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IN THE SUPREME COURT OF PENNSYLVANIA

No. _____

COMMONWEALTH OF PENNSYLVANIA,

v.

DEREK LEE,

Petitioner.

PETITION FOR ALLOWANCE OF APPEAL

On Petition for Allowance of 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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**Application for pro hac vice forthcoming upon grant of allowance of appeal*

ATTORNEYS FOR PETITIONER

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I. OPINIONS DELIVERED IN COURTS BELOW

A three-judge panel of the Superior Court of Pennsylvania issued an opinion denying Petitioner's appeal from his judgment of sentence and motion for modification of sentence on June 13, 2023. The opinion is attached as Appendix B.

Judge Christine Dubow issued a concurring opinion which is attached as Appendix C.

Judge Elliot Howsie of the Allegheny County Court of Common Pleas issued an opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925(b) dated March 3, 2022. Judge Howsie's opinion is attached as Appendix A.

II. ORDER IN QUESTION

On June 13, the Superior Court of Pennsylvania issued an opinion and order affirming the judgment of sentence and order denying Mr. Lee's motion for modification of sentence in the Allegheny County Court of Common Pleas. *See* Appendix B at 9.

III. QUESTIONS PRESENTED FOR REVIEW

1. Where a litigant raises and fully briefs a claim that a Pennsylvania constitutional provision provides greater protection than an analogous federal constitutional provision, are courts required to conduct the analysis set forth by this Court in *Commonwealth v. Edmunds*?

Suggested Answer: Yes.

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

Suggested Answer: Yes.

3. Is Defendant's mandatory sentence of life imprisonment with no possibility of parole unconstitutional under the Eighth Amendment to the U.S. Constitution where he was convicted of second-degree murder in which he did not kill or intend to kill and therefore had categorically-diminished culpability under the Eighth Amendment?

Suggested Answer: Yes.

STATEMENT OF THE CASE

Petitioner, Derek Lee, is challenging the mandatory imposition of a life sentence with no possibility of parole following his conviction for felony-murder as unconstitutional. Despite never taking or intending to take a life, Mr. Lee has been condemned to die in prison. Mr. Lee is one of over 1,000 people mandatorily sentenced to life-without-parole for a felony-murder conviction in Pennsylvania. Both the number of people serving this punishment and the manner in which it is imposed makes Pennsylvania an extreme outlier in the United States and globally. Pennsylvania is one of only two U.S. states that mandate life-without-parole sentences for people convicted of felony-murder irrespective of whether they killed or intended to kill, and notwithstanding their level of involvement in the felony. It is a punishment which does not match the culpability attendant to the offense, and is excessive in relation to every legitimate penological purpose. It does not promote public safety and disproportionately impacts Black Pennsylvanians. As jurisprudential and practical standards governing the imposition of life-without-parole punishments have evolved, Pennsylvania's imposition of this punishment has not. In keeping with this Commonwealth's and this Court's tradition of assessing proportionate punishments and evaluating the protections afforded by Pennsylvania's Constitution, Mr. Lee's Petition presents an opportunity to remedy the injustice wrought by his permanent exclusion from society.

A three-judge panel of the Superior Court, finding that it was bound by prior Superior Court precedent and rulings of other panels of the same court, affirmed Mr. Lee's judgment of sentence. Judge Christine Dubow joined in the three-judge panel's judgment, but wrote a concurring memorandum urging the Supreme Court to "revisit whether a mandatory minimum sentence of life-without-parole imposed for all second-degree murder convictions is constitutional under Article I, Section 13 of the Pennsylvania Constitution." Appendix C, 1.

Mr. Lee was convicted of second-degree murder, robbery, and conspiracy on September 26, 2016 following a jury trial in the Allegheny County Court of Common Pleas, presided over by Judge David Cashman. Mr. Lee was convicted in relation to the shooting death of Leonard Butler on October 14, 2014 in Pittsburgh, PA. Tina Chapple testified for the prosecution that she was in a long-term relationship with the decedent, Leonard Butler. Notes of Testimony (hereafter "NT"), Vol. I, 340-41. On the day of Mr. Butler's death, Ms. Chapple testified that Mr. Butler called her downstairs where she saw two men with guns. *Id.* at 371-74. Both men were wearing partial face coverings, but Ms. Chapple identified one of the men as Mr. Lee. *Id.* at 375. Ms. Chapple testified that the person she identified as Mr. Lee directed her and Mr. Butler to the basement and demanded money. *Id.* at 381; 391. Ms. Chapple testified that eventually Mr. Butler took off his watch and gave it to the person she identified as Mr. Lee, who then went upstairs while Mr.

Butler and the other man remained in the basement with Ms. Chapple. *Id.* at 397. Ms. Chapple testified that Mr. Butler attempted to lunge at the other man who remained in the basement, then heard a "pow" noise. *Id.* Mr. Butler was shot and died from his injuries. There was no dispute that Mr. Lee did not cause Mr. Butler's death, nor was there any testimony indicating that Mr. Lee intended to kill Mr. Butler.

On September 26, 2016, the jury returned a verdict. NT, Vol. III, 453. Mr. Lee was found not guilty of first-degree murder, guilty of second-degree murder, guilty of one count of robbery, not guilty of one count of robbery, not guilty of burglary, and guilty of criminal conspiracy to commit robbery. *Id.* Mr. Lee was sentenced by Judge Cashman on December 19, 2016 to the mandatory penalty of life imprisonment for second-degree murder and 10-20 years consecutive to life imprisonment for criminal conspiracy. No further penalty was imposed on Mr. Lee's robbery conviction. RR at 121a.

On November 4, 2020, Judge Cashman granted Mr. Lee's request to reinstate his post-sentence motion and appellate rights. RR at 286a. Current counsel for Mr. Lee filed a post-sentence motion for modification of sentence, seeking vacatur of Mr. Lee's mandatory sentence of life imprisonment as unconstitutional under Article I, Section 13 of the Pennsylvania Constitution and the Eighth Amendment to the U.S.

Constitution. RR at 293a. That motion was denied by operation of law on July 26, 2021. RR at 305a.

Mr. Lee filed a notice of appeal to the Superior Court, raising two issues: 1) whether Mr. Lee's sentence of mandatory life-without-parole violated the Eighth Amendment to the U.S. Constitution; and 2) whether Mr. Lee's sentence violated Article I, Section 13 of the Pennsylvania Constitution. Following Judge Cashman's retirement, Judge Elliot Howsie filed an opinion pursuant to Rule 1925(b) on March 23, 2022. Appendix A.

Following oral argument, a three-judge panel of the Superior Court affirmed Mr. Lee's judgment of sentence. Judge Olson, joined by Judges Colins and Dubow, filed a memorandum opinion in support of the order. Appendix B. Judge Dubow filed a concurring memorandum in which she urged this Court to revisit the constitutionality of mandatory life-without-parole for felony-murder and stated that, absent purported binding precedent, she would have remanded to the trial court for an evidentiary hearing on the factors determining whether Mr. Lee's sentence is unconstitutional under the Pennsylvania Constitution. Appendix C.

This Petition for Allowance of Appeal presents an ideal opportunity for this Court to heed Judge Dubow's suggestion to revisit the constitutionality of mandatory life-without-parole for felony-murder. Mr. Lee is proceeding on direct appeal following the reinstatement of his post-sentence motion and appellate rights. Despite

no jurisdictional or procedural barriers to raising this claim, no court has yet engaged with the substance of his arguments that this sentence violates Article I, Section 13 of the Pennsylvania Constitution and the Eighth Amendment to the U.S. Constitution, or addressed the factors set forth by this Court in *Commonwealth v. Edmunds,* 586 A.2d 887 (Pa. 1991), for determining whether a state constitutional provision provides greater protections than its federal counterpart. There is no dispute on the evidence adduced at trial that Mr. Lee neither took a life or intended to take a life. His incarceration until death serves no legitimate penological purpose and this Court should rectify Pennsylvania's increasingly outlier status in continuing to impose this draconian punishment.

IV. MR. LEE'S PETITION FOR ALLOWANCE OF APPEAL SHOULD BE GRANTED

The Supreme Court of Pennsylvania's review of an order of the Superior Court is discretionary. Pa. R.A.P. 1114(a). The Rules of Appellate Procedure set forth seven reasons a petition for allowance of appeal may be granted, any one of which is sufficient to grant the petition. Pa. R.A.P. 1114(b). Mr. Lee's petition invokes four of these reasons in the questions presented for review. Each of these reasons are sufficient and provide compelling grounds, both alone and when considered together, for this Court to grant Mr. Lee's Petition for Allowance of Appeal.

First, the Superior Court's holding conflicts with holdings of this Court on the same legal questions. Pa. RAP 1114(b)(2). The Superior Court held that Mr. Lee's sentence was constitutional under Pennsylvania's constitution because courts have previously ruled that Pennsylvania's "cruel punishments" clause is coextensive with the U.S. Constitution's prohibition on "cruel and unusual" punishment. That holding conflicts with this Court's holdings in *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), and its progeny that courts must conduct an independent analysis each time a litigant properly raises a claim that a state constitutional provision provides greater protection than an analogous federal constitutional provision.

Mr. Lee's Petition also involves questions of first impression. Pa. RAP 1114(b)(3). His Petition asks this Court to determine, for the first time following significant jurisprudential developments, the proper analytical framework for adjudicating his challenge to the constitutionality of a mandatory life-without-parole sentence for felony-murder under both the U.S. and Pennsylvania Constitutions, as well as the ultimate resolution of those questions. Thus, his Petition also involves the constitutionality of a state statute. Pa. RAP 1115(b)(5). Mr. Lee is challenging the application of state statutes mandating that anyone convicted of second degree murder be sentenced to life imprisonment, and concomitantly the state statute prohibiting the parole board from considering anyone sentenced to life imprisonment for release on parole.

Finally, Mr. Lee's Petition is of substantial public importance and requires immediate redress in this Court. Pa. RAP 1114(b)(4). Mr. Lee is one of over one thousand people in Pennsylvania condemned to die in prison for their conviction of an offense which does not require them to take a life or intend to take a life. Pennsylvania is an extreme outlier in this respect and should join a growing number of jurisdictions who have curtailed their reliance on the felony-murder doctrine and imposition of permanent punishment.

Due to the weight of these considerations both individually and in combination, this Court should grant this Petition for Allowance of Appeal and address the questions presented for review herein.

a. In conflict with rulings of this Court, the Superior Court panel in this case failed to conduct the mandatory *Edmunds* analysis on Mr. Lee's state constitutional claim.

The Superior Court's opinion in this matter contradicts this Court's previous holdings which require courts to conduct an independent analysis to determine whether a Pennsylvania constitutional provision provides greater protection than an analogous federal constitutional provision with respect to the specific claim raised. *See* Pa. R.A.P. 1114(b)(2). The Superior Court failed to conduct this inquiry, despite Mr. Lee fully and extensively briefing each of the factors relevant to the analysis under *Commonwealth v. Edmunds*, 586 A.2d 887, 894 (Pa. 1991), *See* Brief for

Appellant, 33-52. Instead, the Superior Court relied solely on previous rulings that the Eighth Amendment and Art. I, § 13 of the Pennsylvania Constitution are coextensive, despite these rulings only addressing claims that are distinct from the claim raised by Mr. Lee. Appendix B, 9. This Court should intervene to ensure that its mandates are uniformly followed in lower courts and to evaluate Mr. Lee's claim under *Edmunds*.

Mr. Lee raises a challenge to the mandatory imposition of life imprisonment with no possibility of parole for his felony-murder conviction under the anti-cruelty provision of Art. I, § 13 of the Pennsylvania Constitution. This challenge is distinct from his claim under the Eighth Amendment to the federal constitution. Mr. Lee here argues that even if the Eighth Amendment does not prohibit his sentence, pursuant to the four-factor analysis laid out in *Edmunds*, the state constitutional provision provides greater protections than its federal counterpart and a lifetime prohibition on parole eligibility for a defendant who did not take a life nor intend to take a life is unconstitutional.

Even if a court has previously found that a state constitutional provision and its federal analog are coextensive with respect to certain claims, courts are not "absolved of the duty to independently review a properly presented state constitutional claim" seeking broader protection than the federal constitutional counterpart. *Commonwealth v. Baker*, 78 A.3d 1044, 1054 (Pa. 2013) (Castille, J.,

concurring). It is "important and necessary" to conduct this analysis "each time" a provision of the Pennsylvania Constitution is raised. *Edmunds,* 586 A.2d at 894-95. This Court has rejected the notion that a court need not conduct a separate state constitutional analysis where another court has previously decided that the state constitutional provision is co-extensive with an analogous federal provision in *Jubelirer v. Rendell*, 953 A.2d 514, 522 (Pa. 2008). Rather, the inquiry is specific to the claim arising under the Pennsylvania Constitution.

This Court has, in several cases, conducted an *Edmunds* factor analysis involving the same state and federal counterpart provisions to determine whether the state provision provides greater protections in a specific context or strand of jurisprudence involving those constitutional provisions. *See e.g. Edmunds*, 586 A.2d 887 (determining whether Pa. Const. Art. I, § 8 provided greater protection than the Fourth Amendment to the U.S. Constitution); *Commonwealth v. Alexander,* 243 A.3d 177 (Pa. 2020) (same); *Commonwealth v. Russo,* 934 A.2d 1199 (Pa. 2007) (same); *Commonwealth v. Glass,* 754 A.2d 655 (Pa. 2000) (same); *Commonwealth v. Cleckley,* 738 A.2d 427 (Pa. 1999) (same); *Commonwealth v. Matos,* 672 A.2d 769 (Pa. 1996) (same). In a directly analogous legal question to the question raised by Mr. Lee, this Court noted in *Commonwealth v. Batts* that although courts had previously decided that Art. I, § 13 is co-extensive with the Eighth Amendment in certain contexts, it had only done so in cases involving distinct legal and factual

questions. Thus, the Court conducted an *Edmunds* analysis with respect to the Article I, § 13 claim at issue. *Commonwealth v. Batts,* 66 A.3d 286, 297 n. 4 (Pa. 2013) (*Batts I)*. In a recent concurring opinion in *Commonwealth v. Felder*, 269 A.3d 1232 (Pa. 2022) (Donohue, J., concurring), Justice Donohue, joined by Justice Todd, recognized that claims premised on Art. I, § 13 providing greater protections than the Eighth Amendment remain viable. *Felder,* 269 A.2d at 1247-1251. Despite this Court ultimately deciding in *Batts I* that the state and federal constitutional provisions were co-extensive as to the question of whether the state constitution requires a categorical ban on the imposition of life-without-parole sentence on juvenile offenders, this ruling did not "foreclose a departure" from Eighth Amendment jurisprudence with respect to distinct questions implicating the same constitutional provisions. *Id.* at 1248. Accordingly, Mr. Lee's state constitutional challenge to his life-without-parole sentence for felony-murder must be assessed on its own terms under the *Edmunds* factors.

The fact that courts have previously found that a Pennsylvania constitutional provision is co-extensive with its federal counterpart in a particular context thus does not abrogate the need for courts to conduct a separate analysis under *Edmunds* when faced with a new claim arising under the same state constitutional provision. In keeping with this Court's guidance, Mr. Lee raised each of the *Edmunds* factors in

the trial court and in the Superior Court. *See* RR at 293a; Brief for Appellant, 33-52. Mr. Lee extensively briefed each of these factors.

Mr. Lee's state constitutional claim is based in jurisprudential developments in the U.S. Supreme Court and this Court related to the proper analytical framework for evaluating whether mandatory life-without-parole sentences are constitutional when applied to specific categories of offenders or offenses. As is discussed in detail *infra*, U.S. Supreme Court Eighth Amendment jurisprudence provides a baseline for assessing whether Mr. Lee's life-without-parole sentence is unconstitutional under Pennsylvania's "cruel punishments" clause. The U.S. Supreme Court's "categorical approach" seeks to assess whether a capital punishment or life-without-parole sentencing practice is excessive as applied to a category of offenders or offenses. *Graham v. Florida,* 560 U.S. 48, 60 (2010). Under this categorical approach, courts must first consider "'objective indicia of society's standards, as expressed in legislative enactments and state practice,' to determine whether there is a national consensus" rejecting the punishment as excessive. *Graham*, 560 U.S. at 61 (quoting *Roper v. Simmons*, 543 U.S. 551, 563 (2005)). Next, courts must assess whether the punishment is categorically disproportionate when comparing the culpability of the class of offenders with the severity of the punishment. *Id.* This assessment considers whether the sentencing practice serves legitimate penological interests. *Id.* at 67.

While this Court is not bound by federal constitutional jurisprudence in determining questions involving an analogous state constitutional provision, the categorical approach provides a useful baseline for interpreting Pennsylvania's cruel punishments clause in this context. At a minimum, Art. I, § 13 should be moored to its historical underpinnings as a protection against the most severe punishments being imposed unless "necessary to the public safety" while also adhering to "the duty of every government to endeavor to reform, rather than exterminate offenders." DIGEST OF THE LAWS OF PENNSYLVANIA 806 (John W. Purdon ed. 1831), 646–47 (John W. Purdon ed. 1831). A "cruel" punishment in this context is one which is "unduly harsh" or inflicts "excessive" or "unjust" suffering. John F. Stinneford, *The Original Meaning of "Cruel"*, 105 Geo. L.J. 441, 448, 464, 494 (2017). Pennsylvania's anti-cruelty provision requires a contemporary assessment of the proportionality between Mr. Lee's punishment and penological goals. Mr. Lee seeks a ruling that, pursuant to this analysis, his permanent exclusion from parole eligibility is unconstitutional under Pennsylvania's cruel punishments clause.[1] The specific constitutional claim raised by Mr. Lee has not previously been ruled upon by any court in this Commonwealth, to counsel's knowledge. Thus, an analysis under the factors set forth in *Edmunds* must be conducted.

[1] At a minimum, his case must be remanded for factual findings relevant to this inquiry. Mr. Lee raised this alternative form of relief in his appeal to the Superior Court after requesting an evidentiary hearing in the Court of Common Pleas.

Neither the trial court nor the Superior Court conducted this analysis, or even acknowledged Mr. Lee's arguments that the *Edmunds* factors must be addressed. The Superior Court cited to this Court's ruling in *Commonwealth v. Zettlemoyer,* 454 A.2d 937, 967 (Pa. 1982), and a Superior Court ruling in *Commonwealth v. Elia,* 83 A.3d 254, 267 (Pa. Super. 2013) for the proposition that the Eighth Amendment and Article I, Section 13 are coextensive. Appendix B, 9. However, as this Court has repeatedly recognized, courts *must* conduct an *Edmunds* analysis where a litigant asserts that the state constitution provides greater protection, fully briefs the *Edmunds* factors, and the specific factual and legal questions raised by the claim have not been previously ruled upon. Neither *Zettlemoyer* nor *Elia* address the specific claim raised by Mr. Lee that mandatory life-without-parole for felony-murder violates the anti-cruelty provision of the state constitution.[2] Nor has any court conducted an analysis under *Edmunds* to evaluate the claim raised by Mr. Lee.

As Mr. Lee briefed in the Superior Court, the four-factor analysis set forth in *Edmunds* weighs in favor of finding that Art. I, § 13 provides greater protection than the Eighth Amendment with respect to his claim. *Edmunds* requires courts to analyze: (1) the text of the Pennsylvania constitutional provision; (2) the history of

[2] *Zettlemoyer,* which was decided prior to this Court's ruling in *Edmunds,* rejected a claim that capital punishment is in itself violative of Pennsylvania's "cruel punishments" clause. *Zettlemoyer,* 454 A.2d at 967. In *Elia,* the Superior Court did not conduct an *Edmunds* analysis in rejecting a claim that Art. I, § 13 provided broader protections than the Eighth Amendment in the context of a mandatory minimum sentence imposed for an involuntary deviate sexual intercourse conviction. *Elia,* 83 A.3d at 267.

the provision, including Pennsylvania case law; (3) related case law from other states; and (4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence. *Edmunds*, 586 A.2d at 895.

i. *The Text of Pennsylvania's Constitution*

First, the text of Article I, § 13 of the Pennsylvania Constitution differs from the Eighth Amendment in that it prohibits "cruel punishments," rather than "cruel and unusual punishments." *See Baker*, 78 A.3d at 1054–55 (Castille, J., concurring) (recognizing textual distinctions between state prohibition on cruel punishments and federal prohibition against cruel and unusual punishment as providing potential basis for determining that Pennsylvania Constitution provides greater protection). The textual difference is not trivial, and finding that the difference is substantive would bring Pennsylvania in line with several other states.

Interpreting Pennsylvania's anti-cruelty provision as coextensive with the Eighth Amendment would thus, among other things, render the federal language as "mere surplusage." *See Harmelin v. Michigan*, 501 U.S. 957, 967 (1991) (noting the difference between "cruel" and "unusual" in the federal Constitution). The "and unusual" language that is included in the federal Constitution and not in the state Constitution, however, is not "mere surplusage." The word unusual in the context of

the Eighth Amendment historically connoted a punishment that was in "long usage" or "immemorial usage." John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment As A Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739, 1745 (2008) (internal citations omitted). The late Justice Scalia advanced this understanding of the constitutional meaning of "unusual" as well in his concurrence in *Harmelin*, 501 U.S. at 966-75. Scalia explained, "A requirement that punishment not be 'unusual' . . . was primarily a requirement that judges pronouncing sentence remain within the bounds of common-law tradition." *Id.* at 974. More recently, this understanding of the constitutional meaning of "unusual" was recognized in a majority opinion authored by Justice Gorsuch that approvingly cited Stinneford's scholarship on the subject. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019) (citing Stinneford, *The Original Meaning of "Unusual"*, for the observation "that Americans in the late 18th and early 19th centuries described as "unusual" governmental actions that had "fall[en] completely out of usage for a long period of time"). Understood in this light, Pennsylvania's omission of this meaningful and purposive term must be understood as substantive, broadening the anti-cruelty prohibition in the state Constitution by leaving it unencumbered with a requirement that a challenged punishment be contrary to the common law. Instead, Pennsylvania's Constitution permits challenges to punishments that have been

imposed continuously over a long duration of time if there is a basis for determining that they are "cruel" in a constitutional sense.

ii. *The History of Art. I, § 13*

Second, the history of Article I, § 13 shows that it was intended to prohibit punishments that are not necessary to further rehabilitative and deterrent goals.[3] Severe punishments which are not necessary to public safety are excessive and unjust. Nothing in the history of Art. 1, § 13 limits its protection to the scope of the Eighth Amendment. The Pennsylvania state constitution is not modeled after the federal constitution, and states are only obligated to treat federal standards as baseline protections. *See Edmunds*, at 896; *Baker*, 78 A.3d 1044, 1054.

Historical sources "are remarkably consistent in interpreting a cruel punishment as one whose effects are unduly harsh, not as one imposed with a cruel intent." John F. Stinneford, *The Original Meaning of "Cruel"*, 105 Geo. L.J. 441, 473-74 (2017). A punishment that is "unduly harsh" is one that inflicts "excessive" or "unjust" "suffering." *Id*. at 448, 464, 494. Understood in this light, Pennsylvania's anti-cruelty provision establishes that it is unconstitutional to subject a person to a punishment that causes "unjust suffering." Comments by the architects of the 1790

[3] Kevin Bendesky, "The Key-Stone to the Arch": Unlocking Section 13's Original Meaning, forthcoming in University of Pennsylvania Journal of Constitutional Law, Vol. 26, No. __, 2023 (finding that the original meaning of Pennsylvania state constitution's prohibition on cruel punishments applied to proscribe any punishment that exceeded that which furthered "deterrence and reformation."). Accessed at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4457030.

Pennsylvania constitution and the criminal justice laws of that time are consonant with this understanding of cruelty, and establish that whether a punishment was "unjust" or "excessive" or "cruel" was to be determined by considering its necessity for rehabilitation and deterrence.

Pennsylvania criminal law from the era of the 1790 Constitution reinforces the Commonwealth's longstanding historical commitment to rehabilitation and public safety. That the law's most severe punishments should not be meted out unless "absolutely necessary to the public safety" was explicitly proclaimed in the preamble to a 1794 law restricting capital punishment to first-degree murder, which was a substantial reform and limitation on the death penalty at the time: "whereas it is the duty of every government to endeavor to reform, rather than exterminate offenders, and the punishment of death ought never to be inflicted, where it is not absolutely necessary to the public safety." DIGEST OF THE LAWS OF PENNSYLVANIA 806 (John W. Purdon ed. 1831), 646–47 (John W. Purdon ed. 1831). Thomas Mifflin, the state's first governor and chairman of the 1790 constitutional convention endorsed these principles in addressing the legislature in 1794: "every punishment, which is not absolutely necessary for [deterrence], is an act of tyranny and cruelty." JOURNAL OF THE SENATE OF PENNSYLVANIA (Dec. 8, 1792).

iii. *Related State Law*

Third, other states with similar anti-cruel punishments provisions have interpreted their constitutional standards to be distinct from the Eighth Amendment. Washington, California, Florida, Minnesota, and Michigan state courts have all recognized that the differences in language cannot be ignored in interpreting the extent of the protections provided.

In Washington state, which has an anti-cruelty constitutional provision that is textually identical to Article I, Sec. 13 of the Pennsylvania Constitution, the state's Supreme Court specifically acknowledged that its constitutional provision ought to provide greater protection than the Eighth Amendment "because it prohibits conduct that is merely cruel; it does not require that the conduct be both cruel and unusual." *State v. Bassett*, 482 P.3d 343, 349 (Wash. 2018) (quoting *State v. Dodd*, 120 Wn.2d 1, 21 (1992)).

Other state courts have made similar distinctions, characterizing the difference between their state constitution's "cruel *or* unusual" language and the federal constitution's "cruel *and* unusual" as a substantive distinction. *See People v. Carmony* 26 Cal. Rptr. 3d 365, 378 (Cal. 2005) (referring to the distinction as "purposeful and substantive rather than merely semantic"); *Armstrong v. Harris*, 773 So.2d 7, 17 (Fla. 2000) (deciding that, within its state constitutional provision, "cruel" and "unusual" were to be defined "individually and disjunctively"); *State v.*

Mitchell 577 N.W.2d 481, 488 (Minn. 1998) (referring to the textual difference as "not trivial"); *People v. Bullock*, 485 N.W.2d 866, 872 (Mich. 1992) (stating that the "textual difference does not appear to be accidental or inadvertent").

iv. Policy Considerations Unique to Pennsylvania

Fourth, Pennsylvania-specific policy considerations weigh strongly in favor of interpreting Article I, § 13 to provide greater protection than the Eighth Amendment in the context of this case. Pennsylvania is an extreme outlier both nationally and globally in sentencing people to die in prison, particularly when convicted of felony-murder. Pennsylvania stands virtually alone in mandating that anyone convicted of felony-murder is sentenced to life imprisonment with no possibility of parole. The overwhelming majority of states do not mandate life imprisonment with no opportunity for parole for felony-murder. In total, thirty states do not sentence people to life-without-parole where the person has not killed or intended to kill.[4] Nearly every state that does authorize life-without-parole for

[4] Nineteen states do not make life imprisonment with no opportunity for parole an authorized sentence for felony-murder. *See* Ala. Code §§ 13A-6-2; 13A-5-6; Alaska Stat. §§ 12.55.125; 11.41.110; Colo. Rev. Stat. Ann. §§ 18-3-103 & 18-1.3-40; Conn. Gen. Stat. § 53a-35a; Ind. Code Ann. § 35-42-1-1; Kan. Stat. Ann. §§ 21-5402; 21-6620; Me. Stat. tit. 17-A, §§ 202 & 1604; Minn. Stat. § 609.19; Miss. Code Ann. §§ 97-3-19 & 97-3-21; Mo. Ann. Stat. § 565.021; N.J. Stat. Ann. § 2C:11-3; N.Y. Penal Law §§ 125.25 & 70.00; Ohio Rev. Code Ann. § 2903.02 & 2929.02; Or. Rev. Stat. Ann. § 163.115; 11 R.I. Gen. Laws Ann. §§ 11-23-1 & 11-23-2; Tex. Penal Code Ann. §§ 19.02 & 12.32; Utah Code Ann. § 76-5-203; Va. Code Ann. § 18.2-10 & 18.2-32–18.2-33; Wis. Stat. Ann. § 940.03.

Seven states have effectively abolished the felony-murder doctrine, while four states permit life-without-parole sentences only on proof that the offender either took a life or with recklessness

felony-murder requires an additional level of intent or action by the defendant in order to potentially permit a life-without-parole sentence. Only Pennsylvania and Louisiana mandate life-without-parole for felony-murder regardless of a person's level of intent or participation in the offense. *See* La. Stat. Ann. § 14:30.1 (2021).

Current trends also show a strong disfavor of mandatory permanent incarceration for felony-murder. California,[5] Massachusetts,[6] and Colorado[7] are among the states that have seen recent limitations. Globally, few countries impose life-without-parole punishments for felony-murder – an offense which has either been abolished altogether or was never adopted in other common law countries aside from the United States.[8]

This sentencing practice reflects substantial racial bias and has contributed to the creation of a growing aging and elderly population in prison that poses virtually no public safety risk at great cost to the state and the lives of those incarcerated. In Pennsylvania, over 70 percent of people who have been sentenced to die in prison

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that another person would die. *See* PAUL H. ROBINSON & TYLER SCOT WILLIAMS, MAPPING AMERICAN CRIMINAL LAW: CH. 5 FELONY-MURDER RULE 2-4 (2017).

[5] *See In re Bennett*, 26 Cal. App. 5th 1002 (Ca. 2018) (requiring reckless indifference to loss of human life). California subsequently reformed its felony-murder rule to apply retroactively and allow those who did not intend to kill and did not act with at least reckless indifference to human life in the killing itself to seek resentencing. S.B. 775, 2021-2022 Reg. Sess. (Cal. 2021).
[6] *See Commonwealth v. Concepcion*, 487 Mass. 77 (Ma. 2021) (requiring proof of malice).
[7] *See* Nazgol Ghandnoosh, Emma Stammen, & Connie Budaci, The Sentencing Project, Felony Murder: An On-Ramp for Extreme Sentencing 16 (2022) (noting Colorado bill eliminating mandatory life-without-parole for felony-murder).
[8] Abbie VanSickle, *If He Didn't Kill Anyone, Why Is It Murder?*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/us/california-felony-murder.html.

for a death they had no intention to cause—and that was, in fact, caused by another person—are Black.[9] Meanwhile, Black people make up only 11 percent of the population.[10] Felony-murder can cover such a wide range of culpability that prosecutors can justify bringing or dropping the charge according to their preference. *Id.* Additionally, research shows that for lower-culpability crimes like felony-murder, where sentences are variable and discretionary, racial bias plays a greater role. Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. Rev. 2031, 2081 (2010).

Like the U.S. prison population generally, the population of people serving life imprisonment with no opportunity for parole in Pennsylvania is also aging or elderly.[11] Criminologists have long found that a person's involvement in crime correlates strongly to age, and that older incarcerated people pose little public safety risk.[12] Social science research shows that older individuals who have been released

[9] *See* Andrea Lindsay & Clara Rawlings, Philadelphia Lawyers for Social Equity, *Life Without Parole for Second-Degree Murder in Pennsylvania: An Objective Assessment of Race* (2021).
[10] Carrie Johnson, *Life-without-parole For 'Felony Murder': Pa. Case Targets Sentencing Law*, NPR (Feb. 4, 2021), https://www.npr.org/2021/02/04/963147433/life-without-parole-for-felony-murder-pa-case-targets-sentencing-law.
[11] *See e.g.* Joshua Vaughn, "What Does Death By Incarceration Look Like in Pennsylvania? These Elderly, Disabled Men Housed in a State Prison," The Appeal (Nov. 20, 2019) https://theappeal.org/death-by-incarceration-pennsylvania-photo-essay/.
[12] Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, The Sentencing Project (November 5, 2018) https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment/.

from prison, including those convicted of homicide-related or other serious offences, have extremely low recidivism rates,[13] and that people tend to "age out" of crime in their 30s and 40s, including those who have committed violent or more serious offenses.[14]

The aging population of people sentenced to life imprisonment with no possibility of parole in Pennsylvania also presents serious and costly public health concerns, which have become particularly and painfully obvious in the era of COVID-19. Many incarcerated people have physiological ages that are at least ten to 15 years older than their actual age, and the term "elderly" often refers to someone between 50-55 years of age in prisons.[15] Poor health conditions, exacerbated by the conditions of incarceration, put the aging prison population at high risk of serious or fatal infections and diseases.[16]

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[13] Elizabeth Gaynes et al., *The High Costs of Low Risk: the Crisis of America's Aging Prison Population*, The Osborne Association at 18 (May 2018) https://www.osborneny.org/assets/files/Osborne_HighCostsofLowRisk.pdf.

[14] *See e.g.* Dana Goldstein, "Too Old to Commit Crime?", N.Y. Times (Mar. 20, 2015) https://www.nytimes.com/2015/03/22/sunday-review/too-old-to-commit-crime.html.

[15] *See* Meredith Greene et al., "Older Adults in Jail: High Rates and Early Onset of Geriatric Conditions," 6:3 Health & Justice at 1, 4–5 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5816733/pdf/40352_2018_Article_62.pdf.

[16] *See* Rachel E Lopez et al., Pandemic in PA Prisons (2020), https://www.drexel.edu/~/media/Files/law/academics/clinical/clc/CLC-pandemic-pa-prisons-report.ashx?la=en; U.S. Gov. Accountability Office, BlogWatch, COVID-19 Potential Impact on Prisons' Population & Health Care Costs, May 13, 2020, https://blog.gao.gov/2020/05/13/covid-19-potential-impact-on-prisons-populations-and-health-care-costs/.

The specialized medical care needs of the aging prison population also account for a highly disproportionate portion of prison expenditures.[17] Pennsylvania, for example, spends an estimated $66,000 a year to incarcerate an older person.[18] Yet, the specialized needs of an increasing aging prison population have grown past the prison system's capability to provide effective and humane care.[19]

This Court should grant Mr. Lee's Petition in keeping with its command that courts conduct an *Edmunds* analysis when properly raised by a litigant and, for the first time, address Mr. Lee's arguments under that analysis.

b. Mr. Lee's Petition presents questions of first impression and involves the constitutionality of state statutes as to whether his mandatory sentence of life imprisonment with no possibility of parole is unconstitutional under recent developments in sentencing jurisprudence

This Court should grant Mr. Lee's Petition so that it can address two other compelling reasons for granting allowance of appeal. First, Mr. Lee's Petition raises a question of first impression as to the proper analytical framework for evaluating claims that a mandatory life-without-parole punishment is unconstitutional when applied to a certain class of offenders or offenses. Pa. RAP 1114(b)(3). Second, this

[17] *See* "At America's Expense: The Mass Incarceration of the Elderly," ACLU 26–29 (2012), https://www.aclu.org/sites/default/files/field_document/elderlyprisonreport_20120613_1.pdf.
[18] Ashley Nellis, "Pennsylvania Is Poised for Much-needed Criminal Justice Reform, but Can We Abolish Life-without-parole?", Philadelphia Inquirer (Jan. 28, 2019) https://www.inquirer.com/opinion/commentary/pennsylvania-incarceration-life-without-parole-prison-sentencing-20190128.html.
[19] *See* fn.7, *supra* at 22.

question involves the constitutionality of state statutes dictating that any person convicted of felony-murder be sentenced to life imprisonment and forbidding the parole board from considering anyone sentenced to life imprisonment for release on parole. Pa. RAP 1114(b)(5).

The Pennsylvania Crimes Code mandates that judges impose a sentence of life imprisonment upon conviction for second-degree murder under 18 Pa.C.S. § 1102(b). Every person sentenced to life imprisonment is denied any opportunity to be considered for parole pursuant to 61 Pa.C.S. § 6137(a). In tandem, these statutes are unconstitutional as applied to Mr. Lee, who was convicted of felony-murder and did not take a life or intend to take a life. *See e.g Batts I,* 66 A.3d at 295-296 (it is only the interaction between sentencing code and parole code that renders a sentence of "life imprisonment" a life-without-parole punishment). In *Batts I,* this Court determined that the portions of the parole code that prohibit people serving life sentences for crimes committed as juveniles from consideration for parole are severable from the sentencing statute, thus trial courts may impose a minimum term-of-years sentence after which a defendant will become parole-eligible with a maximum of life imprisonment. *Id.* at 294-97. This Court should grant allowance of appeal and issue a similar ruling with respect to Mr. Lee's sentence.

In the trial court and on appeal in the Superior Court, Mr. Lee argued that the proper analytical framework for assessing whether his punishment is

unconstitutional under the state or federal constitution is the "categorical approach" set forth by the United States Supreme Court when assessing the proportionality of the harshest punishments under the Eighth Amendment. The Eighth Amendment to the U.S. Constitution prohibits "cruel and unusual punishments." U.S. Const. Amend. XIII. Article I, Section 13 of the Pennsylvania Constitution prohibits "cruel punishments." Pa. Const. Art. I § 13. Under the U.S. Supreme Court's Eighth Amendment jurisprudence, the Court has set forth two distinct lines of analysis to determine whether a sentencing practice is disproportionate and therefore violates the Eighth Amendment.

Under one analytical framework, courts assess whether a term-of-years sentence is grossly disproportionate to the offense. *Lockyer v. Andrade,* 538 U.S. 63, 72 (2003) ("A gross disproportionality principle is applicable to sentences for terms of years"). Under the second analytical framework, which controls in this case, courts assess whether a capital punishment or life-without-parole sentencing practice is excessive as applied to a category of offenders or offenses. *Graham,* 560 U.S. at 60. Since the U.S. Supreme Court determined that this categorical approach applies to sentences of life-without-parole, this Court has never undertaken an analysis of whether the categorical approach must also apply to people, like Mr. Lee, who were convicted of felony-murder and mandatorily-sentenced to life imprisonment with no possibility of parole. Consistent application of precedent compels application of the

categorical approach to this particular life-without-parole sentencing practice, which as a strict rule is applied to an entire category of offenders in Pennsylvania. Accordingly, this Court has also never assessed whether, under the categorical approach, mandatory life-without-parole sentences are unconstitutional when imposed on people who did not take a life or intend to take a life.

The U.S. Supreme Court's rulings in *Graham, Miller v. Alabama,* and *Montgomery v. Louisiana* provide the proper analytical framework for Mr. Lee's claims under the state and federal constitutions. In those rulings, the Court held that life-without-parole sentences are sufficiently similar to the death penalty to warrant application of its categorical approach to assessing the constitutionality of the sentence. *See Graham,* 560 U.S. at 69; *Miller,* 567 U.S. at 474-75. The Court applied this analysis to categories of offenses and offenders that it had previously identified in its death penalty jurisprudence as categorically less culpable in order to find that the life-without-parole punishments at issue were unconstitutional. In *Graham,* the Court held that life-without-parole was unconstitutional when imposed on the category of children who were convicted of non-homicide offenses. *Graham,* 560 U.S. at 69. In *Miller,* the court held that mandatory life-without-parole was unconstitutional when applied to the category of children. 560 U.S. at 479. These rulings established that the Court's jurisprudence prohibiting the harshest punishments for categories of offenders with diminished culpability are applicable

when someone is sentenced to life imprisonment with no meaningful opportunity for release. Similar to the defendants in *Graham, Miller,* and *Montgomery,* Mr. Lee also belongs to a category of diminished culpability that the Court has held is categorically less culpable and therefore less deserving of the harshest punishments: people convicted of felony-murder who did not kill or intend to kill. *See Enmund v. Florida,* 458 U.S. 782 (1982).

In *Enmund,* the U.S. Supreme Court held that the death penalty is unconstitutional when imposed on the category of people convicted of felony-murder who did not kill or intend to kill. 458 U.S. at 797. The Court reasoned that robbery is not "'so grievous an affront to humanity that the only adequate response may be ... death'." *Id.* (quoting *Gregg v. Georgia,* 428 U.S. 153, 184 (1976)). The Court emphasized that the focus on determining whether the penalty was proportionate must be on the culpability of the defendant, "not that of those who committed the robbery and shot the victims." *Id.* at 798. The defendant's specific intent is critical to the degree of criminal culpability, and therefore to the proportionality of a punishment. *Id.* at 800. Defendants who do not kill, attempt to kill, or intend to kill are therefore less morally culpable than those who do, and are therefore less deserving of the most severe punishments.

The *Graham* Court recognized that "life-without-parole sentences share some characteristics with death sentences that are shared by no other sentences." *Graham,*

560 U.S. at 69. Like the death penalty, life imprisonment with no opportunity for parole alters "the offender's life by a forfeiture that is irrevocable" and deprives them "of the most basic liberties." *Id.* at 69-70. Like the death penalty, life-without-parole denies all hope and possibility of redemption. *Id.* at 70. The Court expanded on this line of analysis in *Miller*. The Court reasoned 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. *Montgomery* clarified that *Miller* did not merely pronounce a procedural rule that required individualized sentencing, but that it forbade life-without-parole for a category of offenders – namely, children whose offenses "reflect[] unfortunate yet transient immaturity." *Montgomery*, 577 U.S. at 208. *Montgomery* thus emphasized the Court's categorical approach to evaluating the constitutionality of life-without-parole sentences.

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

at 67. This analysis further requires the Court to consider "whether the challenged sentencing practice serves legitimate penological goals." *Id*.

Neither the trial court nor the Superior Court conducted this analysis. In affirming Mr. Lee's judgment of sentence, the Superior Court panel reasoned that it was bound by a prior decision of the Superior Court, which found that life-without-parole for felony-murder was constitutional under the "grossly disproportionate" line of jurisprudence. Appendix B, 6 (citing *Commonwealth v. Rivera,* 238 A.3d 482 (Pa. Super. 2020). The court further noted that *Graham*, *Miller*, and *Montgomery* all dealt with juveniles, rather than adults, a distinction that conflated the rationale for application of the categorical approach to the most severe punishments with the substantive assessment of whether children had diminished culpability pursuant to that categorical approach. *Id.* at 7. While *Graham, Miller,* and *Montgomery* all dealt with the diminished culpability of children, people who did not kill or intend to kill are another category of diminished culpability under the Court's Eighth Amendment jurisprudence. The analytical framework underlying those decisions involving children applies equally to other categories of diminished culpability identified by the Court in this strand of jurisprudence.

With respect to Mr. Lee's claim under the Pennsylvania Constitution, the court relied on its previous ruling in *Commonwealth v. Henkel,* 938 A.2d 433 (Pa. Super. 2007). The *Henkel* court summarily rejected a claim that life imprisonment as

punishment for felony-murder is unconstitutional under both the U.S. and Pennsylvania Constitutions. *Id.* at 446-47. The *Henkel* court noted that, in 1983, the Superior Court rejected a claim that life imprisonment for second-degree murder was unconstitutional. *Id.* at 446 (citing *Commonwealth v. Middleton*, 467 A.2d 841 (Pa. Super. 1983)). The entirety of the *Henkel* court's reasoning in rejecting the appellants' state and federal constitutional claims reads, "Henkel and Lischner give us no reason to revisit this precedent aside from a bald allegation that their sentences 'seem to constitute cruel and unusual punishment' and are '*arguably* disproportionate'." *Id.* at 447 (emphasis in original). Unlike the appellants in *Henkel*¸ Mr. Lee has developed a robust analysis for his state constitutional claim under both the factors laid set forth in *Edmunds* and the standard for assessing whether his punishment violates the Pennsylvania Constitution's anti-cruelty provision.

Permanent incarceration for Mr. Lee's offense of conviction represents a quintessential "mismatch" between his culpability and the severity of the punishment. As discussed in detail *supra*, "objective indicia" unequivocally demonstrates that Pennsylvania is a national and global outlier in imposing mandatory life-without-parole for every felony-murder conviction, and thus runs afoul of the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

Likewise, the severity of the punishment does not match the culpability of the category of offense. The *mens rea* required to be convicted of second-degree murder is merely the intent to engage in the underlying felony. *Id*; *Commonwealth v. Tarver*, 493 Pa. 320, 328 (Pa. 1981) ("the malice necessary to make a killing, even an accidental one, murder, is constructively inferred from the malice incident to the perpetration of the initial felony."). In other words, a defendant does not need to have caused the death of another person or have any intent to kill another in order to be convicted of second-degree murder. This "artificially constructed kind of intent" does not count as intent for purposes of sentencing jurisprudence. *Miller*, 567 U.S. at 491 (Breyer, J. concurring). Life-without-parole is akin to the death penalty in severity, as both require a forfeiture that is irrevocable. *Graham*, 560 U.S. at 69.

Life imprisonment with no possibility of parole serves no legitimate penological purpose when imposed on people who did not kill or intend to kill. There is a longstanding consensus among experts that longer, harsher sentences do not increase the deterrent effect of a penalty, no matter the offense. *See, e.g.*, Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24(2) Oxford J. of Legal Studies 173 (2004). At a minimum, for deterrence to have any effect, individuals must be aware of the penalty associated with their contemplated criminal act. Since felony-murder punishes a person for an act which

they did not intend and which another person committed, this basic requirement cannot be satisfied.

Incapacitation cannot serve as a sufficient justification. In addition to imputing accountability for the actions of another onto people convicted of felony-murder, permanent incarceration for felony-murder does not increase public safety. As people age, their likelihood of engaging in antisocial behavior—especially violence—plummets. People convicted of homicide offenses are similarly unlikely to engage in antisocial behavior after their release from prison, and are significantly less likely than people convicted of other offenses to recidivate. *See e.g.* James Austin & Lauren-Brooke Eisen, *How Many Americans are Unnecessarily Incarcerated?*, Brennan Institute for Justice at 36 (2016); Ashley Nellis, *Throwing Away the Key*, 23(1) Fed. Sent. R. 28 (2010).

These findings have been borne out in Pennsylvania and across the country. In Pennsylvania, between 1933-2005, only 2.5% of people who were released after their life sentences were commuted were ever re-incarcerated for a new criminal conviction on any offense.[20] An even more recent study of 269 people from Philadelphia who were formerly sentenced to life imprisonment with no possibility

[20] *See* Advisory Committee on Geriatric and Seriously Ill Inmates, Joint State Government Committee of the General Assembly of the Commonwealth of Pennsylvania, A Report of the Advisory Committee on Geriatric and Seriously Ill Inmates at 77 (2005).

of parole for homicide offenses committed when they were juveniles found that, of the 174 who had been released, the recidivism rate was only 1.14% (defined as reconviction for any offense).[21]

Retribution and rehabilitation are also not served by mandatory life-without-parole for felony-murder. Life sentences with no possibility of parole for those who did not kill or intend to kill are disproportionate according to retributivist logic as well, evidenced by the fact that this penalty is identical to that imposed on approximately 3,500 people convicted of first-degree murder in Pennsylvania.[22] Retribution, the penological concept of punishment in proportion to the severity of the criminal act committed, manifests as vengeance without principle in Mr. Lee's case, since the punishment is identical to that imposed on people whose culpability is greater under the Eighth Amendment. Furthermore, life-without-parole "forswears altogether the rehabilitative ideal." *Graham*, 560 U.S. at 74. Permanent punishment, by its very nature, rejects rehabilitation as a penological goal. Regardless of Mr. Lee's future conduct, he will not be provided a meaningful opportunity for release from prison.

[21] Tarika Daftary-Kapur, Ph.D. & Tina M. Zottoli, Ph.D., *Resentencing of Juvenile Lifers: The Philadelphia Experience* (April 30, 2020) https://www.montclair.edu/newscenter/2020/04/30/new-study-finds-1-recidivism-rate-among-released-philly-juvenile-lifers/.

[22] Pennsylvania Department of Corrections, 2021 Annual Statistical Report 21 Table 21 (2022).

In recent years, the constitutionality of mandating permanent incarceration for felony-murder has come under greater scrutiny, both in the general public and in the courts. Judge Dubow's concurrence in Mr. Lee's Superior Court appeal is indicative of this sentiment. Judge Dubow specifically urged this Court to "revisit" the constitutionality of this punishment under the Pennsylvania Constitution. Appendix C, 1-2. This issue is ripe for this Court to address, both as a question of first impression and as one involving the constitutionality of state statutes. Granting allowance of appeal is necessary in order to decide momentous questions of first impression and to give effect to vital constitutional rights.

c. The questions presented are of the utmost public importance and require a prompt and definitive resolution

Mr. Lee's Petition presents claims that seek to vindicate his fundamental right to be free from cruel punishments in a state which is a national and global outlier in both the severity and frequency with which it imposes that punishment. This Court must address and remedy the continued infliction of permanent incarceration on people who did not take a life or intend to take a life. Pa. RAP 1114(b)(4).

As discussed in detail *supra*, there are numerous policy-based reasons for striking down Mr. Lee's sentence as unconstitutional. These points are relevant to the legal analysis for determining the bounds of Pennsylvania's anti-cruelty provision and the propriety of Mr. Lee's sentence, but also underscore the critical importance of this

issue and the necessity of this Court granting allowance of appeal. Pennsylvania's "cruel punishments" clause is grounded in a requirement that the government may not punish more than is necessary for public safety and has a duty to rehabilitate, rather than eradicate, its citizens. It should – and must – be read to reflect a respect for the basic human dignity of all people to be capable of change and be free from the infliction of unnecessary suffering.

Mr. Lee is one of over 1,000 people in Pennsylvania who are being permanently excluded from their communities and denied a right to redemption due to a conviction for an offense that did not require them to take a life or intend to take a life. Pennsylvania stands virtually alone in both the manner and frequency of imposing this punishment. It is one of only two U.S. states that mandate life-without-parole punishments for felony-murder regardless of a person's intent, or lack thereof, and level of participation in the crime. The staggering racial bias in felony-murder conviction rates in Pennsylvania provides further reason to view this issue urgently. This Court has an opportunity to bring Pennsylvania more in line with contemporary standards and begin to redress some of the harms caused by an ethos that seeks to exclude and punish, rather than repair and redeem.

No court has yet ruled on the merits of Mr. Lee's specific claims as to why his punishment is unconstitutional. This Court should grant his Petition and squarely address his claims.

V. CONCLUSION

For these reasons, the Petition for Allowance of Appeal should be granted.

Respectfully submitted,

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**Application for admission pro hac vice forthcoming*

Certificate of Compliance – Length of Petition

I hereby certify that the foregoing Brief of Appellant consists of 8,652 words based on the word count function of the word processor that this brief was prepared on, excluding the title page, table of contents, table of citations, signature blocks, and appendices, and thus complies with the requirement of Pennsylvania Rule of Appellate Procedure 1115(f) that petitions for allowance of appeal shall not exceed 9,000 words.

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Certificate of Compliance – Public Access Policy

I certify that this Petition for Allowance of Appeal 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 13th day of July, 2023, I caused the foregoing Petition for Allowance of Appeal to be served on the District Attorney of Allegheny County by electronic filing at the following:

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APPENDIX A

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

VS.

DEREK LEE,
DEFENDANT

CRIMINAL DIVISION

CP-02-CR-0016878-2014

OPINION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

BY THE COURT:

, J.
ELLIOT C. HOWSIE

APPENDIX B

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT OP 65.37

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

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

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

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

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

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

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

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* Retired Senior Judge assigned to the Superior Court.

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

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

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

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

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

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

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

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

Appellant's Brief at 2.

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

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

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

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

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

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

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

Appellant's Brief at 14-15.

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

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

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

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

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

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

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

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

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

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

Appellant's Brief at 52.

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

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

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

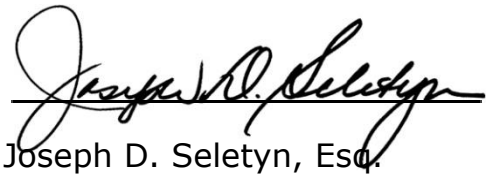
Further, as the Pennsylvania Supreme Court expressly held, "the rights secured by the Pennsylvania prohibition against 'cruel punishments' are co-extensive with those secured by the Eighth and Fourteenth Amendments." ***Commonwealth v. Zettlemoyer***, 454 A.2d 937, 967 (Pa. 1982), *overruled on other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

Judgment of sentence affirmed. Jurisdiction relinquished.

Judge Colins joins this Memorandum.

Judge Dubow files a Concurring Memorandum.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/13/2023

APPENDIX C

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

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

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

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

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

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

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

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* Retired Senior Judge assigned to the Superior Court.

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

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

APPENDIX D

APPENDIX D

Statutes

18 Pa.C.S. § 1102(b)

...

(b) Second degree.-- Except as provided under section 1102.1, 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.

61 Pa.C.S. § 6137(a)

(a)General criteria for parole.--(1) The board may parole subject to consideration of guidelines established under 42 Pa.C.S. § 2154.5 (relating to adoption of guidelines for parole) or subject to section 6137.1 (relating to short sentence parole) and such information developed by or furnished to the board under section 6174 (relating to right of access to offenders), or both, and may release on parole any offender to whom the power to parole is granted to the board by this chapter, except an offender condemned to death or serving life imprisonment, whenever in its opinion:

...

Ala. Code §13A-6-2; 13A-5-6

13A-6-2

(a) A person commits the crime of murder if he or she does any of the following:

(1) With intent to cause the death of another person, he or she causes the death of that person or of another person.

(2) Under circumstances manifesting extreme indifference to human life, he or she recklessly engages in conduct which creates a grave risk of death to a person other than himself or herself, and thereby causes the death of another person.

(3) He or she commits or attempts to commit arson in the first degree, burglary in the first or second degree, escape in the first degree, kidnapping in the first degree, rape in the first degree, robbery in any degree, sodomy in the first degree, aggravated child abuse under Section 26-15-3.1, or any other felony clearly dangerous to human life and, in the course of and in furtherance of the crime that he or she is committing or attempting to commit, or in immediate flight therefrom, he or she, or another participant if there be any, causes the death of any person.

(4) He or she commits the crime of arson and a qualified governmental or volunteer firefighter or other public safety officer dies while performing his or her duty resulting from the arson.

(b) A person does not commit murder under subdivisions (a)(1) or (a)(2) of this section if he or she was moved to act by a sudden heat of passion caused by provocation recognized by law, and before there had been a reasonable time for the passion to cool and for reason to reassert itself. The burden of injecting the issue of killing under legal provocation is on the defendant, but this does not shift the burden of proof. This subsection does not apply to a prosecution for, or preclude a conviction of, manslaughter or other crime.

(c) Murder is a Class A felony; provided, that the punishment for murder or any offense committed under aggravated circumstances by a person 18 years of age or older, as provided by Article 2 of Chapter 5 of this title, is death or life imprisonment without parole, which punishment shall be determined and fixed as provided by Article 2 of Chapter 5 of this title or any amendments thereto. The punishment for murder or any offense committed under aggravated circumstances by a person under the age of 18 years, as provided by Article 2 of Chapter 5, is either life imprisonment without parole, or life, which punishment shall be determined and fixed as provided by Article 2 of Chapter 5 of this title or any amendments thereto and the applicable Alabama Rules of Criminal Procedure.

If the defendant is sentenced to life on a capital offense, the defendant must serve a minimum of 30 years, day for day, prior to first consideration of parole.

13A-5-6

(a) Sentences for felonies shall be for a definite term of imprisonment, which imprisonment includes hard labor, within the following limitations:

(1) For a Class A felony, for life or not more than 99 years or less than 10 years.

...

Alaska Stat. §12.55.125

...

(b) A defendant convicted of attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, kidnapping, or misconduct involving a controlled substance in the first degree shall be sentenced to a definite term of imprisonment of at least five years but not more than 99 years. A defendant convicted of murder in the second degree or murder of an unborn child under AS 11.41.150(a)(2)--(4) shall be sentenced to a definite term of imprisonment of at least 15 years but not more than 99 years. A defendant convicted of murder in the second degree shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years when the defendant is convicted of the murder of a child under 16 years of age and the court finds by clear and convincing evidence that the defendant (1) was a natural parent, a stepparent, an adoptive parent, a legal guardian, or a person occupying a position of authority in relation to the child; or (2) caused the death of the child by committing a crime against a person under AS 11.41.200--11.41.530. In this subsection, “legal guardian” and “position of authority” have the meanings given in AS 11.41.470.

...

Alaska Stat §11.41.110

(a) A person commits the crime of murder in the second degree if

...

(3) under circumstances not amounting to murder in the first degree under AS 11.41.100(a)(3), while acting either alone or with one or more persons, the person commits or attempts to commit arson in the first degree, kidnapping, sexual assault

in the first degree, sexual assault in the second degree, sexual abuse of a minor in the first degree, sexual abuse of a minor in the second degree, burglary in the first degree, escape in the first or second degree, robbery in any degree, or misconduct involving a controlled substance under AS 11.71.010(a), 11.71.021(a), 11.71.030(a)(2) or (9), or 11.71.040(a)(1) or (2) and, in the course of or in furtherance of that crime or in immediate flight from that crime, any person causes the death of a person other than one of the participants;

...

Colo. Rev. Stat. Ann. § 18-3-103

(1) A person commits the crime of murder in the second degree if:

(a) The person knowingly causes the death of a person; or

(b) Acting either alone or with one or more persons, he or she commits or attempts to commit felony arson, robbery, burglary, kidnapping, sexual assault as prohibited by section 18-3-402, sexual assault in the first or second degree as prohibited by section 18-3-402 or 18-3-403, as those sections existed prior to July 1, 2000, or a class 3 felony for sexual assault on a child as provided in section 18-3-405(2), or the felony crime of escape as provided in section 18-8-208, and, in the course of or in furtherance of the crime that he or she is committing or attempting to commit, or of immediate flight therefrom, the death of a person, other than one of the participants, is caused by any participant.

(1.5) It is an affirmative defense to a charge of violating subsection (1)(b) of this section that the defendant:

(a) Was not the only participant in the underlying crime; and

(b) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(c) Was not armed with a deadly weapon; and

(d) Did not engage himself or herself in or intend to engage in and had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious bodily injury.

(2) Diminished responsibility due to self-induced intoxication is not a defense to murder in the second degree.

(2.5) Deleted by Laws 1996, H.B.96-1087, § 12, eff. July 1, 1996.

(3)(a) Except as otherwise provided in paragraph (b) of this subsection (3), murder in the second degree is a class 2 felony.

(b) Notwithstanding the provisions of paragraph (a) of this subsection (3), murder in the second degree is a class 3 felony where the act causing the death was performed upon a sudden heat of passion, caused by a serious and highly provoking act of the intended victim, affecting the defendant sufficiently to excite an irresistible passion in a reasonable person; but, if between the provocation and the killing there is an interval sufficient for the voice of reason and humanity to be heard, the killing is a class 2 felony.

(c) For purposes of determining sudden heat of passion pursuant to subsection (3)(b) of this section, a defendant's act does not constitute an act performed upon a sudden heat of passion if it results solely from the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including but not limited to under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance toward the defendant.

(4) A defendant convicted pursuant to subsection (1) of this section shall be sentenced by the court in accordance with the provisions of section 18-1.3-406.

(5) As used in this section, unless the context otherwise requires:

(a) “Gender identity” and “gender expression” have the same meaning as in section 18-1-901(3)(h.5).

(b) “Intimate relationship” has the same meaning as in section 18-6-800.3.

(c) “Sexual orientation” has the same meaning as in section 18-9-121(5)(b).

Conn. Gen. Stat. § 53a-35a

Sec. 53a-35a. Imprisonment for any felony committed on or after July 1, 1981: Definite sentences; terms authorized. For any felony committed on or

after July 1, 1981, the sentence of imprisonment shall be a definite sentence and the term shall be fixed by the court as follows: (1) For a capital felony, a term of life imprisonment without the possibility of release unless a sentence of death is imposed in accordance with section 53a-46a; (2) for the class A felony of murder, a term not less than twenty-five years nor more than life; (3) for the class A felony of aggravated sexual assault of a minor under section 53a-70c, a term not less than twenty-five years or more than fifty years; (4) for a class A felony other than an offense specified in subdivision (2) or (3) of this section, a term not less than ten years nor more than twenty-five years; (5) for the class B felony of manslaughter in the first degree with a firearm under section 53a-55a, a term not less than five years nor more than forty years; (6) for a class B felony other than manslaughter in the first degree with a firearm under section 53a-55a, a term not less than one year nor more than twenty years, except that for a conviction under section 53a-59(a)(1), 53a-59a, 53a-70a, 53a-94a, 53a-101(a)(1) or 53a-134(a)(2), the term shall be not less than five years nor more than twenty years; (7) for a class C felony, a term not less than one year nor more than ten years, except that for a conviction under section 53a-56a, the term shall be not less than three years nor more than ten years; (8) for a class D felony, a term not less than one year nor more than five years, except that for a conviction under section 53a-60b or 53a-217, the term shall be not less than two years nor more than five years, for a conviction under section 53a-60c, the term shall be not less than three years nor more than five years, and for a conviction under section 53a-216, the term shall be five years; (9) for an unclassified felony, a term in accordance with the sentence specified in the section of the general statutes that defines the crime.

Ind. Code Ann. § 35-42-1-1

IC 35-42-1-1 Murder

Sec. 1. A person who:

...

(2) kills another human being while committing or attempting to commit arson, burglary, child molesting, consumer product tampering, criminal deviate conduct (under IC 35-42-4-2 before its repeal), kidnapping, rape, robbery, human trafficking, promotion of human labor trafficking, promotion of human sexual trafficking, promotion of child sexual trafficking, promotion of sexual trafficking of a younger child, child sexual trafficking, or carjacking (before its repeal);

...

commits murder, a felony.

Kan. Stat. Ann. §§ 21-5402; 21-6620

21-5402. Murder in the first degree. (a) Murder in the first degree is the killing of a human being committed:

(1) Intentionally, and with premeditation; or

(2) in the commission of, attempt to commit, or flight from any inherently dangerous felony.

...

21-6620. Sentencing of certain persons to mandatory minimum term of imprisonment of 25, 40 or 50 years or life without the possibility of parole; determination; evidence presented.

...

(b) The provisions of this subsection shall apply only to the crime of murder in the first degree as described in K.S.A. 2022 Supp. 21-5402(a)(2), and amendments thereto, committed on or after July 1, 2014.

(1) Except as provided in subsection (b)(2), a defendant convicted of murder in the first degree as described in K.S.A. 2022 Supp. 21-5402(a)(2), and amendments thereto, shall be sentenced to imprisonment for life and shall not be eligible for probation or suspension, modification or reduction of sentence. In addition, the defendant shall not be eligible for parole prior to serving 25 years' imprisonment, and such 25 years' imprisonment shall not be reduced by the application of good time credits. No other sentence shall be permitted.

(2) The provisions of subsection (b)(1) requiring the court to impose a mandatory minimum term of imprisonment of 25 years shall not apply if the court finds the defendant, because of the defendant's criminal history classification, would be subject to presumptive imprisonment pursuant to the sentencing guidelines grid for nondrug crimes and the sentencing range would exceed 300 months if the sentence established for a severity level 1 crime was imposed. In such case, the defendant is required to serve a mandatory minimum term equal to the sentence established for a

severity level 1 crime pursuant to the sentencing range. The defendant shall not be eligible for parole prior to serving such mandatory minimum term of imprisonment, and such mandatory minimum term of imprisonment shall not be reduced by the application of good time credits. No other sentence shall be permitted.

...

La. Stat. Ann. § 14:30.1 (2021)

§30.1. Second degree murder

A. Second degree murder is the killing of a human being:

...

(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated or first degree rape, forcible or second degree rape, aggravated arson, aggravated burglary, aggravated kidnapping, second degree kidnapping, aggravated escape, assault by drive-by shooting, armed robbery, first degree robbery, second degree robbery, simple robbery, cruelty to juveniles, second degree cruelty to juveniles, or terrorism, even though he has no intent to kill or to inflict great bodily harm.

...

B. Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

Me. Stat. tit. 17-A, §§ 202 & 1604

§202. Felony murder

1. A person is guilty of felony murder if acting alone or with one or more other persons in the commission of, or an attempt to commit, or immediate flight after committing or attempting to commit, murder, robbery, burglary, kidnapping, arson, gross sexual assault, or escape, the person or another participant in fact causes the death of a human being, and the death is a reasonably foreseeable consequence of such commission, attempt or flight.

[PL 1991, c. 377, §8 (AMD).]

2. It is an affirmative defense to prosecution under this section that the defendant:

A. Did not commit the homicidal act or in any way solicit, command, induce, procure or aid the commission thereof; [PL 1977, c. 510, §39 (RPR).]

B. Was not armed with a dangerous weapon, or other weapon which under circumstances indicated a readiness to inflict serious bodily injury; [PL 1977, c. 510, §39 (RPR).]

C. Reasonably believed that no other participant was armed with such a weapon; and [PL 1977, c. 510, §39 (RPR).]

D. Reasonably believed that no other participant intended to engage in conduct likely to result in death or serious bodily injury. [PL 1977, c. 510, §39 (RPR).]

[PL 1977, c. 510, §39 (RPR).]

3. Felony murder is a Class A crime.

§1604. Imprisonment for crimes other than murder

1. Maximum terms of imprisonment dependent on crime class. Unless a different maximum term of imprisonment is specified by statute, the maximum term of imprisonment is as follows:

A. In the case of a Class A crime, 30 years; [PL 2019, c. 113, Pt. A, §2 (NEW).]

...

Minn. Stat. § 609.19

...

Subd. 2.Unintentional murders.

Whoever does either of the following is guilty of unintentional murder in the second degree and may be sentenced to imprisonment for not more than 40 years:

(1) causes the death of a human being, without intent to effect the death of any person, while committing or attempting to commit a felony offense other than criminal sexual conduct in the first or second degree with force or violence or a drive-by shooting; or

...

Miss. Code Ann. §§ 97-3-19 & 97-3-21

§ 97-3-19. Homicide; murder defined; capital murder; lesser-included offenses.

(1) The killing of a human being without the authority of law by any means or in any manner shall be murder in the following cases:

...

(c) When done without any design to effect death by any person engaged in the commission of any felony other than rape, kidnapping, burglary, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39, or in any attempt to commit such felonies;

...

§ 97-3-21. Homicide; penalty for murder or capital murder.

Every person who shall be convicted of murder shall be sentenced by the court to imprisonment for life in the State Penitentiary.

Every person who shall be convicted of capital murder shall be sentenced (a) to death; (b) to imprisonment for life in the State Penitentiary without parole; or (c) to imprisonment for life in the State Penitentiary with eligibility for parole as provided in Section 47-7-3(1)(f).

Mo. Ann. Stat. § 565.021

565.021. Second degree murder, penalty. — 1. A person commits the offense of murder in the second degree if he or she:

(1) Knowingly causes the death of another person or, with the purpose of causing serious physical injury to another person, causes the death of another person; or

(2) Commits or attempts to commit any felony, and, in the perpetration or the attempted perpetration of such felony or in the flight from the perpetration or attempted perpetration of such felony, another person is killed as a result of the perpetration or attempted perpetration of such felony or immediate flight from the perpetration of such felony or attempted perpetration of such felony.

2. The offense of murder in the second degree is a class A felony, and the punishment for second degree murder shall be in addition to the punishment for commission of a related felony or attempted felony, other than murder or manslaughter.

3. Notwithstanding section 556.046 and section 565.029, in any charge of murder in the second degree, the jury shall be instructed on, or, in a jury-waived trial, the judge shall consider, any and all of the subdivisions in subsection 1 of this section which are supported by the evidence and requested by one of the parties or the court.

N.J. Stat. Ann. § 2C:11-3

2C:11-3. Murder.

a. Except as provided in N.J.S.2C:11-4, criminal homicide constitutes murder when:
...

(3)It is committed when the actor, acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary, kidnapping, carjacking, criminal escape or terrorism pursuant to section 2 of P.L.2002, c.26 (C.2C:38-2), and in the course of such crime or of immediate flight therefrom, any person causes the death of a person other than one of the participants; except that in any prosecution under this subsection, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a)Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b)Was not armed with a deadly weapon, or any instrument, article or substance

readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c)Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d)Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

b.(1) Murder is a crime of the first degree but a person convicted of murder shall be sentenced, except as provided in paragraphs (2), (3) and (4) of this subsection, by the court to a term of 30 years, during which the person shall not be eligible for parole, or be sentenced to a specific term of years which shall be between 30 years and life imprisonment of which the person shall serve 30 years before being eligible for parole.

...

N.Y. Penal Law § 125.25

§ 125.25 Murder in the second degree.

A person is guilty of murder in the second degree when:
...

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, criminal sexual act in the first degree, sexual abuse in the first degree, aggravated sexual abuse, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or

substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury; or

...

Murder in the second degree is a class A-I felony.

N.Y. Penal Law § 70.00

§ 70.00 Sentence of imprisonment for felony.

* 1. Indeterminate sentence. Except as provided in subdivisions four, five and six of this section or section 70.80 of this article, a sentence of imprisonment for a felony, other than a felony defined in article two hundred twenty or two hundred twenty-one of this chapter, shall be an indeterminate sentence. When such a sentence is imposed, the court shall impose a maximum term in accordance with the provisions of subdivision two of this section and the minimum period of imprisonment shall be as provided in subdivision three of this section.

* NB Effective until September 1, 2025

* 1. Indeterminate sentence. Except as provided in subdivisions four and five of this section or section 70.80 of this article, a sentence of imprisonment for a felony, other than a felony defined in article two hundred twenty or two hundred twenty-one of this chapter, shall be an indeterminate sentence. When such a sentence is imposed, the court shall impose a maximum term in accordance with the provisions of subdivision two of this section and the minimum period of imprisonment shall be as provided in subdivision three of this section.

* NB Effective September 1, 2025

2. Maximum term of sentence. The maximum term of an indeterminate sentence shall be at least three years and the term shall be fixed as follows:

(a) For a class A felony, the term shall be life imprisonment;

(b) For a class B felony, the term shall be fixed by the court, and shall not exceed twenty-five years;

(c) For a class C felony, the term shall be fixed by the court, and shall not exceed fifteen years;

(d) For a class D felony, the term shall be fixed by the court, and shall not exceed seven years; and

(e) For a class E felony, the term shall be fixed by the court, and shall not exceed four years.

3. Minimum period of imprisonment. The minimum period of imprisonment under an indeterminate sentence shall be at least one year and shall be fixed as follows:

(a) In the case of a class A felony, the minimum period shall be fixed by the court and specified in the sentence.

(i) For a class A-I felony, such minimum period shall not be less than fifteen years nor more than twenty-five years; provided, however, that (A) where a sentence, other than a sentence of death or life imprisonment without parole, is imposed upon a defendant convicted of murder in the first degree as defined in section 125.27 of this chapter such minimum period shall be not less than twenty years nor more than twenty-five years, and, (B) where a sentence is imposed upon a defendant convicted of murder in the second degree as defined in subdivision five of section 125.25 of this chapter or convicted of aggravated murder as defined in section 125.26 of this chapter, the sentence shall be life imprisonment without parole, and, (C) where a sentence is imposed upon a defendant convicted of attempted murder in the first degree as defined in article one hundred ten of this chapter and subparagraph (i), (ii) or

(iii) of paragraph (a) of subdivision one and paragraph (b) of subdivision one of section 125.27 of this chapter or attempted aggravated murder as defined in article one hundred ten of this chapter and section 125.26 of this chapter such minimum period shall be not less than twenty years nor more than forty years.

(ii) For a class A-II felony, such minimum period shall not be less than three years nor more than eight years four months, except that for the class A-II felony of predatory sexual assault as defined in section 130.95 of this chapter or the class A-II felony of predatory sexual assault against a child as defined in section 130.96 of this chapter, such minimum period shall be not less than ten years nor more than twenty-five years.

(b) For any other felony, the minimum period shall be fixed by the court and specified in the sentence and shall be not less than one year nor more than one-third of the maximum term imposed.

4. Alternative definite sentence for class D and E felonies. When a person, other than a second or persistent felony offender, is sentenced for a class D or class E felony, and the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that a sentence of imprisonment is necessary but that it would be unduly harsh to impose an indeterminate or determinate sentence, the court may impose a definite sentence of imprisonment and fix a term of one year or less.

5. Life imprisonment without parole. Notwithstanding any other provision of law, a defendant sentenced to life imprisonment without parole shall not be or become eligible for parole or conditional release. For purposes of commitment and custody, other than parole and conditional release, such sentence shall be deemed to be an indeterminate sentence. A defendant may be sentenced to life imprisonment without parole upon conviction for the crime of murder in the first degree as defined in section 125.27 of this chapter and in accordance with the procedures provided by law for imposing a sentence for such crime. A defendant who was eighteen years of age or older at the time of the commission of the crime must be sentenced to life imprisonment without parole upon conviction for the crime of terrorism as defined in section 490.25 of this chapter, where the specified

offense the defendant committed is a class A-I felony; the crime of criminal possession of a chemical weapon or biological weapon in the first degree as defined in section 490.45 of this chapter; or the crime of criminal use of a chemical weapon or biological weapon in the first degree as defined in section 490.55 of this chapter; provided, however, that nothing in this subdivision shall preclude or prevent a sentence of death when the defendant is also convicted of the crime of murder in the first degree as defined in section 125.27 of this chapter. A defendant who was seventeen years of age or younger at the time of the commission of the crime may be sentenced, in accordance with law, to the applicable indeterminate sentence with a maximum term of life imprisonment. A defendant must be sentenced to life imprisonment without parole upon conviction for the crime of murder in the second degree as defined in subdivision five of section 125.25 of this chapter or for the crime of aggravated murder as defined in subdivision one of section 125.26 of this chapter. A defendant may be sentenced to life imprisonment without parole upon conviction for the crime of aggravated murder as defined in subdivision two of section 125.26 of this chapter.

* 6. Determinate sentence. Except as provided in subdivision four of this section and subdivisions two and four of section 70.02, when a person is sentenced as a violent felony offender pursuant to section 70.02 or as a second violent felony offender pursuant to section 70.04 or as a second felony offender on a conviction for a violent felony offense pursuant to section 70.06, the court must impose a determinate sentence of imprisonment in accordance with the provisions of such sections and such sentence shall include, as a part thereof, a period of post-release supervision in accordance with section 70.45.

* NB Repealed September 1, 2025

Ohio Rev. Code Ann. § 2903.02

..

(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code.

(C) Division (B) of this section does not apply to an offense that becomes a felony of the first or second degree only if the offender previously has been convicted of that offense or another specified offense.

(D) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

Ohio Rev. Code Ann. § 2929.02

...

(B)(1) Except as otherwise provided in division (B)(2) or (3) of this section, whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life.

(2) Except as otherwise provided in division (B)(3) of this section, if a person is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code, the victim of the offense was less than thirteen years of age, and the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, the court shall impose an indefinite prison term of thirty years to life pursuant to division (B)(3) of section 2971.03 of the Revised Code.

(3) If a person is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code and also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that were included in the indictment, count in the indictment, or information that charged the murder, the court shall impose upon the offender a term of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

...

Or. Rev. Stat. Ann. § 163.115

(1)
Except as provided in ORS 163.095 (“Aggravated murder” defined), 163.118 (Manslaughter in the first degree) and 163.125 (Manslaughter in the second degree), criminal homicide constitutes murder in the second degree:

...

(b)
When it is committed by a person, acting either alone or with one or more persons, who commits or attempts to commit any of the following crimes and in the course of and in furtherance of the crime the person is committing or attempting to commit, or during the immediate flight therefrom, the person, or another participant if there be any, causes the death of a person other than one of the participants:

(A)
Arson in the first degree as defined in ORS 164.325 (Arson in the first degree);

(B)
Criminal mischief in the first degree by means of an explosive as defined in ORS 164.365 (Criminal mischief in the first degree);

(C)
Burglary in the first degree as defined in ORS 164.225 (Burglary in the first degree);

(D)
Escape in the first degree as defined in ORS 162.165 (Escape in the first degree);

(E)
Kidnapping in the second degree as defined in ORS 163.225 (Kidnapping in the second degree);

(F)
Kidnapping in the first degree as defined in ORS 163.235 (Kidnapping in the first degree);

(G)
Robbery in the first degree as defined in ORS 164.415 (Robbery in the first degree);

(H)
Any felony sexual offense in the first degree defined in this chapter;

(I)
Compelling prostitution as defined in ORS 167.017 (Compelling prostitution); or

(J)
Assault in the first degree, as defined in ORS 163.185 (Assault in the first degree), and the victim is under 14 years of age, or assault in the second degree, as defined in ORS 163.175 (Assault in the second degree) (1)(a) or (b), and the victim is under 14 years of age; or

...

(3)
It is an affirmative defense to a charge of violating subsection (1)(b) of this section that the defendant:

(a)
Was not the only participant in the underlying crime;

(b)
Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid in the commission thereof;

(c)
Was not armed with a dangerous or deadly weapon;

(d)
Had no reasonable ground to believe that any other participant was armed with a dangerous or deadly weapon; and

(e)
Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death.

(5)
Except as otherwise provided in ORS 144.397 (Release eligibility for juvenile offenders after 15 years of imprisonment) and 163.155 (Sentencing for murder of pregnant victim):

(a)

A person convicted of murder in the second degree, who was at least 15 years of age at the time of committing the murder, shall be punished by imprisonment for life.

(b)

When a defendant is convicted of murder in the second degree under this section, the court shall order that the defendant shall be confined for a minimum of 25 years without possibility of parole, release to post-prison supervision, release on work release or any form of temporary leave or employment at a forest or work camp.

...

11 R.I. Gen. Laws Ann. § 11-23

§ 11-23-1. Murder.

The unlawful killing of a human being with malice aforethought is murder. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any arson or any violation of § 11-4-2, 11-4-3, or 11-4-4, rape, any degree of sexual assault or child molestation, burglary or breaking and entering, robbery, kidnapping, or committed during the course of the perpetration, or attempted perpetration, of felony manufacture, sale, delivery, or other distribution of a controlled substance otherwise prohibited by the provisions of chapter 28 of title 21, or committed against any law enforcement officer in the performance of his or her duty or committed against an assistant attorney general or special assistant attorney general in the performance of his or her duty, or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him or her who is killed, is murder in the first degree. Any other murder is murder in the second degree. The degree of murder may be charged in the indictment or information, and the jury may find the degree of murder, whether the murder is charged in the indictment or information or not, or may find the defendant guilty of a lesser offense than that charged in the indictment or information, in accordance with the provisions of § 12-17-14.

§ 11-23-2. Penalties for murder.

Every person guilty of murder in the first degree shall be imprisoned for life. Every person guilty of murder in the first degree: (1) committed intentionally while engaged in the commission of another capital offense or other felony for which life imprisonment may be imposed; (2) committed in a manner creating a great risk of death to more than one person by means of a weapon or device or substance which would normally be hazardous to the life of more than one person; (3) committed at the direction of another person in return for money or any other thing of monetary value from that person; (4) committed in a manner involving torture or an aggravated battery to the victim; (5) committed against any member of the judiciary, law enforcement officer, corrections employee, assistant attorney general or special assistant attorney general, or firefighter arising from the lawful performance of his or her official duties; (6) committed by a person who at the time of the murder was committed to confinement in the adult correctional institutions or the state reformatory for women upon conviction of a felony; or (7) committed during the course of the perpetration or attempted perpetration of felony manufacture, sale, delivery or other distribution of a controlled substance otherwise prohibited by the provisions of chapter 28 of title 21; shall be imprisoned for life and if ordered by the court pursuant to chapter 19.2 of title 12 that person shall not be eligible for parole from imprisonment. Every person guilty of murder in the second degree shall be imprisoned for not less than ten (10) years and may be imprisoned for life.

Tex. Penal Code Ann. § 19.02

Sec. 19.02. MURDER. (a) In this section:

(1) "Adequate cause" means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.

(2) "Sudden passion" means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation.

(b) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual;

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

(3) commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

(c) Except as provided by Subsection (d), an offense under this section is a felony of the first degree.

(d) At the punishment stage of a trial, the defendant may raise the issue as to whether he caused the death under the immediate influence of sudden passion arising from an adequate cause. If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree.

Tex. Penal Code Ann. § 12.32

Sec. 12.32. FIRST DEGREE FELONY PUNISHMENT. (a) An individual adjudged guilty of a felony of the first degree shall be punished by imprisonment in the Texas Department of Criminal Justice for life or for any term of not more than 99 years or less than 5 years.

(b) In addition to imprisonment, an individual adjudged guilty of a felony of the first degree may be punished by a fine not to exceed $10,000.

Utah Code Ann. § 76-5-203

76-5-203. Murder -- Penalties-- Affirmative defense and special mitigation -- Separate offenses.

(1) (a) As used in this section, "predicate offense" means:

(i) a clandestine drug lab violation under Section 58-37d-4 or 58-37d-5;

(ii) aggravated child abuse, under Subsection 76-5-109.2(3)(a), when the abused individual is younger than 18 years old;

(iii) kidnapping under Section 76-5-301;

(iv) child kidnapping under Section 76-5-301.1;

(v) aggravated kidnapping under Section 76-5-302;

(vi) rape under Section 76-5-402;

(vii) rape of a child under Section 76-5-402.1;

(viii) object rape under Section 76-5-402.2;

(ix) object rape of a child under Section 76-5-402.3;

(x) forcible sodomy under Section 76-5-403;

(xi) sodomy upon a child under Section 76-5-403.1;

(xii) forcible sexual abuse under Section 76-5-404;

(xiii) sexual abuse of a child under Section 76-5-404.1;

(xiv) aggravated sexual abuse of a child under Section 76-5-404.3;

(xv) aggravated sexual assault under Section 76-5-405;

(xvi) arson under Section 76-6-102;

(xvii) aggravated arson under Section 76-6-103;

(xviii) burglary under Section 76-6-202;

(xix) aggravated burglary under Section 76-6-203;

(xx) robbery under Section 76-6-301;

(xxi) aggravated robbery under Section 76-6-302;

(xxii) escape or aggravated escape under Section 76-8-309; or

(xxiii) a felony violation of Section 76-10-508 or 76-10-508.1 regarding discharge of a firearm or dangerous weapon.

(b) Terms defined in Section 76-1-101.5 apply to this section.

(2) An actor commits murder if:

(a) the actor intentionally or knowingly causes the death of another individual;

(b) intending to cause serious bodily injury to another individual, the actor commits an act clearly dangerous to human life that causes the death of the other individual;

(c) acting under circumstances evidencing a depraved indifference to human life, the actor knowingly engages in conduct that creates a grave risk of death to another individual and thereby causes the death of the other individual;

(d) (i) the actor is engaged in the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense, or is a party to the predicate offense;

(ii) an individual other than a party described in Section 76-2-202 is killed in the course of the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense; and

(iii) the actor acted with the intent required as an element of the predicate offense;

(e) the actor recklessly causes the death of a peace officer or military service member in uniform while in the commission or attempted commission of:

(i) an assault against a peace officer under Section 76-5-102.4;

(ii) interference with a peace officer while making a lawful arrest under Section 76-8-305 if the actor uses force against the peace officer; or

(iii) an assault against a military service member in uniform under Section 76-5-102.4; or

(f) the actor commits a homicide that would be aggravated murder, but the offense is reduced in accordance with Subsection 76-5-202(4).

(3) (a) (i) A violation of Subsection (2) is a first degree felony.

(ii) A defendant who is convicted of murder shall be sentenced to imprisonment for an indeterminate term of not less than 15 years and which may be for life.

Va. Code Ann. § 18.2-10 & 18.2-32–18.2-33

§ 18.2-10. Punishment for conviction of felony; penalty.
The authorized punishments for conviction of a felony are:

(a) For Class 1 felonies, imprisonment for life and, subject to subdivision (g), a fine of not more than $100,000. Any person who was 18 years of age or older at the time of the offense and who is sentenced to imprisonment for life upon conviction of a Class 1 felony shall not be eligible for (i) parole, (ii) any good conduct allowance or any earned sentence credits under Chapter 6 (§ 53.1-186 et seq.) of Title 53.1, or (iii) conditional release pursuant to § 53.1-40.01 or 53.1-40.02.
(b) For Class 2 felonies, imprisonment for life or for any term not less than 20 years and, subject to subdivision (g), a fine of not more than $100,000.

(c) For Class 3 felonies, a term of imprisonment of not less than five years nor more than 20 years and, subject to subdivision (g), a fine of not more than $100,000.

(d) For Class 4 felonies, a term of imprisonment of not less than two years nor more than 10 years and, subject to subdivision (g), a fine of not more than $100,000.

(e) For Class 5 felonies, a term of imprisonment of not less than one year nor more than 10 years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than $2,500, either or both.

(f) For Class 6 felonies, a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than $2,500, either or both.

(g) Except as specifically authorized in subdivision (e) or (f), the court shall impose either a sentence of imprisonment together with a fine, or imprisonment only. However, if the defendant is not a natural person, the court shall impose only a fine.

For any felony offense committed (i) on or after January 1, 1995, the court may, and (ii) on or after July 1, 2000, shall, except in cases in which the court orders a suspended term of confinement of at least six months, impose an additional term of incarceration of not less than six months nor more than three years, which shall be suspended conditioned upon successful completion of a period of post-release supervision pursuant to § 19.2-295.2 and compliance with such other terms as the sentencing court may require. However, such additional term may only be imposed when the sentence includes an active term of incarceration in a correctional facility.
For a felony offense prohibiting proximity to children as described in subsection A of § 18.2-370.2, the sentencing court is authorized to impose the punishment set forth in that section in addition to any other penalty provided by law.

§ 18.2-32. First and second degree murder defined; punishment.
Murder, other than aggravated murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate or animate object sexual penetration, robbery, burglary or abduction, except as provided in § 18.2-31, is murder of the first degree, punishable as a Class 2 felony.

All murder other than aggravated murder and murder in the first degree is murder of the second degree and is punishable by confinement in a state correctional facility for not less than five nor more than forty years.

Code 1950, § 18.1-21; 1960, c. 358; 1962, c. 42; 1975, cc. 14, 15; 1976, c. 503; 1977, cc. 478, 492; 1981, c. 397; 1993, cc. 463, 490; 1998, c. 281; 2021, Sp. Sess. I, cc. 344, 345.

§ 18.2-32.1. Murder of a pregnant woman; penalty.

The willful and deliberate killing of a pregnant woman without premeditation by one who knows that the woman is pregnant and has the intent to cause the involuntary termination of the woman's pregnancy without a live birth shall be punished by a term of imprisonment of not less than ten years nor more than forty years.

1997, c. 709.

§ 18.2-32.2. Killing a fetus; penalty.

A. Any person who unlawfully, willfully, deliberately, maliciously and with premeditation kills the fetus of another is guilty of a Class 2 felony.

B. Any person who unlawfully, willfully, deliberately and maliciously kills the fetus of another is guilty of a felony punishable by confinement in a state correctional facility for not less than five nor more than 40 years.

2004, cc. 1023, 1026.

§ 18.2-32.3. Human infant; independent and separate existence.

For the purposes of this article, the fact that the umbilical cord has not been cut or that the placenta remains attached shall not be considered in determining whether a human infant has achieved an independent and separate existence.

2010, cc. 810, 851.

§ 18.2-33. Felony homicide defined; punishment.

The killing of one accidentally, contrary to the intention of the parties, while in the prosecution of some felonious act other than those specified in §§ 18.2-31 and 18.2-32, is murder of the second degree and is punishable by confinement in a state correctional facility for not less than five years nor more than forty years.

Wis. Stat. Ann. § 940.03

940.03 Felony murder. Whoever causes the death of another human being while committing or attempting to commit a crime specified in s. 940.19, 940.195, 940.20, 940.201, 940.203, 940.204, 940.225 (1) or (2) (a), 940.30, 940.31, 943.02,

943.10 (2), 943.231 (1), or 943.32 (2) may be imprisoned for not more than 15 years in excess of the maximum term of imprisonment provided by law for that crime or attempt.

Regulations

Pa.RAP 1114

Rule 1114. Standards Governing Allowance of Appeal.

(a) *General Rule.* Except as prescribed in Pa.R.A.P. 1101 (appeals as of right from the Commonwealth Court), review of a final order of the Superior Court or the Commonwealth Court is not a matter of right, but of sound judicial discretion, and an appeal will be allowed only when there are special and important reasons therefor.

(b) *Standards.* A petition for allowance of appeal may be granted for any of the following reasons:

(1) the holding of the intermediate appellate court conflicts with another intermediate appellate court opinion;

(2) the holding of the intermediate appellate court conflicts with a holding of the Pennsylvania Supreme Court or the United States Supreme Court on the same legal question;

(3) the question presented is one of first impression;

(4) the question presented is one of such substantial public importance as to require prompt and definitive resolution by the Pennsylvania Supreme Court;

(5) the issue involves the constitutionality of a statute of the Commonwealth;

(6) the intermediate appellate court has so far departed from accepted judicial practices or so abused its discretion as to call for the exercise of the Pennsylvania Supreme Court's supervisory authority; or

(7) the intermediate appellate court has erroneously entered an order quashing or dismissing an appeal.

Constitutional Provisions

Pa. Const. Art. I § 8

§ 8. Security from searches and seizures.

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Pa. Const. Art. I § 13

§ 13. Bail, fines and punishments.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.

U.S. Const. Amend. IV

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. XIII

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.