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IN THE SUPREME COURT OF PENNSYLVANIA
NO. 3 WAP 2024

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

DEREK LEE,

Appellant.

REPLY 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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

REGULATIONS

OTHER AUTHORITIES

SUMMARY OF THE ARGUMENT

The Commonwealth and its supporting *amicus* brief do nothing to undermine the substantial and thorough arguments set forth by Mr. Lee that his life-without-parole sentence is unconstitutional under the Pennsylvania Constitution's "cruel punishments" clause. The Commonwealth offers no argument of its own on the history of that clause, related case law from other states, or policy factors relevant to the inquiry this Court must undertake under *Commonwealth v. Edmunds*. Instead, the Commonwealth ineffectively attempts to undermine Mr. Lee's arguments with respect to those *Edmunds* factors. The Commonwealth's argument with respect to the text of that provision is contradicted by the very cases it relies on in support of that the proposition that "cruel" and "cruel and unusual" should be interpreted identically. The Commonwealth likewise does not offer much in the way of justification for a life-without-parole sentence for felony-murder, and wholly ignores an essential element of that analysis—the lack of specific intent to take a life.

With respect to the Eighth Amendment, the Commonwealth applies a gross disproportionality standard and little in the way of analysis under that standard. Due to developments in Eighth Amendment jurisprudence, this Court should apply a categorical approach. Under this approach, Mr. Lee's sentence of life-without-parole is unconstitutional.

ARGUMENT

Appellant, Derek Lee, is challenging his mandatory sentence of life-without-parole imposed upon his conviction for felony-murder under 18 Pa.C.S.A. §2502(b). Mr. Lee's sentence is unconstitutional under both the Pennsylvania Constitution's prohibition on "cruel punishments" at article I, section 13, and the Eighth Amendment to the U.S. Constitution's prohibition on "cruel and unusual punishments." Mr. Lee's claim is premised on the lack of legitimate penological purposes served by life-without-parole imposed on people who did not intend to take a life. *See, e.g.*, Brief for Appellant, 44-53.

The Commonwealth submitted a brief on behalf of Appellee, and *amicus curiae* Pennsylvania District Attorneys Association ("PDAA") filed a brief in support of the Commonwealth's position that mandatory life-without-parole for felony-murder is a constitutional punishment. The Commonwealth asserts that Mr. Lee's sentence is not grossly disproportionate, and thus does not violate the Eighth Amendment. Brief for Appellee, 6-17. The Commonwealth also asserts that article I, section 13 of the Pennsylvania Constitution is co-extensive with the Eighth Amendment, thus Mr. Lee's sentence does not violate the Pennsylvania Constitution. *Id.* at 17-29. Neither the Commonwealth's brief nor PDAA's *amicus* brief undermine Mr. Lee's legal arguments as to why his sentence is unconstitutional.

I. THE COMMONWEALTH FAILS TO COUNTER MR. LEE'S ARGUMENT THAT HIS SENTENCE VIOLATES THE PENNSYLVANIA CONSTITUTION

As required by *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), and its progeny, Mr. Lee's opening brief presented a methodical, comprehensive analysis as to why the state constitution's prohibition on cruel punishments should be construed independently of the federal Constitution's Eighth Amendment. Mr. Lee then argued that this Court should, consistent with the text, history, and purpose of the cruel punishments prohibition, utilize a specific proportionality standard that assesses punishments according to their relationship to the goals of deterrence and rehabilitation. In its response brief, the Commonwealth presents no countervailing position on the *Edmunds* factors or defense of the punishment at issue on deterrence or rehabilitative grounds. Instead, it offers only meager and misleading pushback on marginal issues and misrepresents the basis for the rule that Mr. Lee asks this Court to adopt.

Prior to assessing the proportionality between the crime for which Mr. Lee was convicted and the sentence imposed, this Court must first conduct an analysis pursuant to *Edmunds* and decide what standard it will use to adjudicate his state constitutional claim. Mr. Lee's principal brief set forth the basis for his claim that his life-without-parole sentence violates article I, section 13 of the Constitution of Pennsylvania. Under the factors outlined by this Court in *Edmunds*, Pennsylvania's

cruel punishments clause should be construed to provide greater protection than the Eighth Amendment in this context. Brief for Appellant, 9-53. While the Commonwealth discusses the *Edmunds* factors in its brief, it fails to counter Mr. Lee's arguments.[1] Furthermore, the Commonwealth's brief rests on its argument that article I, section 13 is co-extensive with the Eighth Amendment without addressing the substantive state constitutional standard set forth in Mr. Lee's principal brief. If this Court finds that article I, section 13 provides greater protection than the Eighth Amendment in this context, it should adopt the standard that a life-without-parole sentence for felony-murder is excessive if it does not further deterrence and rehabilitative goals. Brief for Appellant, 43-53.

Under the analysis this Court established in *Edmunds*, litigants must address four factors to determine whether a provision of the Pennsylvania Constitution provides broader protection than an analogous provision of the federal constitution: (1) the text of the constitutional provision at issue; (2) the history of the Pennsylvania

[1] *Amicus* PDAA devotes a substantial portion of its brief to chastising *amici* who are supporting Mr. Lee's position for failing to adequately address the legal arguments at issue in this matter. *See* Brief for *Amicus Curiae* Pennsylvania District Attorneys Association, 8-14. Yet, PDAA does not even mention the required *Edmunds* analysis in its brief, let alone conduct an analysis under *Edmunds.* PDAA does not cite any relevant Eighth Amendment standards in arguing that Mr. Lee's sentence is constitutional. *Id.* at 3-8. Nonetheless, it is perfectly acceptable for *amici* to provide assistance to this Court in reaching a decision by offering insight to the broader context or import of a case, rather than strictly offering legal arguments which the parties themselves are expected to brief. *See, e.g.*, Pa. R.A.P. 531 Official Note (an "*amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court.") (citing U.S. Supreme Ct. R. 37.1). Further, policy factors are explicitly recognized as relevant to the legal analysis under *Edmunds.*

constitutional provision; (3) related case-law from other states; and (4) policy considerations unique to Pennsylvania. *Edmunds*, 586 A.2d at 895.

A. Text of article I, section 13

This Court has instructed that it is concerned not merely with textual distinctions between the state constitutional prohibition on "cruel punishments" and the federal Constitution's prohibition on "cruel and unusual punishments," but whether textual distinctions support "new theoretical distinctions based on the differences between the conceptions of 'cruel' and 'unusual.'" *Commonwealth v. Batts*, 66 A.3d, 286, 298 (Pa. 2013). Mr. Lee's opening brief provided just such a basis for a "new theoretical distinction[]" along the lines invited by this Court in *Batts*.

The Commonwealth's brief acknowledges the textual distinction, then attempts to wave it away with an underdeveloped – and inaccurate – analysis of how the U.S. Supreme Court has interpreted the Eighth Amendment. Brief for Appellee, 18-19. The Commonwealth argues that, because the term "unusual" in the context of the Eighth Amendment refers to punishments that have "fallen out of favor for a long period of time," and the U.S. Supreme Court has barred punishments that were continuously imposed until they were found unconstitutional, the Commonwealth implies that the U.S. Supreme Court has, in effect, interpreted the Eighth Amendment as not including the "and unusual" clause. *Id.* The Commonwealth's

characterization of the phrase "and unusual" is not only wrong, it was just sharply contradicted by the U.S. Supreme Court itself on the same day the Commonwealth filed its brief in the instant matter. *See City of Grants Pass, Oregon v. Johnson,* –S. Ct. -- , 2024 WL 3208072, *11 (June 28, 2024) (recognizing "unusual" punishments were those that had "long fallen out of use" by the time the Eighth Amendment was adopted and employing a historical and comparative analysis to determine whether the punishment at issue was unusual) (citing *Bucklew v. Precythe,* 587 U.S. 119, 130 (2019)).

The U.S. Supreme Court cases cited by the Commonwealth for the proposition that the Eighth Amendment—like article I, section 13—also forbids only "cruel punishments" in fact support Mr. Lee's position that "unusual" has an independent meaning and substantive import vis-à-vis the Eighth Amendment and are consistent with the method employed by the Court in *Grants Pass*. Brief for Appellee, 19. Each of these rulings include extensive analyses as to whether the punishments at issue are widely in use throughout the country or not. A key component of the Court's Eighth Amendment jurisprudence is whether a consensus has emerged disfavoring the imposition of a particular punishment on a class of offenders or offenses. In each of the cases cited by the Commonwealth to disprove the argument that the term "unusual" has an independent, substantive meaning, the U.S. Supreme Court in fact engaged in a comparative analysis of state and federal sentencing practices to assess

whether the punishment in question had fallen out of favor. *See Graham v. Florida*, 560 U.S. 48, 62-67 (2010) (finding life-without-parole for non-homicide offenses committed by children "exceedingly rare," i.e., "unusual"); *Kennedy v. Louisiana*, 554 U.S. 407, 422-426 (2008) (death sentence for rape of a child not permitted in 45 jurisdictions is evidence of "national consensus" against the penalty); *Coker v. Georgia*, 433 U.S. 584, 593-596 (1977) (Court "seek[s] guidance in history and from the objective evidence of the country's present sentencing practices," finding state legislatures "very heavily" on the side of rejecting the death penalty for rape of an adult); *Enmund v. Florida*, 458 U.S. 782, 789-793 (1982) (finding that legislatures "weigh[] on the side of rejecting capital punishment" when the defendant did not take a life or attempt to take a life). As *Grants Pass* makes explicit, this comparative analysis of punishment practices is consistent with the original meaning of the term "unusual" in the Eighth Amendment.

The text of Pennsylvania's article I, section 13 – which forbids "cruel punishments" – is broader on its face than the Eighth Amendment's bar on "cruel and unusual punishments." The historical understanding of these terms supports Appellant's argument that they should be given distinct application in this context, and that the omission of the term "unusual" in the Pennsylvania Constitution is meaningful. Specifically, the omission of "unusual" removes the requirement that a challenged punishment be contrary to longstanding practice or that a consensus

against imposing the punishment exists. While these factors may be relevant to a court's consideration of whether a punishment is "cruel," they are not strict burdens to overcome for a litigant challenging a punishment under article I, section 13 as they are under the Eighth Amendment.

B. History of article I, section 13

The Commonwealth next attempts to brush aside Mr. Lee's considerable historical discussion of how the framers of the Pennsylvania Constitution understood "cruel punishments" by simply not engaging with Mr. Lee's arguments. The Commonwealth asserts that the framers of Pennsylvania's Constitution did not intend for their calls to make punishments more proportional and lenient to be reflected in the Constitution, but only as "an exercise of enlightened political will." Brief for Appellee at 20. The legislature, the Commonwealth asserts, is the branch responsible for implementing this enlightened political will. *Id.* Finally, the Commonwealth cites to this Court's decision in *Commonwealth v. Sourbeer,* 422 A.2d 116, 124 (Pa. 1980), for its reasoning that the Court should not substitute its judgment for that of the legislature when analyzing whether a punishment is "cruel and unusual." *Id.* at 123-24. The Commonwealth ignores the reality that the people advocating for such "an exercise of enlightened political will" to make punishments more proportional were the same people who promulgated the precise constitutional right in question in Mr. Lee's case. The construction of a constitutional right is

certainly as much an exercise of political will as any of the comparable legislative enactments that Appellee seeks to distinguish it from, and the early constitutional and legislative history of the Commonwealth should be read together to reflect a single conception of the proper bounds of punishment.

The Commonwealth's argument does nothing to further a historical understanding of article I, section 13, or address Mr. Lee's position. That the legislature is charged with setting the permissible punishments for criminal offenses is not at issue here. Mr. Lee's principal brief sets forth the full historical context of article I, section 13 – that it did not simply give *carte blanche* to the legislature to levy punishments as an expression of political will, but instead represents a substantive check on the authority of the state to punish in a manner that is harsher than necessary to further the goals of deterrence and rehabilitation. Brief for Appellant, 16. The historical record discussed by Mr. Lee contains ample links between the conception of "cruelty" to the specific constitutional right enshrined in the Pennsylvania Constitution and legislative enactments that were meant to further effectuate the purpose of the right. These early legislative enactments are not separate and apart from the constitutional prohibition against cruel punishments, but instead "are of course persuasive evidence of what the Constitution means." *Harmelin v. Michigan*, 501 U.S. 957, 980 (1991).

As detailed in Mr. Lee's opening brief, the framers of Pennsylvania's Constitution "had a distinct understanding of 'cruelty.'" *See* Brief for Appellant, 16 (quoting Kevin Bendesky, *"The Key-Stone to the Arch": Unlocking Section 13's Original Meaning*, 26 U. Pa. J. Const. L. 201, 204 (2023)). Cruel punishments were those that did not further deterrence and reformation, and the meaning of "cruelty" in this sense was intended to evolve with increased knowledge and experience. *Id.* The Commonwealth presents no countervailing evidence as to the historical meaning and purpose of the cruel punishments prohibition.

If the textually significant difference and historical analysis of Pennsylvania's cruel punishment prohibition are fully understood, giving independent meaning to article I, section 13 of the Constitution becomes an imperative of justice and a matter of legal rectitude. These first two *Edmunds* factors provide a sufficient basis for this Court to finally give independent meaning to the anti-cruelty provision of the state Constitution, though the remaining *Edmunds* factors provide additional grounds for doing so as well.

C. Related Case-Law From Other States

In responding to Mr. Lee's argument that related case-law from other states supports interpreting article I, section 13 as providing broader protection than the Eighth Amendment in this case, the Commonwealth notes that the cases cited by Mr. Lee, in which other state supreme courts held that their states' anti-cruelty

constitutional provisions provided greater protection than the Eighth Amendment, did not deal with life-without-parole sentences for adults convicted of felony-murder. Brief for Appellee, 21-23. The Commonwealth further notes that other states have "moved away from automatic sentences of life without parole for adults," but that these changes have come from legislative enactments. *Id.* at 23-24. The Commonwealth cites no additional case law from other states and presents no further argument as to how this *Edmunds* factor can aid this Court in adjudicating Mr. Lee's claim.

The cases from other states cited in Mr. Lee's principal brief are substantially relevant to this Court's analysis in at least three ways: first, they provide this Court with guidance as to how other states' highest courts have analyzed challenges to punishments under state constitutions with similar or identical text to Pennsylvania's article I, section 13; second, these cases – like Mr. Lee's – involved challenges to life-without-parole sentences imposed on a class of offenses or offenders with diminished culpability; and third, they reflect a growing trend of states giving independent meaning to their own constitutional anti-punishment clauses and limiting life-without-parole sentences on classes of offenders and offenses. All of these factors are relevant under *Edmunds* in determining whether article I, section 13 provides greater protection than the Eighth Amendment in this context.

That other states' highest courts have not yet addressed the specific claim raised by Mr. Lee – that mandatory life-without-parole sentences imposed on people convicted of felony-murder are unconstitutional under the state constitution – is unsurprising. As an initial matter, as noted in Mr. Lee's principal brief, Pennsylvania is an outlier; approximately 80% of U.S. jurisdictions do not mandate life-without-parole for all felony-murder convictions. Brief for Appellant, 33. Further, few state supreme courts have engaged in a substantive analysis of their own state constitutional anti-cruelty provisions in comparison to the Eighth Amendment at all, and many states have identical provisions to the Eighth Amendment. At least two state supreme courts, however, are currently considering cases with claims similar to Mr. Lee's. On May 31, 2024, the Michigan Supreme Court requested briefing and oral argument on an application for leave to appeal, including on the question of whether mandatory life-without-parole is constitutional in the absence of malice in *People v. Langston.*[2] Likewise, the Colorado Supreme Court recently held oral argument on June 17, 2024 in a challenge to the constitutionality of life-without-parole for felony-murder in *Sellers v. People.* The Colorado Supreme Court will decide whether life-without-parole for felony-murder is unconstitutional and should apply retroactively in light of recent legislative enactments which ended life-

[2] *People v. Langston*, SC 163968 (Mich. May 31, 2024). Available at: https://www.courts.michigan.gov/49e0db/siteassets/case-documents/uploads/sct/public/orders/163968_19_01.pdf (last accessed July 8, 2024).

without-parole for felony-murder prospectively.[3] Mr. Lee has provided this Court with ample guidance from other state supreme courts to determine whether article I, section 13 should be given independent meaning from the Eighth Amendment and how this Court might engage in an analysis of whether Mr. Lee's sentence is unconstitutional under the state constitution.

D. Policy considerations unique to Pennsylvania

Mr. Lee's principal brief sets forth several distinct policy considerations that are relevant under *Edmunds* to determining whether article I, section 13 provides greater protection than the Eighth Amendment in this context. Brief for Appellant, 32-43. Notably, Mr. Lee and *amici* presented substantial argument about the stark and widespread racial disparities in Pennsylvania's life-without-parole sentencing scheme for felony-murder. Brief for Appellant, 37-39; *see e.g.* Brief of *Amici Curiae* The Antiracism and Community Lawyering Practicum at Boston University School of Law, Fred T. Korematsu Center for Law and Equality, and the NAACP Legal Defense and Educational Fund, Inc. in Support of Appellant Derek Lee, 6-17. Neither the Commonwealth nor *amicus* PDAA[4] address or acknowledge these arguments.

[3] Supreme Court, State of Colorado, Court Calendar June 17, 2024. Available at: https://www.coloradojudicial.gov/sites/default/files/2024-05/Orals%20Docket%20June%202024_0.pdf (last accessed July 8, 2024).

[4] This disconcerting silence from Appellee and an association that accounts for 67 of 68 district attorney offices in the state of Pennsylvania is all the more troubling in light of the fact that every

The Commonwealth responds to Mr. Lee's arguments that Pennsylvania is an extreme outlier in both the number of people serving life-without-parole and the manner in which it sentences people convicted of felony-murder by asserting that Pennsylvania's extraordinary number of people serving life-without-parole is a function of its general murder sentencing scheme and noting that it is "odd" that Mr. Lee fails to provide the number of people convicted of felony-murder who were "non-slayers." Brief for Appellee, 24-25. The Commonwealth fails to acknowledge Mr. Lee's argument that Pennsylvania likely sentences more people to die in prison for felony-murder than any jurisdiction in the world and that only nine other states mandate life-without-parole for felony-murder convictions. Brief for Appellant, 33-34. As *amici* in support of Mr. Lee noted, Pennsylvania is a global outlier in both continuing to employ the felony-murder doctrine and in imposing life-without-parole, rendering Pennsylvania's life-without-parole sentencing for felony-murder "particularly suspect" under international human rights law. *Amici Curiae* Brief of the Special Rapporteur on Contemporary Forms of Racism and Expert Mechanism to Advance Racial Justice and Equality in Law Enforcement (EMLER) in Support of Petitioner, 12.

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single District Attorney in the state of Pennsylvania is white, as noted in the Brief of *Amici Curiae* submitted by the Antiracism and Community Lawyering Practicum at Boston University School of Law, Fred T. Korematsu Center for Law and Equality, and the NAACP Legal Defense and Education Fund, Inc., 13.

Furthermore, there is nothing "odd" about failing to cite the specific number of people convicted of felony-murder who caused the death of another person. Pennsylvania's felony-murder law makes no distinction between those who caused a death and those who merely participated in the underlying felony for purposes of a second-degree murder conviction.[5] Furthermore, Mr. Lee's claim is not predicated solely on the fact that he did not take a life. It is the lack of a specific intent to kill – which, as a matter of law, applies to all people convicted of second-degree murder – that renders the punishment of life-without-parole constitutionally disproportionate.

The Commonwealth further argues that Mr. Lee's reference to the declining use of life-without-parole as a punishment for felony-murder convictions is unpersuasive because these changes were legislative enactments, rather than judicial rulings. Although, as argued above, this Court need not conduct a full evaluation as to whether a punishment is "unusual" under the state constitution, it also need not ignore factors which render Pennsylvania a unique outlier in the severity of its

[5] *Amicus curiae* Governor Josh Shapiro's brief asserts that "in about half of second degree murder cases the defendant was the killer." Brief of *Amicus Curiae* Governor Josh Shapiro, 5. This number is provided without any source citation, instead purporting to have come from a non-public review conducted by the Pennsylvania Department of Corrections pursuant to a vague methodology that involved review of unknown documents contained in "case files." Even an exhaustive review of every transcript and case file would not lead to a reliable estimate of how many people convicted of second-degree murder committed the act resulting in loss of life, however, as this fact is not an element of a second-degree murder offense and thus cannot be definitely inferred from a jury determination of guilt.

felony-murder sentencing scheme. Pennsylvania is one of a shrinking list of states that mandatorily impose life-without-parole for felony-murder, and it likely imposes this sentence with more frequency than any other state. In light of article I, section 13's historical underpinnings as a progressive clause intended to limit punishments only to those necessary to achieve deterrent and rehabilitative aims, which represented a deliberate intention on the part of the framers to distinguish Pennsylvania from the more severe punishments of other jurisdictions, Pennsylvania's outlier status is even more relevant for this Court's consideration of Mr. Lee's claim.

The Commonwealth dismisses Mr. Lee's arguments relating to the increasing costs and unnecessary incarceration of aging people as outside of the purview of this Court. Brief for Appellee, 25-26. On the contrary, policy considerations unique to Pennsylvania are explicitly recognized by this Court as a relevant factor under *Edmunds.* The population of people serving these sentences is rapidly aging, and requires financial resources be directed at costs associated with an aging population in lieu of increased programming, services, and other measures that would improve public safety. Brief for Appellant, 39-40. Moreover, the likelihood of any risk to public safety from releasing people convicted of felony-murder is low, and maintaining this increasingly aging population is also likely to contribute to increased negative health effects. *Id.* at 40-42; *see also* Brief of Juvenile Law Center,

Youth Sentencing & Reentry Project and Philadelphia Lawyers for Social Equity as *Amici Curiae* in Support of Appellant Derek Lee, 25-31. Criminologists and law professors filed a brief as *amici curiae* in support of Mr. Lee which explained that people convicted of felony-murder almost always "age out" of criminal behavior. Brief of *Amici Curiae* Criminologists and Law Professors in Support of Petitioner, 13-16.

Lastly, the Commonwealth asserts that commutation is a viable release valve for people serving life-without-parole sentences and that any failures in this system are best addressed by the legislature. Brief for Appellee, 26-28. The Commonwealth notes that there was an uptick in commutations under Governor Wolf and that current Governor Shapiro has shown sympathy toward Mr. Lee's cause. *Id.* at 27-28. While commutation theoretically is available to people serving life-without-parole sentences, including those convicted of felony-murder, it is wholly inadequate and insufficient to provide the meaningful opportunity for release that is required to render a sentence for felony-murder constitutional. Governor Wolf's 53 commutations amount to less than 1% of the total people serving a life-without-parole sentence in Pennsylvania. And it appears thus far into the Shapiro administration that the trend is going in the direction of dramatically fewer

commutations for those serving life-without-parole sentences.[6] Even if Governor Shapiro had continued or improved upon this trend, it would be a grossly insufficient substitute for parole eligibility.

In addition to the sheer number of people serving life-without-parole sentences, the commutation application process requires waiting periods of several years[7] and is subject to the political whims of Board of Pardons members. It is a system no longer designed to provide nor capable of providing a release valve for people sentenced to life-without-parole. Former Secretaries of the Board of Pardons acknowledged that, because clemency is an act of mercy and there are no governing guidelines or eligibility requirements, commutation "has an element of arbitrariness to it." Brief of Former Pardons Board Secretaries Brandon Flood and Celeste Trusty as *Amicus Curiae* in Support of Petitioner Derek Lee, 7-8. *Amici* also noted that clemency is neither designed to function as a corollary or substitute for parole, nor is it possible for it to function as a substitute for parole. While clemency is an act of mercy or grace, parole remains a penological measure focused on public safety and allowing for rehabilitation outside of prison walls. *Id.* at 3-6. As the use of commutation declined from an average of 32 per year during Governor Milton

[6] Of three lifers recommended for commutation to Governor Shapiro, he has only commuted one so far. *See*: https://www.bop.pa.gov/Statistics/Pages/Commutation-of-Life-Sentences.aspx.
[7] Pa. Board of Pardons, Frequently Asked Questions. Available at: https://www.bop.pa.gov/application-process/Pages/Frequently-Asked-Questions.aspx (last accessed July 12, 2024)

Shapp's tenure to only two per year over the next nine governors' tenures, the population of people serving life-without-parole increased from 650 to over 5,000. *Id.* at 8. In order for commutation to serve a similar function to its operation in the 1970s, Pennsylvania governors would need to grant roughly 250 commutations *per year*. As *amici* note, the unanimity requirement for a recommendation of the Board of Pardons to even permit the governor to grant a commutation has resulted in far fewer recommendations. *Id.* at 8.

It is also important to reply to what the Commonwealth and PDAA have chosen to remain silent upon: race. Despite Mr. Lee raising the extraordinary racial disparity among those serving life-without-parole for felony-murder in Pennsylvania, the Commonwealth and its *amicus* have opted to ignore the stark and obvious racial justice implications of this case. This Court should not ignore them. So long as the structural racism that has been deeply embedded in the institutions of this country remains in any vestige the legal profession and the judiciary have a special obligation not to ignore the heavily racialized distribution of suffering caused by excessively cruel punishments when adjudicating their constitutionality. A ruling striking down life-without-parole sentences for felony-murder will be an important step toward creating a more racially just society for future generations of Pennsylvanians.

E. Life-without-parole for felony-murder is disproportionate under article I, section 13.

After concluding that Pennsylvania's cruel punishments clause should provide broader protection in this context than the Eighth Amendment, Mr. Lee's principal brief proposed a Pennsylvania-specific standard under which to assess whether a life-without-parole sentence for felony-murder is unconstitutional. Brief for Appellant, 43-44. Based on the *Edmunds* analysis relevant to this case and in particular the historical underpinnings of article I, section 13, this Court should adopt a proportionality standard which prohibits punishments that are unnecessary to further rehabilitation and deterrence goals. *Id.* A life-without-parole sentence for felony-murder far exceeds what is necessary to further these goals, and is therefore unconstitutional. Brief for Appellant, 44-53.

The Commonwealth does not address Appellant's argument that Mr. Lee's sentence is unconstitutional under this standard. In its arguments attempting to justify life-without-parole for felony-murder, the Commonwealth misapprehends the nature of Mr. Lee's claim. Mr. Lee's position is not, as the Commonwealth contends, predicated on the fact that he did not cause the death in this case. *See e.g.* Brief for Appellee, 17 ("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..."). Under Pennsylvania's felony-murder doctrine, it is not even necessary that the state prove beyond a reasonable doubt that a particular defendant committed the act which led to the death of another person in order to secure a felony-murder conviction. *See e.g.* Pa. Suggested Standard Criminal Jury Instructions, 15.2502B Second-Degree Murder, Subcommittee Note (3rd Ed. 2019) ("If the evidence is unclear whether it was the act of the defendant or the act of the co-felon that caused the death, the jurors may be told that they need not resolve the question as long as they are satisfied it was the act of one or the other.").[8]

The Commonwealth ignores the essential thrust of why those convicted of felony-murder have long been recognized by courts to have diminished culpability: the lack of specific intent to kill. In *Enmund,* the U.S. Supreme Court recognized that, "American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to the degree of his criminal culpability." *Enmund,* 458 U.S. at 800 (internal quotations omitted). The imputed malice attendant to felony-murder is an "artificially constructed kind of intent [that] does not count as intent for purposes of the Eighth Amendment." *Miller v. Alabama,* 567

[8] While it is true that Mr. Lee, even in the light most favorable to the prosecution, did not commit the act which led to the decedent's death in this matter, a rule distinguishing between those convicted of second-degree murder for sentencing purposes may implicate *Alleyne v. United States,* 570 U.S. 99, 114-116 (2013). Under *Alleyne* any fact which triggers a mandatory minimum sentence must be proved beyond a reasonable doubt and submitted to a jury. Maintaining a mandatory minimum of life-without-parole for some convicted of second-degree murder would raise substantial *Alleyne* concerns.

U.S. 460, 491 (2012) (Breyer, J. concurring). As a matter of law, a person convicted of second-degree murder in Pennsylvania did not have the specific intent to take a life.

The distinguishing feature of Pennsylvania's felony-murder doctrine from other types of murder is that the malice is imputed from the actor's intent to engage in an enumerated felony. *See Commonwealth v. Allen*, 379 A.2d 1335, 1338 (Pa. 1977). This element of intent – or lack thereof – is essential in analyzing the proportionality of a life-without-parole sentence. As argued in Mr. Lee's principal brief, deterrence goals are not served by sentencing people to life-without-parole for outcomes which they did not intend. Brief for Appellant, 44-47. Life-without-parole's permanence also deprives people of the opportunity for rehabilitation outside of prison walls, and denial of meaningful opportunity for release contravenes robust data on the likelihood that people like Mr. Lee do not pose public safety risks. Brief for Appellant, 47-53.

II. THE COMMONWEALTH APPLIES AN INCORRECT STANDARD IN DEFENSE OF A PUNISHMENT THAT IS BOTH CRUEL AND UNUSUAL IN VIOLATION OF THE EIGHTH AMENDMENT

In addition to Mr. Lee's claim under article I, section 13 of the Pennsylvania Constitution, this Court granted review of Mr. Lee's claim that his sentence violates the Eighth Amendment to the U.S. Constitution. When assessing the constitutionality of a punishment, the U.S. Supreme Court applies one of two

analytical frameworks: (1) a gross disproportionality principle; or (2) a categorical approach which discerns whether there are mismatches between the punishment and the culpability of a class of offenders or offenses. As Mr. Lee argued in his principal brief, following the U.S. Supreme Court's decisions in *Graham* and *Miller*, the heightened proportionality review of the categorical approach should be applied to life-without-parole sentences. Brief for Appellant, 53-57.

The Commonwealth only addresses whether Mr. Lee's sentence is constitutional under the Court's gross disproportionality jurisprudence. Under this standard, the Commonwealth argues that courts should assess (1) the gravity of offense and harshness of the penalty; (2) sentences imposed on others in the same jurisdiction; and (3) sentences imposed for the same offense in other jurisdictions. Brief for Appellee, 8 (citing *Commonwealth v. Proctor*, 156 A.3d 261, 275 (Pa. Super. 2017).

The Commonwealth acknowledges that the *Miller* Court applied a categorical approach and "may have altered the analysis to some degree," but argues that *Miller* does not apply to adults, and it did not forbid life-without-parole sentences altogether. Brief for Appellee, 8-9. The Commonwealth notes that Pennsylvania courts have "recognized that *Miller* does not apply to those over 18 who claim to possess the same or similar cognitive disabilities as minors." *Id.* at 9. Thus, the Commonwealth argues life-without-parole for second-degree murder is not grossly

disproportionate. *Id.* at 10. The Commonwealth further argues that the U.S. Supreme Court decisions relied upon by Mr. Lee do not apply because he was not sentenced to death and is not a juvenile. *Id.* at 11-12.

The Commonwealth does not address Mr. Lee's argument that the categorical approach is the appropriate framework to apply to his claim. 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-without-parole. As argued in Mr. Lee's principal brief, application of this standard renders Mr. Lee's sentence unconstitutional under the Eighth Amendment. Brief for Appellant, 53-59.

According to the Commonwealth, Mr. Lee is actually "trying to escape the consequences attendant to being an accomplice." *Id.* at 13. The Commonwealth cites to *Commonwealth v. Yuknavich*, 295 A.2d 290, 293 (Pa. 1972), for the proposition

that anyone engaging in an enumerated felony under Pennsylvania's felony-murder law, held to the standard of a reasonable man, would know or should know that a death might result from that felony. Brief for Appellee, 13. Ten years after *Yuknavich*, the U.S. Supreme Court in *Enmund* explicitly rejected that reasoning in assessing the culpability of a felony-murder defendant for *sentencing* purposes. The Court reasoned that deterrence was an insufficient rationale to support the death penalty for felony-murder because "there is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself." *Enmund*, 458 U.S. at 799. The Court supported this reasoning with statistics that showed "only about one-half of one percent of robberies resulted in homicide." *Id.*

Mr. Lee's appeal in this matter does not seek to escape consequences of being an accomplice, nor is it aimed at undermining the felony-murder rule itself. While there may be much to criticize about the felony-murder doctrine, it is not under scrutiny in this case. In the context of assessing the proportionality of a mandatory life-without-parole sentence for a person convicted of felony-murder, the reality of the doctrine cannot be ignored, however. The U.S. Supreme Court recognized this reality in *Enmund* by differentiating the culpability *for sentencing purposes* of those who had a specific intent to kill and those convicted of felony-murder. *See also*

Miller, 567 U.S. at 491 (Breyer, J. concurring) (the felony-murder doctrine's "artificially constructed kind of intent does not count as intent for purposes of the Eighth Amendment.") In particular, the penological purpose of deterrence holds no weight when people are punished for the consequences of actions they did not intend. *Amici* criminologists set forth in great detail how life-without-parole for felony-murder fails to satisfy any valid penological purpose, including retribution, rehabilitation, deterrence, and incapacitation. Brief of *Amici Curiae* Criminologists and Law Professors in Support of Petitioner, 5-30.

III. *AMICUS CURIAE* BRIEF BY THE PENNSYLVANIA DISTRICT ATTORNEYS' ASSOCIATION ADDRESSES ARGUMENTS APPELLANT DID NOT MAKE REGARDING A CLAIM NOT BEFORE THIS COURT

The *amicus curiae* brief of the Pennsylvania District Attorneys' Association is based upon two premises regarding Mr. Lee's claims, both of which are false. First, that Mr. Lee is actually challenging the theory of vicarious liability underlying the felony-murder doctrine. Brief for *Amicus Curiae* PDAA, 5. Contrary to amicus' assertion, Mr. Lee does not challenge the vicarious liability doctrine, as that would involve a challenge to Mr. Lee's conviction itself. Nowhere in the questions presented or in Mr. Lee's opening brief is any such argument invited or advanced, and the PDAA's bald assertion to the contrary does not make it so. That the felony-murder rule rests on tenuous ground – as this Court previously recognized in *Com. ex rel. Smith v. Myers,* 261 A.2d 550, 553 (Pa. 1970) – only provides additional

support for the claim that the irrevocable harshness of life-without-parole renders the *sentence* unconstitutional.

Second, PDAA claims that Mr. Lee and the *amici* in support of his claims merely "presume" that Mr. Lee's lack of intent to take a life has legal significance. Brief for *Amicus Curiae* Pennsylvania District Attorneys Association, 2; 4; 5; 7; 13. This is not a mere presumption, however, as offenses that lack an intent to take a life have been long-recognized in federal constitutional law and the Pennsylvania criminal code as warranting lesser penalties than offenses that involve a specific intent to take a life. This is not a controversial proposition. Mr. Lee's entire opening brief demonstrated the legal significance of the fact that he did not kill or intend to kill. *See generally* Brief for Appellant. The U.S. Supreme Court also recognized the legal significance of this fact more than 40 years ago in *Enmund*, 458 U.S. 782. And the Pennsylvania legislature itself has recognized that a specific intent to kill is a *sine qua non* of a first degree murder conviction, [9] which carries the possibility of a death sentence.[10] Second-degree murder does not contain *any* intent to take a life as

[9] 18 Pa.C.S.A.§ 2502(a), "Murder of the first degree.--A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.";
[10] 18 Pa.C.S.A.§ 1102(a) ("a person who has been convicted of a murder of the first degree or of murder of a law enforcement officer of the first degree shall be sentenced to death or to a term of life imprisonment").

an element of the offense,[11] and it does not permit the death penalty,[12] indicating the obvious fact that the legislature has determined that second-degree murder offenses involved less culpability than first degree murder offenses.[13]

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.

[11] 18 Pa.C.S.A.§ 2502(b), "(b) Murder of the second degree.--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.

[12] 18 Pa.C.S.A.§ 1102(b)(" a person who has been convicted of murder of the second degree, of second degree murder of an unborn child or of second degree murder of a law enforcement officer shall be sentenced to a term of life imprisonment.").

[13] That the PDAA claim that some people convicted of second-degree murder in fact have *greater* culpability for constitutional purposes than people convicted of first-degree murder is similarly unpersuasive. Brief for *Amicus Curiae* Pennsylvania District Attorneys Association, 6. Even if there are cases where a defendant convicted of second-degree murder committed the act resulting in death, the legal import of a second-degree murder conviction is that the defendant did not commit specific-intent, first-degree murder, and therefore a jury or judge imposed a lower gradation of guilt.

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.[14]

Respectfully submitted,

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[14] Governor Shapiro's brief implores this Court to uphold the status quo for those currently serving life-without-parole for felony-murder by not deciding the retroactivity question so that the legislature can take actions that it has consistently abstained from taking for decades. Brief of Amicus Curiae Governor Josh Shapiro, 18. That the Governor points to the legislature's response to *Miller v. Alabama* as a model for addressing those who are currently serving life-without-parole for felony-murder is misplaced given that the General Assembly passed a statute, 18 Pa.C.S.A.§ 1102.1, that was explicitly *not retroactive*. The lesson that should be derived from *Miller* is that retroactivity should be announced upon the issuance of a substantive rule – and any rule striking down Mr. Lee's sentence would be substantive pursuant to *Teague v. Lane*, 489 U.S. 288 (1989). All stakeholders in this issue have an interest in this Court issuing an unambiguous ruling that clearly delineates the constitutional parameters to guide lower courts and the legislature, including the retroactive applicability of any substantive rule.

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CERTIFICATE OF COMPLIANCE: LENGTH OF BRIEF

I hereby certify that the foregoing Reply Brief for Appellant consists of 6,874 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 reply briefs shall not exceed 7,000 words.

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CERTIFICATE OF COMPLIANCE: PUBLIC ACCESS POLICY

I certify that this Reply 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 12th day of July, 2024, I caused the foregoing Reply Brief for Appellant to be served on the District Attorney of Allegheny County by electronic filing at the following:

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