>1</sup>

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<sup>1</sup> The Court could also allow the Pennsylvania Board of Parole to fashion a remedy pursuant to its authority in the statutory code to create rules governing the review of parole eligible individuals if the prohibition on eligibility were severed for those serving life sentences for second-degree murder and the requirement that they reach a minimum were also severed as part of a Constitutional ruling. See 61 Pa. C.S. § 6139(a)(4) (authorizing the Parole Board to adopt rules and regulations for when to consider applications for parole). If the legislature does not act, this Court is far from powerless to craft a just and administrable remedy through re-sentencing proceedings or the parole board, but these secondary problems need not be addressed unless the General Assembly is unable or unwilling to remedy a constitutionally defective statute. There is no basis for presuming that General Assembly will not attempt to craft such a remedy.



f. Deciding issues of constitutional magnitude in criminal sentencing necessarily involves “unavoidable, wide-scale consequences” in the legal system. *Commonwealth v. Wolfe*, 140 A.3d 651, 662 (Pa. 2016). These consequences should not stand in the way of reaching a principled and just conclusion that protects the rights of people and upholds the ideals of our constitution. Nonetheless, the parade of horrors outlined by the OAG in its proposed brief *are* easily avoidable and the actual consequences of crafting a remedy to the constitutional violation at issue need not result in upheaval on the scale suggested by the OAG.

g. This Court has several options in remedying the constitutional violation of Mr. Lee’s sentence. However, the first necessary step is deciding the constitutional question at issue.

27. The OAG concludes its proposed brief by positing that Mr. Lee’s sentence of life-without-parole for second-degree murder is not unconstitutional under the state constitution because the framers of the constitution did not intend to prohibit life sentences for felony-murder. Proposed Supplemental Brief, 4-5. Again, the OAG does not set forth any legal standards, cite to any historical sources, or cite to any authority whatsoever. The OAG’s proposed brief does not seriously grapple with the constitutional question at issue and is wrong in three critical respects:

a. First, this Court’s own article I, section 13 jurisprudence recognizes that

the cruel punishments clause is “not a static concept.” *Commonwealth v. Zettlemyer*, 454 A.2d 937, 968 (Pa. 1982); *Commonwealth v. Baker*, 78 A.3d 1044, 1050 (Pa. 2013). This aligns with well-understood principles of constitutional interpretation that recognize the underlying principles and standards of constitutional rights involve weightier interests and fundamental values that have deeper roots than legislative enactments that must yield to just constitutional challenges. As stated by the Michigan Supreme Court, “The very purpose of a constitution is to subject the passing judgments of temporary legislative or political majorities to the deeper, more profound judgment of the people reflected in the constitution, the enforcement of which is entrusted to our judgment.” *People v. Bullock*, 440 Mich. 15, 41 (Mich. 1992). Thus, the OAG’s claim, provided without any authority, that constitutional interpretation somehow locks the statutory code in existence at the time of its passing in place in perpetuity misstates this Court’s jurisprudence and negates the structural function of the state Constitution.

b. Relatedly, the OAG’s analysis would impermissibly create a de facto requirement that only punishments that are “unusual” violate article 1, section 13, as it posits that the mere longevity of life imprisonment as a penalty for felony-murder should decide the constitutional question. But the specific and substantive distinction between the cruel punishment clause in the Pennsylvania

Constitution and the federal Constitution's cruel and unusual punishment clause has been established beyond doubt in Appellant's opening brief. Brief for Appellant, 9-44.

c. The OAG is not only wrong on the legal standard under article I, section 13 and the *Edmunds* factors, it is also incorrect that the history of punishment for felony-murder supports its position.

d. The historical trajectory of punishment for felony-murder in Pennsylvania shows that the General Assembly has determined it is in fact and in law a less culpable degree of murder. In 1974, the General Assembly separated felony-murder out from first-degree murder for the first time in the state since 1794, thus recognizing a key component of Mr. Lee's argument that the lack of an intent to take a life renders second-degree murder less culpable than first-degree murder. Act of March 26, 1974, P.L. 213, No. 46, § 2. And this Court has recognized that this lack of a specific intent to take a life is the critical distinction between first and second-degree murder:

“The difference between first- degree and second-degree murder lies in the requisite malice. Where first-degree murder requires a specific intent to kill (actual malice), 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).

e. In addition to Pennsylvania having recognized felony-murder as being

a less culpable degree of murder for 50 years under statutory law, this Court should also take note of the historical punishment practices for felony murder in Pennsylvania. As Justice Wecht noted in his dissent in *Scott v. Pennsylvania Board of Probation and Parole*, in the 1950s it was estimated that a defendant sentenced to life imprisonment would spend on average less than 20 years in prison before release through commutation. *Scott v. Pennsylvania Board of Probation and Parole*, 284 A.3d 178, 205 (Pa. 2022) (Wecht, J., dissenting). This was because, in the words of a legislator speaking in 1973, “life imprisonment in Pennsylvania . . . does not necessarily mean life imprisonment.” *Id.* Commutation used to function for life sentences the way modern-day parole operates for other sentences in Pennsylvania, although it is no longer structurally or practically capable of providing this function. This is powerful evidence of the primary importance placed on rehabilitation in the punishment practices for felony-murder in Pennsylvania. Appellant is asking this Court to recognize this history and restore constitutional balance so that “comparative and proportional justice is an imperative within Pennsylvania’s own borders” in regard to sentencing for felony murder. *Baker*, 78 A.3d at 1055(Castille, C.J., concurring).

28. Appellant asks that this Court deny the Office of Attorney General’s motion for leave to submit supplemental briefing and remove its proposed brief from consideration. Appellant’s briefing sets forth a full accounting of the history of

Pennsylvania's anticruelty provision and other relevant factors for adjudication Mr. Lee's constitutional challenge to his sentence.

WHEREFORE, for all the foregoing reasons, Appellant respectfully requests that this Court deny *amicus curiae* Office of Attorney General's Application to File Supplemental Brief.

Respectfully submitted,

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**Certificate of Compliance – Public Access Policy**

I certify that this Answer In Opposition To *Amicus* Office Of Attorney General's Application To File Supplemental Brief 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 8th day of November, 2024, I caused the foregoing Answer In Opposition To *Amicus* Office Of Attorney General's Application To File Supplemental Brief to be served on the District Attorney of Allegheny County by electronic filing at the following:

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