IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 3 WAP 2024

COMMONWEALTH OF PENNSYLVANIA

v.

DEREK LEE,
appellant

SUPPLEMENTAL BRIEF FOR *AMICUS CURIAE* THE OFFICE OF ATTORNEY GENERAL IN SUPPORT OF THE COMMONWEALTH

Appeal from the decision of the Superior Court, 1008 WDA 2021, June 13, 2023, affirming the judgment of sentence for second degree murder, CP-02-CR-16878-2014, entered December 19, 2016, in the Court of Common Pleas of Allegheny County.

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ARGUMENT

This Court recently heard oral argument on a question of Pennsylvania constitutional law: whether the statutory sentence for second degree murder violates the "cruel punishment" clause of Art. I, § 13.

At argument, however, the parties and the Court spent little time addressing that question. Instead, the issue that consumed most of the lengthy proceedings – exceeding one hour – was the shape of the "remedy" the Court might impose. Nevertheless, despite the extended time spent trying to work through that issue, the remedy question is in fact even more difficult than has been acknowledged to this point.

That is because of the specific nature of the alleged constitutional error. The defendant does not contend that life without parole is unconstitutional per se. Nor does he say that life without parole is unconstitutional simply because it is mandatory. Rather, he argues that life without parole is unconstitutional *if the defendant did not himself kill or intend to kill* the victim. That is the issue on which the defendant sought and was granted allowance of appeal;[1] that is the issue as

[1] "Is [Petitioner's] mandatory sentence of life imprisonment with no possibility of parole unconstitutional under Article I, § 13 of the Constitution of Pennsylvania where he was convicted of second-degree murder in which he did not kill or intend to kill and therefore had categorically-diminished culpability, and where Article I, § 13 should provide better protections in those circumstances than the Eighth Amendment to the U .S. Constitution?" https://www.pacourts.us/assets/opinions/SUPREME/out/180WAL2023%20-%20105837188255583165.pdf

framed in the statement of the question in the defendant's brief,[2] and reiterated in his reply brief;[3] and that is the issue addressed by the defendant's *amicus* briefs.[4] Thus 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.

The problem, however, is that the proposed standard – whether the defendant personally killed or intended to kill the victim – is not merely a resentencing issue. There is a significant danger that it will be treated as *an element of the offense*. In *Alleyne v. United States*, 570 U.S. 99 (2013), the United States Supreme Court held, as a matter of federal constitutional law, that factual findings which change the maximum or mandated minimum sentence must be considered as part of the crime. Under *Alleyne*, such factual findings must be made by a jury, not a judge, and must be proven beyond a reasonable doubt.

If, as seems quite possible, these requirements are applied to remands here, then the resulting proceedings will not be new sentencing hearings; they will be *new*

[2] Brief for Appellant at 2.

[3] "Mr. Lee's entire opening brief demonstrated the legal significance of the fact that he did not kill or intend to kill." Reply Brief for Appellant at 27.

[4] *See, e.g.*, Pennsylvania Prison Society Brief at 18; Avis Lee Brief at 6; "Antiracism" Brief at 22; Governor's Brief at 5; Juvenile Brief at 3; Flood/Trusty Brief at 6; Philadelphia District Attorney Brief at 5; Philadelphia Defender Association Brief at 35; "Scholars" Brief at 2; Sentencing Project Brief at 2.

trials. And, because the proposed standard is likely to be seen as "substantive" rather than "procedural," it will quite possibly be applied with full retroactivity, not just in cases that are still pending. This would mean 1000-plus remands: *i.e.*, 1000-plus jury trials. As one member of the Court observed at oral argument, our hard-working common pleas judges will of course step up to that challenge. But, because they are hard-working, they are already working on *other* pending matters. They will have to stop working on those other matters in order to make room for these new matters. And, because most of these new trials will be for crimes committed decades ago, they will require considerably more resources than the average trial, even the average murder trial.

But that is not the end of the difficulty. Arguably, the defendant's proposed constitutional standard – killed or intended to kill – doesn't just constrain the sentence for felony murder; in effect, it creates a *new crime*, with new elements. And, because that new crime did not exist at the time the offense was committed, it is arguably *ex post facto* as applied to previously committed offenses. That would mean not 1,000 new trials, but 1,000 discharges.

To be sure, felony murder defendants could then presumably be resentenced on remaining charges for which they were convicted. But the felonies underlying felony murder – robbery, rape, burglary, arson, and kidnapping – are all graded as first-degree felonies, carrying a maximum sentence of ten to twenty years in prison.

Many, perhaps most, felony murderers will have served that ten-year minimum, or even the twenty-year maximum, and will be released, as if the crimes in which they participated had not resulted in a death. And in many felony murder prosecutions, there may not even be an underlying felony on which to impose sentence. Relying on the current sentence for felony murder, prosecutors often decline to move to trial on the underlying felony. In those cases, there would be no remaining charges if the felony murder sentence is struck down.

Of course, if that is what the Pennsylvania Constitution requires, so be it. If 1,000 felony murder defendants must be resentenced, or retried, or released outright, that is the price of living in a constitutional democracy. But these potential consequences place renewed emphasis on the proper resolution of the threshold, primary question before the Court: *does* the cruel punishment clause in fact prohibit the current sentence? The answer to that question is not a matter of considering contemporary rationales for the imposition of punishment, in order to determine the circumstances in which we might think that punishment "cruel." Such an exercise is merely a form of making the policy judgments reserved for the legislature.

Rather, the answer to the question presented is whether the framers of the constitutional provision, and the people who adopted it, *intended* the cruel punishment clause to prohibit life sentences for felony murder. Did the drafters of the clause in 1790 so intend, while at almost the same time they amended

Pennsylvania law to provide that the penalty for felony murder would be death? Did the drafters of the 1838 Constitution or of the 1874 Constitution so intend, while at the same time the sentence for felony murder remained unchanged? Did the drafters of the 1968 Constitution so intend, while at the same time the sentence for felony murder had been amended to provide that the only sentence for felony murder was life imprisonment?

The answer to these questions may not result in the sentencing policy that litigants, professors, or even judges would prefer. Indeed, current law does not reflect the sentencing policy that the Attorney General would prefer. But that too is the price of living in a constitutional democracy. The Office of Attorney General stands ready to work with the governor and legislature to change the law through the policy-making process.

CONCLUSION

For these reasons, the Office of Attorney General respectfully requests that this Court affirm the ruling below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 2135

This brief is 1,189 words long.

CERTIFICATE OF COMPLIANCE WITH RULE 127

This brief complies with Pa. R. App. P. 127(a) and 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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