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1008 WDA 2021

IN THE SUPERIOR COURT OF PENNSYLVANIA

WESTERN DISTRICT

1008 WDA 2021

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

DEREK LEE

Appellant

BRIEF FOR APPELLANT

Appeal from the Judgment of Sentence imposed on December 19, 2016 and Order Denying Motion for Modification of Sentence on July 26, 2021 by the Honorable David R. Cashman in the Criminal Division of the Court of Common Pleas of Allegheny County, Pennsylvania at CP-02-CR-0016878-2014.

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STATEMENT OF JURISDICTION

Jurisdiction of this Honorable Court is invoked pursuant to the Judicial Code, Act of July 9, 1976, P.L. 586 No. 142, as amended. 41 Pa.C.S. § 742.

ORDER IN QUESTION

This is an appeal from the judgment of sentence entered by the Honorable David R. Cashman in the Allegheny County Court of Common Pleas on December 19, 2016. The relevant text of the order states as follows:

> AND NOW, this 19th day of December, 2016, the defendant having been convicted in the above-captioned case is hereby sentenced by this Court as follows. The defendant is to pay all applicable fes and costs unless otherwise noted below:
>
> **Count 1 –** 18 § 2502 §§ B – Murder Of The Second Degree (H2)
>
> To be confined for Life at SCI Camp Hill.
>
> The following conditions are imposed:
>
> Other: Defendant is to RRRI INELIGIBLE
>
> Other: Defendant is INELIGIBLE FOR PAROLE
>
> This sentence shall commence on 12/19/2016.

Reproduced Record (hereafter "RR"), 121a

STANDARD OF REVIEW

On questions of law, this Court's standard of review is *de novo,* and the scope of review is plenary. This Court's standard of review of the constitutionality

of statues and legality of sentences is *de novo* and the scope of review is plenary. *Commonwealth v. Smith,* 210 A.3d 1050, 1062 (Pa. Super. 2019).

STATEMENT OF THE QUESTIONS INVOLVED

1. **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.

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?**

Suggested Answer: Yes.

STATEMENT OF THE CASE

A. Procedural History

Mr. Lee was sentenced 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. Mr. Lee's trial counsel filed a motion to withdraw on the same day that Mr. Lee was sentenced. Judge Cashman ordered counsel to be appointed and that post-sentence motions were permitted to be filed *nunc pro tunc* on December 20, 2016. RR at 138a.

On January 5, 2017, Judge Cashman ordered that Mr. Lee's post-sentence motions *nunc pro tunc* must be filed by March 6, 2017. RR at 139a. On March 6, 2017, counsel for Mr. Lee requested an extension of time to file post-sentence motions *nunc pro tunc. Id.* at 147a. On March 10, 2017, counsel filed a motion to withdraw as counsel on Mr. Lee's request and a motion for a *Grazier* hearing. *Id.* at 154a. On June 29, 2017, Judge Cashman granted counsel's motion to withdraw following a *Grazier* hearing. *Id.* at 165a.

On June 29, 2018, Mr. Lee filed a *pro se* Post-Conviction Relief Act ("PCRA") Petition. *Id.* at 166a. On July 27, 2018, Judge Cashman appointed counsel to represent Mr. Lee in the PCRA proceedings. *Id.* at 179a. Counsel filed a *Turner/Finley* No-Merit letter and motion to withdraw on November 26, 2018. *Id.* at 187a. Judge Cashman granted counsel's request to withdraw and filed a Rule 907 notice of intent to dismiss on December 6, 2018. *Id.* at 196a. Mr. Lee filed a response

on March 18, 2019. *Id.* at 213a. Judge Cashman dismissed the PCRA Petition on March 19, 2019. *Id.* at 226a.

Mr. Lee filed a *pro se* PCRA Petition on June 23, 2020. RR at 232a. Judge Cashman filed a Rule 907 Notice of Intent to Dismiss on August 17, 2020. *Id.* at 247a. On October 15, 2020, Mr. Lee filed a *pro se* motion for leave to file an amended PCRA Petition to reinstate his appellate rights and requesting appointed counsel. *Id.* at 255a

On November 4, 2020, Judge Cashman granted Mr. Lee's request in his motion for leave to amend his PCRA and reinstated his post-sentence motion and appellate rights, providing Mr. Lee thirty days to file any post-sentence motion or appeal. RR at 286a. Current counsel for Mr. Lee were privately retained and entered an appearance on November 30, 2020, simultaneously filing a motion for extension of time. RR at 287a-291a. The motion for extension of time was granted on December 5, 2020. Dkt Entry 12/05/2020.

On March 4, 2021, counsel filed a post-sentence motion for modification of sentence. 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 on August 25, 2021 and a Concise Statement of Errors Complained on Appeal on September 22, 2021. RR at 306a; 337a.

Following Judge Cashman's retirement, the trial court filed an opinion on March 23, 2022 and transmitted the record to this Court on that same date.

B. Factual History

Appellant, Derek 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 and lived with the decedent, Leonard Butler. Notes of Testimony (hereafter "NT"), Vol. I, 340-41. Ms. Chapple testified that she and Mr. Butler had an ongoing conflict with another woman, Jamie Parker, who claimed to be in a relationship with Mr. Butler, and that Mr. Butler had sought and obtained a Protection from Abuse order against Ms. Parker. *Id.* at 342-61. 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. Then, Ms. Chapple testified that Mr. Butler attempted to lunge at the other man who remained in the basement, then heard a "pow" noise. *Id.*

Jamie Parker also testified for the prosecution. Ms. Parker testified that she was in a relationship with Leonard Butler prior to his death and that a week or two prior to his death, she went to his house because Mr. Butler did not contact her after his release from jail. NT, Vol. II, 75. Ms. Parker testified that she worked at the same restaurant as Mr. Lee and that he drove her to Mr. Butler's home on her request on one occasion prior to Mr. Butler's death. *Id.* at 89-92. Ms. Parker testified that she told Mr. Lee that she was upset at Mr. Butler and that Mr. Lee offered to "handle it." *Id.* at 101. Ms. Parker also testified that on the day of Mr. Butler's death, Mr. Lee called to tell her that he was going to talk to Mr. Butler but could not reach his house because the streets were blocked. *Id.* at 105-06.

The prosecution also presented the testimony of Henry Leacock, who lived on a parallel street to Mr. Butler and Ms. Chapple. Mr. Leacock testified that on the day of Mr. Butler's death, he saw two men standing near a parked car and walking through an alley near his home and Mr. Butler's. NT, Vol. II, 250-54. Mr. Leacock believed they were acting suspiciously and called 911, then later wrote down the license plate number of the car and provided it to the 911 operator. *Id.* at 257-260. Mr. Leacock testified that he later saw the two men run back to the car and drive

away, then heard shortly thereafter that someone may have been shot in the area. *Id.* at. 263-64. Mr. Leacock identified Mr. Lee as one of the men he saw in the alley. *Id.* at 283-84. Based on the license plate number provided to police by Mr. Leacock, police found that the vehicle was rented in the name of Derek Lee. *Id.* at 332-33.

On September 26, 2016, the jury returned a verdict. NTT, 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.

SUMMARY OF THE ARGUMENT

Derek Lee was convicted of second degree murder and related offenses and sentenced to the mandatory penalty of life imprisonment with no opportunity for parole. Mr. Lee did not kill or intend to kill in the commission of this offense. He is challenging his mandatory sentence of life imprisonment with no opportunity for parole as a violation of both the Eighth Amendment to the United States Constitutional and Article I, § 13 of the Constitution of Pennsylvania.

The touchstone of the Eighth Amendment inquiry is whether a punishment is proportionate to the offense and the offender. Until recently, the Court maintained a distinction between the way courts analyze capital punishment sentences and sentences to a term of years or life sentences. In the Court's death penalty jurisprudence, courts applied a categorical approach to determine whether death penalty was proportionate when imposed on certain categories of offenders or offenses, leading to bans on imposing capital punishment on children, people with intellectual disability, and people who did not kill or intend to kill, among other categorical prohibitions. In *Enmund v. Florida,* 458 U.S. 782 (1982), the Court recognized that defendants convicted of felony-murder who do not kill or intend to kill have categorically-diminished culpability and cannot be sentenced to death. When analyzing other criminal punishments, the Court employed a gross disproportionality analysis to determine whether the punishment was disproportionate to the offense and comparing the punishment to those received by other defendants.

Beginning with *Graham v. Florida,* 560 U.S. 48 (2010), the Court has applied its categorical approach previously reserved for capital punishments to life-without-parole sentencing schemes. The Court followed suit in *Miller v. Alabama,* 567 U.S. 460 (2012) and *Montgomery v. Louisiana,* 577 U.S. 190 (2016). The Court reasoned that life imprisonment with no possibility of parole is akin to the death penalty as

one of the harshest punishments, and is sufficiently similar to the death penalty so as to require the same level of scrutiny and protection under the Eighth Amendment. Thus, like capital punishment, life sentences with no possibility of parole are now subjected to constitutional analysis under the Court's categorical approach. Under this approach, courts must analyze whether there is a national consensus, including recent trends and international practices, among states with respect to imposing a particular punishment on a certain category of offenders or offenses, then conduct an independent analysis as to whether the punishment sufficiently serves legitimate penological goals when applied to the category of offenders or offenses.

Pennsylvania's mandatory imposition of life sentences with no possibility for parole on every person convicted of second degree murder is an extreme outlier in the national and international contexts. Only one other state imposes mandatory life-without-parole on any person convicted of felony-murder, regardless of their degree of involvement or intent, and the majority of states do not even permit a punishment scheme as harsh as Pennsylvania's felony-murder sentencing scheme. Life-without-parole also does not sufficiently serve legitimate penological interests when imposed on people convicted of felony-murder who do not kill or intend to kill.

Mr. Lee's sentence is also unconstitutional under the Pennsylvania Constitution's prohibition on cruel punishments, which provides at least as much protection as the Eighth Amendment. Even if the Eighth Amendment does not render

Mr. Lee's punishment unconstitutional, the Pennsylvania Constitution can – and should – provide broader protections than its federal counterpart in this context. Under *Commonwealth v. Edmunds,* 586 A.2d 887 (Pa. 1991), courts must conduct a four-part analysis to determine whether a Pennsylvania constitutional provision should be interpreted more broadly than an analogous federal provision.

First, the text of Article I, § 13 prohibits "cruel punishments" and is on its face broader than the Eighth Amendment, which prohibits "cruel *and unusual"* punishments. Interpreting the texts to provide the exact same levels of protection in all circumstances would render the additional language in the Eighth Amendment mere surplusage.

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. Severe punishments which are not necessary to public safety are excessive and unjust.

Third, other states with similar 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 are not trivial and cannot be ignored in interpreting the extent of the protections provided.

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. This sentencing practice reflects substantial racial bias, as 70% of those serving life-without-parole for felony-murder convictions in Pennsylvania are Black despite Black people making up only about 11% of the overall population. Pennsylvania's mandatory life-without-parole scheme for all felony-murder convictions has contributed substantially 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. The situation created by Pennsylvania's sentencing practices is untenable and cannot be justified.

ARGUMENT

Appellant, Derek Lee, brings this appeal following the reinstatement of his post-sentence motion and direct appeal rights. Mr. Lee was convicted of second degree murder and related offenses, for which he was sentenced to the mandatory penalty of life imprisonment, as well as a consecutive sentence of 10-20 years. Mr. Lee is challenging his sentence as a violation of the Eighth Amendment to the U.S. Constitution and Article I, § 13 of the Constitution of Pennsylvania.

Pennsylvania law mandates 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 the trial court, Mr. Lee filed a motion for modification of his sentence, arguing that his life sentence with no possibility for parole is unconstitutional under the U.S and Pennsylvania constitutions and seeking an evidentiary hearing. Judge Howsie, writing for the trial court following Judge Cashman's retirement, opined that Mr. Lee's sentence does not violate these constitutional provisions because the U.S. Supreme Court has only found life-without-parole sentences unconstitutional where defendants were juveniles, and only the death penalty, rather than life-without-parole sentences, have been found unconstitutional when applied to individuals who did not kill or intend to kill. Trial Court Opinion, 4-5. While the trial court is correct that neither the U.S. nor Pennsylvania Supreme Courts have held that life-without-parole is unconstitutional when applied to individuals who did not kill or intend to kill, the question has never been considered by either court in light of recent U.S. Supreme Court case law applying more rigorous proportionality review for life-without-parole sentences. Accordingly, Mr. Lee seeks to apply long-standing Eighth Amendment jurisprudential principles to his situation. Application of the familiar analyses set forth in this jurisprudence by either the trial court or this Court leads to

the conclusion that life imprisonment with no opportunity for parole are not constitutional when applied to the category of offenders who did not kill or intend to kill.

Mr. Lee asks this Court hold that Mr. Lee's sentence is unconstitutional under this analysis or, in the alternative, remand for the trial court to make this determination in the first instance after receiving evidence and argument. Mr. Lee also asks this Court to hold his sentence is unconstitutional under Article I, § 13 of the Pennsylvania Constitution, which forbids cruel punishments and provides at least as much protection as the Eighth Amendment to the U.S. Constitution. Even if Mr. Lee's sentence does not run afoul of the Eighth Amendment, under the analysis set forth in *Commonwealth v. Edmunds,* 586 A.2d 887, 894 (Pa. 1991), the Pennsylvania cruel punishments clause should provide greater protections than the Eighth Amendment in these circumstances.

I. LIFE-WITHOUT-PAROLE FOR A DEFENDANT WHO DID NOT TAKE A LIFE OR INTEND TO TAKE A LIFE VIOLATES THE EIGHTH AMENDMENT

Mr. Lee asserted in his Motion for Modification of Sentence in the trial court that his mandatory life sentence, imposed solely due to his conviction for felony-murder and under which he will never be eligible for parole through operation of Pennsylvania's parole code, is unconstitutional under the Eighth Amendment because he did not kill or intend to kill. In addressing Mr. Lee's Eighth Amendment

claim following appeal to this Court, the trial court correctly noted that Mr. Lee cited to U.S. Supreme Court cases striking down life-without-parole sentences for juveniles and other cases striking down the death penalty for certain categories of offenses or offenders with diminished culpability, including *Enmund v. Florida,* 458 U.S. 782 (1982), which held that the death penalty cannot be applied to defendants who did not kill or intend to kill. Trial Court Op., 4-5. The trial court found that because these rulings had not yet been applied to defendants, like Mr. Lee, who were sentenced to life imprisonment with no possibility of parole but did not kill or intend to kill, his sentence does not violate the Eighth Amendment. The lower court's reasoning, however, failed to apply the proper legal standard for analyzing the constitutionality of life-without-parole sentences under the Eighth Amendment, and instead erroneously held that a question of first impression must fail simply on account of it being a question of first impression.

Mr. Lee recognizes that no binding precedent has yet found that life imprisonment sentences imposed upon defendants who do not kill or intend to kill are unconstitutional under the Eighth Amendment. In *Commonwealth v. Rivera,* this Court held that a mandatory life imprisonment sentence for a second degree murder conviction is not unconstitutional under the Eighth Amendment. 238 A.3d 482, 503 (Pa. Super. 2020). However, the defendant and 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. *See Rivera,* 238 A.3d at 503. As is explained in detail *infra,* the line of cases beginning with *Graham v. Florida,* 560 U.S. 48 (2010), make clear that courts should assess whether a life-without-parole sentence is unconstitutional when applied to a certain category of offenses or offenders under the Court's categorical approach to Eighth Amendment sentencing challenges. *Graham, Miller,* and *Montgomery* instruct 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. Under this categorical analysis, as set forth below, mandatory life imprisonment sentences with no possibility of parole violate the Eighth Amendment when imposed on someone who did not kill or intend to kill. Mr. Lee sought is seeking a determination in the first instance, applying familiar Eighth Amendment jurisprudential principles, as to whether his sentence is unconstitutional under the analytical framework set forth by the U.S. Supreme Court for evaluating such claims that the harshest punishments are unconstitutional when imposed on people with categorically-diminished culpability.

a. Life-without-parole sentences are subject to review under the categorical approach reserved for the law's most severe punishments

The Eighth Amendment to the U.S. Constitution prohibits "cruel and unusual punishments." U.S. Const. Amend. XIII. 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.

When considering the most severe punishments, the Court applies its categorical approach to determine whether the punishment is excessive. Under this categorical jurisprudence, courts must assess whether a punishment is excessive when applied to a particular class of offenders or offenses. *Graham,* 560 U.S. at 60. In the death penalty context, the Court has ruled that people convicted of non-homicide offenses, including felony-murder where the defendant did not kill or intend to kill, cannot be sentenced to death. *See Kennedy v. Louisiana*, 554 U.S. 407 (2008) (barring death penalty for rape of a child); *Coker v. Georgia,* 433 U.S. 584

(1977), 433 U.S. 584 (barring death penalty for rape of an adult); *Enmund*, 458 U.S. 782 (barring death penalty for person convicted of felony murder where the person did not kill or intend to kill). The Court has also ruled that the death penalty cannot be imposed on juveniles or people with intellectual disabilities. *See Roper v. Simmons*, 543 U.S. 551 (2005) (barring death penalty for juveniles); *Atkins v. Virginia*, 536 U.S. 304 (2002) (barring death penalty for people with intellectual disabilities). 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*, 543 U.S. at 563). 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.

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 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 Court again recognized and reinforced that this category of offenses does not warrant the most severe punishments in *Graham,* holding that juveniles convicted of non-homicide offenses cannot be sentenced to life-without-parole. The Court reasoned that "a juvenile offender who did not kill or intend to kill has a *twice* diminished moral culpability," first by virtue of youth, and second by virtue of the nature of the offense. *Graham,* 560 U.S. at 69 (emphasis added).

In *Graham* and *Miller,* the Court held that life-without-parole sentences implicate the same concerns, and are thus entitled to the same scrutiny and Eighth Amendment protections, as the death penalty. For the first time in *Graham,* the Court applied its categorical approach to life-without-parole sentences due to their similarity to the death penalty. *Graham,* 560 U.S. at 61, 69. The Court followed suit in *Miller*. 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.

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 alter "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*. We turn next to analyzing Pennsylvania's life-without-parole sentencing scheme for second degree murder under this framework.

b. Appellant's lifetime prohibition on parole eligibility violates the Eighth Amendment due to his categorically diminished culpability

Mr. Lee was sentenced to life imprisonment under 18 Pa.C.S. § 1102(b), which requires imposition of a life sentence on people convicted of second degree murder. Second degree murder is defined as a criminal homicide that is "committed while the defendant was engaged as a principal or an accomplice in the perpetration of a felony." 18 Pa.C.S. § 2502(b). The *mens rea* required to be convicted of second degree murder is merely the intent to engage in the underlying felony. *Id*; *Com. 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. By virtue of Mr. Lee's life sentence, he will

never be eligible for parole consideration under 61 Pa.C.S. § 6137(a), which forbids the parole board from granting parole to anyone sentenced to life imprisonment. *See Com. v. Batts,* 66 A.3d 286, 295-296 (Pa. 2013) (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,* the Supreme Court of Pennsylvania determined that the portions of the parole code that prohibit people serving life sentences from consideration for parole is 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.

In Mr. Lee's case, there can be no argument that he did not kill or intend to kill. Mr. Lee was found not guilty of first degree murder, as was his co-defendant, conclusively establishing that there was no intent to kill. The only witness to the offense testified that the man she identified as Mr. Lee was not even in the same room when the gunshot that killed Mr. Butler was fired. Tina Chapple testified that Mr. Lee had already left the basement when Mr. Butler attempted to lunge toward the shooter, then she heard the gun go off and Mr. Butler was shot. Mr. Lee's culpability falls well within the category established by *Enmund*: those who, though involved in a felony which ultimately resulted in a person's death, do not kill or intend to kill have categorically diminished culpability for Eighth Amendment purposes. *Enmund,* 458 U.S. at 797.

Applying the categorical approach to Mr. Lee's case, as courts must following *Graham* and *Miller,* the mandatory imposition of a life sentence with no possibility of parole violates the Eighth Amendment. The Court has already established that 1) individuals who do not kill or intend to kill fall into a category of diminished culpability for Eighth Amendment purposes, *Enmund,* 458 U.S. 782; and 2) life-without-parole punishments share sufficiently similar characteristics to the death penalty to apply the Court's categorical approach to Eighth Amendment disproportionate punishments analysis. *Graham,* 560 U.S. at 61; *Miller*, 567 U.S. at 475. That Pennsylvania is a national and global outlier in imposing life-without-parole for felony-murder and the compelling evidence that this punishment is unduly harsh in relation to legitimate penological purposes render its imposition a violation of the Eighth Amendment.

i. *Pennsylvania's mandatory life-without-parole sentencing scheme is objectively out of step with contemporary standards*

Courts must look to nationwide practices when assessing whether a punishment violates the Eighth Amendment for a category of offenders or offenses. The Eighth Amendment reflects the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). In determining the contours of these evolving standards of decency, courts must look to objective indicia such as statutes, recent legislation (including any trends), the frequency with which a punishment is imposed, broader social

consensus, and practices in other countries. *See Graham,* 560 U.S. at 62-67; 80-82. Pennsylvania is an extreme outlier in sentencing those convicted of felony-murder to die in prison.

The vast majority of states do not impose mandatory sentences of life imprisonment with no possibility of parole on individuals convicted of felony-murder who did not kill or intend to kill. *See* ANDREA LINDSAY, PHILADELPHIA LAWYERS FOR SOCIAL EQUITY, LIFE WITHOUT PAROLE FOR SECOND DEGREE MURDER IN PENNSYLVANIA: AN OBJECTIVE ASSESSMENT OF SENTENCING 42 (2021) (hereafter "PLSE Report") (noting that "Pennsylvania is a national exception"). Pennsylvania is one of only two states that make life imprisonment with no opportunity for parole mandatory for people convicted of felony murder irrespective of whether they killed or intended to kill, and notwithstanding their level of involvement in the felony. *Id.* at 6. This stands in stark contrast to nearly all other states in the country.

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 those convicted of felony murder to life with no chance of parole where the person has not killed or intended to kill. This breaks down as follows: nineteen states do not make life imprisonment with no opportunity for parole an authorized sentence for felony

murder.[1] Seven more states have abolished felony murder altogether. *See* PAUL H. ROBINSON & TYLER SCOT WILLIAMS, MAPPING AMERICAN CRIMINAL LAW: CH. 5 FELONY-MURDER RULE 2 (2017), https://scholarship.law.upenn.edu/faculty_scholarship/1719 (listing Arkansas, Hawaii, Kentucky, Michigan, New Hampshire, New Mexico, and Vermont as states that have "effectively rejected the felony-murder rule"); Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 402, 440 (2011). Additionally, four states that authorize life imprisonment with no opportunity for parole for felony murder still require that the defendant must have acted with intent to kill to receive this punishment. ROBINSON & WILLIAMS, *supra* at 3–4 (listing Illinois and North Dakota as requiring proof of "at least recklessness as to causing the death of another human being"); Cal. Penal Code § 189(e) (2021) (requiring the defendant to have actually killed or acted with at least reckless indifference to human life with major participation in the felony). *See* Iowa Code § 707.2(1)(b) and *id.* § 902.1(1) (limiting life imprisonment with no opportunity for parole for felony murder to first degree

[1] 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.

murder where the "person kills another person while participating in a forcible felony").

Indeed, only one other state—Louisiana—mandates life imprisonment with no opportunity for parole for felony murder like Pennsylvania does, irrespective of whether the person killed or intended to kill. La. Stat. Ann. § 14:30.1 (2021). Even in states which permit or mandate life imprisonment with no opportunity for parole, Pennsylvania's regime is harsh. In West Virginia, for example, a jury may enable a person convicted of felony-murder to be eligible for mercy after fifteen years. W. Va. Code § 62-3-15 (2021). Thus, the majority of states do not sanction life imprisonment with no opportunity for parole for those convicted of felony murder who do not intend to kill. Current trends among states also indicate a growing consensus that defendants convicted of felony-murder who do not kill or intend to kill should not be punished as harshly as those who do kill or intend to kill. In 2015, California's Supreme Court ruled that felony-murder defendants must demonstrate at least reckless indifference to human life with respect to the killing itself and not merely the underlying felony, and that knowledge that a co-defendant is armed is insufficient evidence of this. *In re Bennett,* 26 Cal. App. 5th 1002 (Ca. 2018)). Massachusetts's highest court ruled in 2017 that the prosecution must prove malice regarding the killing itself. *Commonwealth v. Concepcion,* 487 Mass. 77 (Ma. 2021). 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). Colorado passed a bill eliminating mandatory life-without-parole for felony-murder and allowing for a sentencing range of 16-48 years to be determined in the trial court's discretion. *See* Nazgol Ghandnoosh, Emma Stammen, & Connie Budaci, The Sentencing Project, Felony Murder: An On-Ramp for Extreme Sentencing 16 (2022).

Additionally, Pennsylvania is an outlier with respect to its aggressive and extensive use of life imprisonment with no opportunity for parole. It has one of the highest populations of people serving life imprisonment with no opportunity for parole sentences, second only to Florida, whose general and incarcerated populations are double that of Pennsylvania. ABOLITIONIST LAW CENTER, A WAY OUT: ABOLISHING DEATH BY INCARCERATION IN PENNSYLVANIA 16 (2018). Pennsylvania alone houses 10% of the country's life imprisonment with no opportunity for parole population. *PLSE Report* at 4. As of 2019, of the 5,436 people serving life imprisonment with no opportunity for parole sentences in Pennsylvania, 1,166 (roughly 21%) were serving it for felony murder. *Id.* This shows that Pennsylvania's mandatory life imprisonment with no opportunity for parole for felony murder imposes harsh punishment at a unique and staggering scale.

The international consensus is likewise strongly against life imprisonment with no opportunity for parole for felony murder. The United States is the only common law country that still recognizes the felony-murder rule. 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/27alifornia-felony-murder.html. Indeed, life imprisonment with no opportunity for parole sentences "are virtually unheard of" outside of the U.S. THE SENTENCING PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT 5 (2021), https://www.sentencingproject.org/publications/no-end-in-sight-americas-enduring-reliance-on-life-imprisonment/. Only four Latin American countries permit life-without-parole sentences. Beatriz Lopez Lorca, *Life Imprisonment in Latin America,* Life Imprisonment and Human Rights 52 (Dirk van Zyl Smit & Catherine Appleton eds., 2016). The European Court of Human Rights has ruled that life-without-parole sentences are cruel if there is no meaningful possibility for review and release. *Vinter v. United Kingdom,* 2013-III Eur. Ct. H.R. 349, 358. Countries and Asia and Africa have found that life-without-parole sentences are incompatible with human dignity, and thus illegal, if they cannot be reviewed and reduced as circumstances warrant. Center for L. and Just., Univ. of S.F., Sch. of L., *Cruel and Unusual: U.S. Sentencing Practices in a Global Context* 25 (2012) [hereinafter *U.S. Sentencing in Global Context*]; *cf.* Meghan J. Ryan, *Taking Dignity*

Seriously: Excavating the Backdrop of the Eighth Amendment, 2016 U. Ill. L. Rev. 2129, 2140–42. Generally, even countries that permit life-without-parole sentences only impose them in extreme circumstances. *See U.S. Sentencing in Global Context* 22, 25-27.

Felony murder is likewise disfavored in the international community as a violation of the fundamental principles of justice and proportionality. The felony-murder rule has been abolished in the United Kingdom, where it originated before being adopted in other Commonwealth countries and the United States. *See* Homicide Act of 1957, 5 & 6 Eliz.2 c.11, § 1 (Gr. Brit.); Criminal Justice Act of 1966, c. 20, § 8 (N. Ir.). The Republic of Ireland, Antigua and Barbuda, Barbados, Kiribati, and Tuvalu, abolished felony murder in the 1960s. *See* Criminal Justice Act 1964 (Act No. 5/1964), § 4 (Ir.), http://www.irishstatutebook.ie/eli/1964/act/5/section/4/enacted/en/html#sec4; Offenses against the Person Act, 1982 (Cap. 300), § 10 (Ant. & Barb.); Offenses against the Person Act, 1994 (Act No. 18/1994), § 3 (Barb.); Penal Code, 1965 (Cap. 67), § 194 (Kiribati); Penal Code, 1965 (Cap. 10.20), § 194 (Tuvalu). The Canadian Supreme Court also eliminated felony-murder in 1990, reasoning that "the principle of fundamental justice that subjective foresight of death is required before a conviction for murder can be sustained," which is necessary to "maintain a proportionality between the stigma and punishment attached to a murder conviction

and the moral blameworthiness of the offender." *R. v. Martineau,* [1990] 2 S.C.R. 633, 644-45 (Can.).

ii. *Life-without-parole for felony murder is excessive in relation to legitimate penological purposes*

Life-without-parole for those such as Appellant who have been convicted of felony-murder in Pennsylvania is excessive in regard to the traditional purposes of punishment the U.S. Supreme Court has turned to as part of its categorical Eighth Amendment framework. There are four principal penological justifications for punishment: deterrence, incapacitation, retribution, and rehabilitation. None of these interests are sufficiently served by sentencing individuals like Mr. Lee to a lifetime of incarceration with no meaningful opportunity for release when they neither killed nor intended 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. This basic requirement is absent in Mr. Lee's case, as he is being punished for an unintended albeit tragic consequence of the robbery he participated in: his co-defendant killed the victim during a struggle over a gun without Mr. Lee's knowledge or involvement while he was in a different part

of the house. The concept of deterrence does not align with punishing people for the unintended consequences of their actions.

Incapacitation is also an unavailing rationale for Mr. Lee' sentence. Forcing people to spend the rest of their natural lives in prison invariably means they become elderly during their incarceration. Aging and rehabilitated people who have spent decades in prison, even for violent crime, present a statistically low risk for re-offending on any offense. One national study found that among individuals previously convicted of a crime, those older than 55 were ten times less likely to commit a further criminal offense as compared to those in their early 20s. James Austin & Lauren-Brooke Eisen, *How Many Americans are Unnecessarily Incarcerated?,* Brennan Institute for Justice at 36 (2016). In a 2004 nationwide study, people released from a life sentence were less than one-third as likely to be rearrested within three years of their release compared to the overall re-arrest rate within that time span. Ashley Nellis, *Throwing Away the Key*, 23(1) Fed. Sent. R. 28 (2010). Strikingly, 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. *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). For those whose

sentences were commuted when they were at least 50 years old, only one out of 99 was re-incarcerated for any reason. *Id*.

More recently, according to a 2018 review of 230 people released from prison in Pennsylvania who were initially sentenced to life imprisonment with no possibility of parole for homicide offenses committed when they were juveniles, only one has been rearrested or re-incarcerated as of April 2018. Samantha Melamed, *35 Years in prison, then 150 days of freedom: Philly's first juvenile lifer back in jail*, Philadelphia Inquirer (April 27, 2018). An even more recent study of 269 people from Philadelphia who were formerly sentenced to life imprisonment with no possibility 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). 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/.

Comparative state data provides further support for the notion that incapacitation does not provide a legitimate justification for this punishment. A study of 368 people convicted of murder in New York found that none were incarcerated for a new violent offense within three years of their release from prison.

Marie Gottschalk, *Days Without End: Life Sentences and Penal Reform*, Prison Legal News (January 15, 2012).In California, out of 860 people who were paroled between 1995-2011 after serving sentences for murder, less than one percent were re-incarcerated for a new felony conviction, and none were convicted of crimes eligible for a life sentence. Nazhol Ghandnoosh, *Delaying a Second Chance: The Declining Prospects for Parole on Life Sentences,* The Sentencing Project at 29 (2017).

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 more than 3,500 people convicted of first degree murder in Pennsylvania. Pennsylvania Department of Corrections, 2019 Annual Statistical Report 21 Table 21 (2020). Retribution, the penological concept of punishment in proportion to the heinousness of the criminal act committed, is rather vengeance without principle in Mr. Lee' case, since the punishment is identical to that imposed on people whose culpability is greater under the Eighth Amendment.

As for rehabilitation, 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

behavior and conduct, he will still be provided no meaningful opportunity for release from prison.

Mr. Lee's mandatory sentence to permanent incarceration for an offense in which he neither took a life nor intended to take a life violates the Eight Amendment's prohibition on cruel and unusual punishments. Life imprisonment with no meaningful opportunity for release does not serve the penological interests recognized as necessary to justify a punishment under the Eighth Amendment. Pennsylvania is one of only two states to mandatorily impose this punishment on all people convicted of felony-murder, regardless of the specific circumstances of their offenses. Other states limit the practice in a variety of ways, and a growing number have abolished it altogether. While very few other countries even permit *any* life-without-parole sentences, its application to people in Mr. Lee's situation is unheard of. This Court should end Pennsylvania's outlier status and recognize that Mr. Lee's sentence violates the Eighth Amendment. Not only is Pennsylvania out of step with the rest of the country and world, but the imposition of a life sentence with no possibility for parole is punishment without penological purpose.

II. APPELLANT'S LIFETIME PRECLUSION FROM PAROLE ELIGIBILITY VIOLATES THE PENNSYLVANIA CONSTITUTION'S PROHIBITION ON CRUEL PUNISHMENTS

Appellant raises a challenge to his permanent exclusion from parole eligibility under the anti-cruelty provision of Art. I, § 13 of the Pennsylvania Constitution. This

challenge is distinct from his claim under the Eighth Amendment of the federal constitution in that Mr. Lee here argues that pursuant to the four-factor analysis laid out in *Com. v. Edmunds*, 586 A.2d 887, 894 (Pa. 1991), the state constitution must provide greater protections than its federal counterpart in order to strike down the lifetime prohibition on parole eligibility for a defendant who did not take a life nor intend to take a life. The text and history of Pennsylvania's anti-cruelty provision, discussed further *infra*, require striking down punishments – such as the one at issue in this case – that are demonstrably excessive to the goals of rehabilitation and deterrence. That Pennsylvania is such an outlier in the United States in imposing such strict, mandatory punishment to those convicted of felony-murder, and the United States is an outlier when it comes to imposing life-without-parole for *any* offense provide further compelling bases for voiding the lifetime parole prohibition. Accordingly, the judiciary is called upon to wield its ample constitutional authority and invalidate this grossly disproportionate punishment.

In assessing a claim that a Pennsylvania constitutional provision provides greater protection than its federal constitutional counterpart, the courts of this commonwealth use the four-part test outlined in *Edmunds*: (1) the text of the Pennsylvania constitutional provision; (2) the history of 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. As of 2018, the court had "vindicated distinctive Pennsylvania constitutional rights" in 373 cases, including 147 cases involving criminal procedure. *See* Seth F. Kreimer, *Still Living after Fifty Years: A Census of Judicial Review under the Pennsylvania Constitution of 1968*, 7 RUTGERS U. L. REV.287, 291, 306; 312 (2018). Notwithstanding the findings by some Pennsylvania courts that certain rights secured by Article I, § 13 are coextensive with those secured by the Eighth Amendment, courts are not "absolved of the duty to independently review a properly presented state constitutional claim" of broader protection than the federal constitutional counterpart. *Commonwealth v. Baker*, 78 A.3d 1044, 1054 (Pa. 2013) (Castille, J., concurring). An independent review of the four *Edmunds* factors support Mr. Lee's argument that a lifetime prohibition on parole eligibility is an unconstitutional cruel punishment when applied to a person who did not take a life or intend to take a life.

a. The text of Article I, § 13

The textual difference between Art. I, § 13 of the Pennsylvania Constitution, declaring that "cruel punishments [shall not be] inflicted", and its federal counterpart, which protects against "cruel and unusual punishments", is substantive, each pointing to distinctive grounds for restraining state authority to inflict punishment. *C.f. 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). States are not bound to the federal interpretation of the federal counterpart to state constitutional provisions, even when they share identical language, and less so when there are notable textual differences between the provisions, as here. *See id* at 1053. (Pennsylvania's anti-cruelty provision does not "require[] lock step devotion to federal law interpreting the Eighth amendment).

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." In a comprehensive historical excavation on the meaning of the word "unusual" in the Eighth Amendment, Professor John Stinneford found the following:

> As used in the Eighth Amendment, the word "unusual" was a term of art that referred to government practices that are contrary to "long usage" or "immemorial usage." Under the common law ideology that came to the founding generation through Coke, Blackstone, and various others, the best way to discern whether a government practice comported with principles of justice was to determine whether it was continuously employed throughout the jurisdiction for a very long time, and thus enjoyed "long usage." The opposite of a practice that enjoyed

> "long usage" was an "unusual" practice, or in other words, an innovation.

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, discussed *infra*.

Pennsylvania would not be alone in finding that such a textual distinction supports broader protections than the Eighth Amendment to the federal Constitution. As discussed below, several sister states have found textual differences from the federal prohibition against cruel and unusual punishments as meaningful evidence of a substantive distinction requiring more extensive protections under their respective state constitutions. *State v. Bassett*, 482 P.3d 343 (Wash. 2018) (recognizing substantive difference between "cruel" and "cruel and unusual"); *People v. Carmony* 26 Cal. Rptr. 3d 365, 378 (2005) (referring to the distinction as "purposeful and substantive rather than merely semantic"); *Armstrong v. Harris*, 773 So.2d 7,17 (Fla. 2000) ("cruel" and "unusual" were to be defined individually and disjunctively"); *State v. Mitchell* 577 N.W.2d 481, 488 (Minn. 1998) (textual difference "not trivial"); *People v. Bullock*, 485 N.W.2d 866, 872 (Mich. 1992) (describing the textual difference as "not appear[ing] to be accidental or inadvertent").

That the text of Pennsylvania's anti-cruelty provision supports an independent, more expansive reading than its federal counterpart is reinforced and given further content by exploring the history of that provision.

b. The history of Article I, § 13

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.

Pennsylvania's second constitution, ratified in 1790, included a provision forbidding all "cruel punishments." For more than 230 years that provision has remained ensconced in the constitution despite the adoption of changes so substantial that the original constitution has twice been officially distinguished from subsequent constitutions by acts of the legislature and modified more than a dozen times.[2] This provision had a distinct, understood legal meaning in the late 18th Century that sheds considerable light on the state constitutional claim that Appellant raises before this Court.

In another legal genealogy by the legal scholar Stinneford, the meaning of the word "cruel" in the country's founding era is explored. John F. Stinneford, *The Original Meaning of "Cruel",* 105 Geo. L.J. 441 (2017). Historical sources "are remarkably consistent in interpreting a cruel punishment as one whose effects are

[2] Revised constitutions were adopted in 1874 and 1968 with amendments in 1901, 1909, 1911, 1913, 1915, 1918, 1920, 1922, 1923, 1928, 1933, 1937, 1943, 1945, 1949, 1951, 1953, 1955, 1956, 1957, 1958, 1959, 1961, 1963 and 1965. *See*: https://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=00&div=0&chpt=1.

unduly harsh, not as one imposed with a cruel intent." *Id*. at 473-74. 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 somebody to a punishment that causes "unjust suffering." Comments by the architects of the 1790 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.[3]

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,

[3] Counsel relied upon research contained in the following unpublished law review article for this insight and the historical examples that follow: Kevin Bendesky, *"The Key-Stone to the Arch": Unlocking Section 13's Original Meaning,* (Apr. 30, 2022) (unpublished manuscript) (on file with author).

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).

Benjamin Rush, a Pennsylvania signatory to the Declaration of Independence who along with James Wilson "mounted a successful campaign to make over the Pennsylvania constitution" of in 1790,[4] echoed the rehabilitative purpose of the criminal punishment system, stating that "the only design of punishment is the reformation of the criminal." BENJAMIN RUSH, *An Enquiry Into the Effects of Public Punishments Upon Criminals, and Upon Society*, republished *in*, ESSAYS, LITERARY, MORAL AND PHILOSOPHICAL, at 136 (Philadelphia, Thomas and William Bradford, 1806).

Similarly, William Bradford, who served as Attorney General of Pennsylvania and later as Attorney General of the United States and was a Pennsylvania Supreme Court Justice,[5] subscribed to the prevailing understanding as to what constituted a

[4] Penn Libraries University Archives & Records Center, https://archives.upenn.edu/exhibits/penn-people/biography/benjamin-rush/.
[5] United States Dept. of Justice website at https://www.justice.gov/ag/bio/bradford-william.

"cruel" punishment. Bradford and other leading protagonists in the founding of the United States were profoundly influenced by the Italian philosopher Cesare Beccaria, author of the seminal book on penal reform *On Crimes and Punishments*. "The Birth of American Law: An Italian Philosopher and the American Revolution," John D. Bessler, September 16, 2014, American Constitution Society, https://www.acslaw.org/?post_type=acsblog&p=10464. In a letter written in 1786, Bradford stated that "Long before the recent Revolution [*On Crimes and Punishments*] was common among lettered persons of Pennsylvania, who admired its principles[.]" *Id*. "In 1793, Bradford wrote *An Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania*, a report that mentions Beccaria in its first paragraph and emphasizes that 'as soon as the principles of Beccaria were disseminated, they found a soil that was prepared to receive them.'" *Id*. One of the "core principles" of Beccaria embraced by Bradford "was that any punishment which is not 'absolutely necessary' is 'cruel' and 'tyrannical.'" *Id*; *cf.* JOURNAL OF THE SENATE OF PENNSYLVANIA (Dec. 8, 1792) (quoting Tomas Mifflin: "every punishment, which is not absolutely necessary for [deterrence], is an act of tyranny and cruelty").

This historical accounting shows that the Pennsylvania constitutional prohibition against cruel punishments was born of an understanding that punishments that are excessive in relation to rehabilitative and deterrent ends were

not "absolutely necessary" and therefore "tyrannical." Furthermore, the omission of the "unusual" conjunction in the state constitution indicates an original intent that the penal laws of the Commonwealth would be subject to judicial review under the cruel punishments clause even if they were "usual," which is to say long-established in the law. Thus, the historical roots of the Pennsylvania constitution's anti-cruelty provision demonstrate that this right *requires* a contemporary assessment of the proportionality between a punishment and its rehabilitative and deterrent ends, as the mere cruelty of a punishment is forbidden regardless of whether it has been long-sanctioned in practice. Newly emergent understandings, evidence, and studies that demonstrate the excessiveness of a punishment such as life-without-parole for the crime of felony murder not only must be given consideration under the state constitutional provision, but in this case they are dispositive as to the "cruelty" of the punishment in question.

c. Related State Law

The jurisprudence of states with anti-cruelty constitutional provisions that are similar or identical to Art. I, § 13 also recognize that there is a not-trivial distinction between their state provisions and the anti-cruelty clause of the Eighth Amendment, and held that their provisions provide broader protection. *State v. Bassett*, 482 P.3d 343 (Wash. 2018). 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." *Id.* at 349 (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").

As the foregoing cases demonstrate, it is commonly accepted that prohibitions against "cruel punishments," "cruel or unusual punishments," and "cruel and unusual punishments" encompass specific terms with meaningful distinctions. This case law reinforces the preceding sections on the text and history of Pennsylvania's prohibition against "cruel punishments," situating the argument that this state's

constitution may – and should – provide greater protections in this regard than its federal counterpart within an established body of state constitutional jurisprudence.[6]

d. Policy Considerations

i. *Pennsylvania is a national and global outlier*

In addition to the preceding sections, there are critical policy considerations that support interpreting Pennsylvania's anti-cruelty provision more broadly than the Eighth Amendment in the case of life imprisonment with no possibility of parole sentences for felony murder. As an initial matter, and as discussed in detail *supra*, Pennsylvania is an outlier both within the United States and globally in the number of people serving life imprisonment with no possibility of parole sentences and in imposing mandatory life sentences on everyone convicted of felony-murder. If Mr. Lee had committed the same offense in any other state in the country save Louisiana it is very unlikely he would have received a life-without-parole sentence. The same holds true for the vast majority of the more than 1,100 who have been sentenced to die in prison in Pennsylvania without any finding by a court that they possessed an intent to take a human life. That Pennsylvania is an outlier in this punishment practice is not only relevant to Appellant's federal constitutional claim; it also

[6] That there are no cases directly on point from other states challenging life-without-parole for felony murder can be explained in large part by the fact that Pennsylvania is alone with Louisiana in mandatorily imposing such sentences. In other states the relief sought by Appellant is not necessary because in other states it is highly unlikely Mr. Lee would have received a life-without-parole sentence.

provides a potent impetus for the courts of this state to strike down this practice under the state constitution.

ii. Disparate Impact Racial Discrimination is Apparent in Felony-Murder Convictions

Racial disparities among people serving life sentences without a possibility of parole in Pennsylvania are also remarkably high, especially among the population serving these sentences for felony-murder. In Pennsylvania, over 70 percent of people who have been sentenced to die in prison for a death they had no intention to cause—and that was, in fact, caused by another person—are Black. Meanwhile, Black people making up only 11 percent of the population. 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. These racial disparities are shocking and unacceptable; they must be remedied.

Felony-murder charging and sentencing decisions are infected with racial injustice in large part because of the immense prosecutorial discretion involved in deciding whether or not to charge an accomplice with an enhanced charge for a death he or she had no part in. Greg Egan, *George Floyd's Legacy: Reforming, Relating, and Rethinking Through Chauvin's Conviction and Appeal Under a Felony-Murder Doctrine Long-Weaponized Against People of Color*, 39 Minn. J.L. & Ineq. 543, 543 (2021). Felony murder can cover such a wide range of culpability that prosecutors

can justify bringing or dropping the charge according to their preference. *Id.* And 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).

Take, for example, a Minnesota study that found Black and Latino people were more than twelve times more likely to be convicted of felony-murder than white people, were less likely to be allowed to plead down to a lesser charge, and were sentenced more harshly after conviction. Greg Egan, *George Floyd's Legacy* at 548. Whereas 66.7% of white people benefitted by pleading down to felony-murder from a more serious charge, only 38.5% of nonwhite defendants had their more-serious charges reduced to felony murder. *Id.* at 548. The rest had felony murder as the top count on their indictment, with no opportunity to plead down. *Id.* And white people convicted of felony-murder received reduced sentences 25% of the time, compared to 16% for nonwhite defendants. *Id.* at 546. Nonwhite people convicted of felony-murder received reduced sentences about as often as they received aggravated sentences, whereas white people got a reduced sentence 2.5 times as often as an aggravated sentence. *Id.*

The injustice is compounded where the person who died was white. In those cases, Black defendants are significantly more likely to be charged in felony-

murder than when the person who died was of any other race. *See* William J. Bowers, Glenn L. Pierce, and John F. McDevitt, *Legal homicide: Death as punishment in America*, 1864-1982. BOSTON: NORTHEASTERN UNIVERSITY PRESS (1984). And a Florida study of 346 homicides found that even in cases ***with no obvious felony circumstances***, prosecutors were most likely to upgrade the charge to felony-murder in cases where the defendant was Black and the victim was white. Michael L. Radelet & Glenn L. Pierce, *Race and prosecutorial discretion in homicide cases*, 19 L. & Soc'y Rev. 587, 592 (1985). Conversely, counties across the country with more Black victims of homicide have statistically fewer sentences of life imprisonment with no opportunity for parole. *Id.*; Brandon Garrett et al., *Life Without Parole Sentencing in North Carolina*, WILSON CENTER FOR SCIENCE AND JUSTICE AT DUKE UNIVERSITY SCHOOL OF LAW (Sep. 22, 2020), https://wcsj.law.duke.edu/2020/10/groundbreaking-research-reveals-increase-in-life-without-parole-sentences-amid-decline-in-serious-crime/.

The staggering racial bias in felony-murder conviction rates in Pennsylvania provides another basis for construing the state Constitution's cruel punishment clause in a manner that ameliorates a severe, permanent punishment that overwhelming impacts those communities that bear the brunt of structural racism. Failure to provide a remedy in this context will only enable the perseverance and retrenchment of pernicious racial inequality and breed disrespect for the law.

iii. Life-Without-Parole for felony-murder convictions is contributing to the inhumane creation of a geriatric prison population that does not further public safety

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. *See* 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/. Yet criminologists have long found that an individual's involvement in crime correlates strongly to age, and that older incarcerated people pose little public safety risk. *A Way Out* at 20; 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/. Indeed, social science research shows that older individuals who have been released from prison, including those convicted of homicide-related or other serious offences, have extremely low recidivism rates, 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) http://www.osborneny.org/resources/the-high-costs-of-low-risk/the-high-cost-of-low-risk/, and that people tend to "age out" of crime in their 30s and 40s, including those who have committed violent or more serious offenses. *See* Joshua Vaughn,

"Aging into Crime: Pennsylvania Deals with Aging Prison Population," The Sentinel (Dec. 7, 2018): https://cumberlink.com/news/local/closer_look/aging-into-crime-pennsylvania-deals-with-aging-prison-population/article_3284ba88-8066-595c-a922-73b4327338f1.html; 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.

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, which has led many prisons to lower the age considered elderly to 50-55 years of age. *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. Aging people in prison are at heightened risk for the early onset of many chronic, debilitating, and/or geriatric conditions even as compared to the already at-risk general prison population. *See id.* at 4–7. This includes conditions like dementia and other cognitive impairments, incontinence, and multimorbidity—having two or more serious medical conditions, such as diabetes, hypertension, heart disease, lung

disease, cancer, stroke, and Hepatitis C. *Id.*, *see also,* High Costs of Low Risks, at 22–23. These poor health conditions, exacerbated by the conditions of incarceration, put the aging prison population at high risk of contracting COVID-19 and other infectious diseases that can lead to serious complications or death. *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. "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. Pennsylvania, for example, spends an estimated $66,000 a year to incarcerate an older person. 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. Yet, the specialized needs of an

increasing aging prison population have grown past the prison system's capability to provide effective and humane care. *See* High Costs of Low Risk, at 22.

e. Conclusion: the *Edmunds* factors support Appellant's challenge to his lifetime prohibition on parole eligibility

Pennsylvania constitutional law – especially law surrounding evolving standards of proportionality – is not stuck in amber. In *Edmunds*, the Pennsylvania Supreme Court underscored: "we have stated with increasing frequency that it is both important and necessary that we undertake an independent analysis of the Pennsylvania Constitution, *each time* a provision of that fundamental document is implicated." 586 A.2d at 894–95 (emphasis added). Taking these factors together, 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. A lifetime preclusion from parole eligibility for individuals like Derek Lee, who did not take a life or intend to take a life, fails to further rehabilitative ends and is grossly excessive vis-à-vis deterrence. The human, racial, public health, and economic costs of the life imprisonment with no possibility of parole scheme in Pennsylvania for felony-murder, together with Appellant's

argument with respect to the other *Edmunds* factors, presents more than "a compelling reason" to interpret Article I, § 13 as affording greater protection than the Eighth Amendment. *See Person v. Penn. State Police Megan's Law Section*, 2015 WL 6790285 at *13 (Pa. Commw. Ct. 2015) ("When there is compelling reason to do so, we may interpret our constitution as affording greater protections than the federal constitution") (citing *Com. v. Gaffney*, 702 A.2d 565, 569 (Pa. 1997)).[7]

III. MR. LEE'S APPEAL SHOULD NOT BE QUASHED AND IS PROPERLY BEFORE THIS COURT

On November 15, 2021, this Court issued a *per curiam* order to show cause as to why this appeal should not be quashed as untimely. Counsel filed a letter in response on November 23, 2021. On December 21, 2021, this Court issued a *per curiam* order discharging the Show-Cause Order and directed Appellant to be prepared to address "whether the trial court's failure to appoint counsel following it's November 4, 2020 Order reinstating Appellant's direct appeal and post-sentence rights constituted a breakdown in the court such that the appeal should not be quashed as untimely." Order, 1008 WDA 2021 (December 21, 2021).

A defendant has a right to effective assistance of counsel at the post-sentence and direct appeal stages. *See e.g. Com. v. Bennett,* 930 A.2d 1264, 1272-73 (Pa.

[7] At the very least these factors require development of a full evidentiary record before the court may pass judgment on Mr. Lee's claims.

2007). A defendant also has a constitutional right to take an appeal from his judgment of sentence. Pa. Const. Art. V § 9. Ordinarily, post-sentence motions must be filed within ten days of the imposition of sentence and a notice of appeal must be filed within thirty days of the imposition of sentence unless a timely post-sentence motion has been filed, in which case an appeal must be filed within 30 days of an order or withdrawal of the post-sentence motion. Pa.R.Crim.P. 720.

A defendant's failure to request and receive an express extension to file a post-sentence motion within the 30-day window for filing a notice of appeal may result in the appeal being quashed if the notice of appeal is not filed within thirty days of the judgment of sentence. *Com. v. Dreves,* 839 A.2d 1122 (Pa. Super. 2003). However, this Court has also recognized that an appeal should not be quashed where there is a breakdown in the judicial process. *Com. v. Piccolo,* 2015 WL 7014644, No. 1060 EDA 2014 (Pa. Super. 2015) (non-precedential), *Com. v. Patterson,* 940 A.2d 493 (Pa. Super. 2007). Courts have recognized a breakdown "in instances where the trial court, at the time of sentencing, either failed to advise Appellant of his post-sentence and appellate rights or misadvised him." *See Patterson,* 940 A.2d at 498-99 (collecting cases).

Of particular relevance to the instant matter, this Court has held that an appeal should not be quashed and a breakdown occurred where the trial court failed to appoint counsel less than ten days after the imposition of sentence. *Com. v.*

Leatherby, 116 A.3d 73 (Pa. Super. 2015). The right to counsel at the post-sentence motion stage is well-established. *See* Pa.R.Crim.P 704(C)(3). In order to waive the right to counsel at this stage, the trial court must conduct a colloquy to ensure that the waiver is knowing, voluntary, and intelligent, and must be informed that if the defendant is indigent, he has the right to have free counsel appointed. Pa.R.Crim.P. 121(A) and (C); *Com. v. Schick,* 2019 WL 4955191, *12-13 (Pa. Super. 2019) (non-precedential) (remanding for filing *nunc pro tunc* counseled post-sentence motion). In the PCRA context, this Court has also found that the failure of the PCRA court to appoint counsel on a first PCRA petition constituted a breakdown in the operations of the court. *Com. v. Alston,* 2019 WL 4899755, *2 (Pa. Super. 2019) (non-precedential).

Mr. Lee had his post-sentence motion and appellate rights reinstated on November 4, 2020, following several requests in *pro se* PCRA filings. RR at 286a. In the PCRA filing that led to the reinstatement of his rights, Mr. Lee expressly requested appointment of counsel. RR at 274a. The trial court order reinstating Mr. Lee's rights advised that he had thirty days to file a post-sentence motion, and the trial court did not appoint counsel. RR at 286a. The right to counsel at the post-sentence and direct appeal stage is well-established and essential to the protection of criminal defendant's rights.

Mr. Lee's trial counsel withdrew on the day Mr. Lee's sentence was imposed in December of 2016. The next day, Judge Cashman ordered that counsel be appointed and expressly permitted post-sentence motions to be filed *nunc pro tunc.* RR at 138a. Appointed counsel received an extension to file post-sentence motions until March 6, 2017. RR at 139a. However, counsel filed a motion to withdraw on March 10, 2017 after requesting an extension to file post-sentence motions, and the trial court scheduled a *Grazier* hearing to assess Mr. Lee's ability to proceed *pro se* on June 28, 2017, well after the set deadline for filing post-sentence motions *nunc pro tunc.* RR at 154a; 164a. No post-sentence motion or direct appeal was filed in the interim.

During the *Grazier* hearing, the district attorney's office informed the court that no post-sentence motions or direct appeal had been filed on Mr. Lee's behalf, and suggested to the court that Mr. Lee's rights be reinstated. *See* RR 219a; 221a. Mr. Lee requested to receive notice of filing deadlines after reinstatement of his post-sentence motion rights at the hearing, to which Judge Cashman responded, "You're the lawyer, we've find out [sic] what's going on," and did not address the matter further. RR at 221a. Mr. Lee then raised the issue of reinstatement of his post-sentence motion and appellate rights in subsequent PCRA filings, but his rights were not reinstated until November 4, 2020. *See* RR at 214a; 257a; 263a. Mr. Lee

expressly requested that counsel be appointed, but Judge Cashman did not appoint counsel. RR at 274a.

Several weeks after the reinstatement of his post-sentence motion and appellate rights, Mr. Lee was able to privately retain undersigned counsel *pro bono*, and counsel entered an appearance and simultaneously filed a motion for extension of time 26 days after the reinstatement of Mr. Lee's post-sentence and appellate rights. RR at 287a-291a. The trial court granted the motion on December 5, 2020, more than 30 days after its order reinstating Mr. Lee's rights. Dkt Entry 12/05/2020.

Current counsel for Mr. Lee promptly entered an appearance and filed a motion for an extension of time upon being retained *pro bono* by Mr. Lee in order to obtain and review the trial record. Although counsel recognizes that this motion did not expressly request to file post-sentence motions *nunc pro tunc,* counsel was not retained until the time for filing such motions had passed and no counsel had been appointed to protect Mr. Lee's post-sentence rights, despite his request that counsel be appointed and his entitlement to counsel at this stage of the proceeding. The trial court did not rule on this motion until after the 30-day deadline for filing a notice of appeal expired. Mr. Lee's post-sentence motion and appellate rights were only reinstated in November of 2020 following an arduous post-trial process in which his trial counsel withdrew on the day of sentencing and appointed counsel

received several extensions, but ultimately filed no post-sentence motions or appeals prior to Mr. Lee proceeding *pro se* after the deadlines for these filings had passed.

In sum, the conditions constituting a breakdown in the court process are as follows: Mr. Lee's trial and post-trial counsel never filed post-sentence motions or direct appeal, leading the district attorney's office to suggest that Mr. Lee's rights be reinstated prior to appointed counsel withdrawing, though this suggestion was not acted upon by the trial court. Mr. Lee filed *pro se* PCRA petitions that led to the reinstatement of these rights. Despite including a request that counsel be appointed in the PCRA filing seeking reinstatement of these rights, the trial court did not appoint counsel. The trial court erroneously ordered that Mr. Lee would have thirty days following reinstatement of his rights to file a post-sentence motion. Mr. Lee was able to privately retain *pro bono* counsel after the deadline for filing post-sentence motions and several days prior to the thirty-day deadline for filing a notice of appeal. *Pro bono* counsel immediately requested an extension, which erroneously did not explicitly include the request to file post-sentence motions *nunc pro tunc,* but the trial court did not grant the extension until after the 30-day deadline had already passed.

Every stage in this process, both individually and cumulatively, represents a breakdown in court proceedings that prevented Mr. Lee from filing a timely post-sentence motion or direct appeal following imposition of his sentence in December

of 2016. Mr. Lee had previously been granted *in forma pauperis* status and was entitled to effective assistance of counsel following the reinstatement of his rights on November 4, 2020, but no counsel was appointed despite his request and after several years of *pro se* litigation attempting to vindicate these rights. Current counsel for Mr. Lee filed a post-sentence motion within the timeframe prescribed by the extension granted in the trial court, and filed a notice of appeal within thirty days of the denial of that motion by operation of law. Mr. Lee's appeal should not be quashed on these grounds.

Counsel for Mr. Lee recognizes that the motion for an extension of time filed upon counsel's entry of appearance erroneously did not include a specific request to file a post-sentence motion *nunc pro tunc*, and that the trial court did not specifically permit the filing of a post-sentence motion *nunc pro tunc*. If this appeal is quashed, current counsel's oversight, combined with the previous failure of trial counsel and appointed post-sentence counsel to file post-sentence motions and direct appeal, as well as the trial court's failure to ensure that Mr. Lee had counsel and that he was properly advised of his post-sentencing rights, would mean that Mr. Lee would have never had a chance to exercise his rights to file post-sentence motions and direct appeal through no fault of his own. If this appeal is quashed, he will once again be deprived of those rights and be forced to seek further reinstatement of those rights. Adjudicating his current appeal will therefore further judicial economy as it will

preclude Mr. Lee from having to once again seek reinstatement of his post-sentence and direct appeal rights, which would eventually put him at the same sequence in the process as he currently is at if this Court does not quash his petition.

Mr. Lee, through no fault of his own, was deprived of effective assistance of counsel after the imposition of his sentence. Upon reinstatement of his post-sentence and appellate rights, he was not appointed counsel, and was not able to obtain counsel until after the expiration of the time for filing a post-sentence motion and near the expiration of the deadline for taking an appeal.

Mr. Lee should not suffer the adverse consequence of further delay in adjudication of his appeal due to this set of circumstances. This situation represents a sufficient breakdown of the judicial process and implicates Mr. Lee's fundamental rights in a manner that warrants this Court hearing his appeal. Mr. Lee respectfully requests that this Court does not quash his appeal.

CONCLUSION

Wherefore, for all the foregoing reasons, Appellant respectfully requests that this Court reverse his judgment of sentence and remand to the trial court for imposition of a minimum sentence that provides a meaningful opportunity for release from prison, or, in the alternative, remand to the trial court to conduct an evidentiary proceeding to determine in the first instance whether Appellant's sentence is unconstitutional.

Respectfully submitted,

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Certificate of Compliance – Word Count

I hereby certify that the foregoing Brief for Appellant consists of 13,869 words based on the word count function of the processing program on which this brief was prepared, excluding the title page, table of contents, and table of citations, and thus complies with the requirement of Pennsylvania Rule of Appellate Procedure 2135 that principal briefs shall not exceed 14,000 words.

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Certificate of Compliance – Public Access Policy

I certify that this Brief for Appellant complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May, 2022 this Brief for Appellant was served via E-service to 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

COMMONWEALTH OF PENNSYLVANIA
IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY

COMMONWEALTH OF PENNSYLVANIA,	:	ALLEGHENY COUNTY COURT OF COMMON PLEAS
	:	CRIMINAL TRIAL DIVISION
v.	:	CP-02-CR-0016878-2014
DEREK LEE, Defendant.	:	OTN: G 694614-4

CONCISE STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

AND NOW, comes defendant, Derek Lee, by and through undersigned counsel, and provides the following Concise Statement of Matters Complained of on Appeal as ordered by this Court on August 31, 2021, pursuant to Pa. R.A.P. 1925(b):

1. On November 4, 2020, this Court granted a Post Conviction Relief Act Petition filed by Mr. Lee and reinstated Mr. Lee's appellate and post-sentencing motion rights.
2. On December 5, 2020 this Court granted Mr. Lee's motion, filed through counsel, for an extension of time until March 4, 2021.
3. On March 4, 2021, Mr. Lee, through counsel filed a Motion for Modification of Sentence pursuant to Pa. R. Crim. Pro. 720(B)(a)(v).
4. That motion was denied by operation of law and an order denying the motion was entered on July 26, 2021.
5. On August 25, 2021, Mr. Lee filed a notice of appeal to the Superior Court.

6. On August 31, 2021, this Court filed an order directing Mr. Lee to file a statement of matters complained of on appeal by September 22, 2021.
7. The following issues will be raised on appeal:
    a. 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?
    b. 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?

Respectfully submitted,

/s/ Bret Grote
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/s/ Quinn Cozzens
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Counsel for Derek Lee

CERTIFICATE OF COMPLIANCE: PUBLIC ACCESS POLICY

I certify that this Concise Statement of Matters Complained of On 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.

/s/ Quinn Cozzens
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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 2021, I caused the Concise Statement of Matters Complained of On Appeal to be served as follows:

Via electronic filing:

Allegheny County District Attorney's Office,
Criminal Division
436 Grant Street Ste 401
Allegheny County Court House
Pittsburgh, PA 15219

Via First Class U.S. Mail:

The Honorable David R. Cashman
436 Grant Street Room 308
Allegheny County Court House
Pittsburgh, PA 15219

/s/ Quinn Cozzens
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Dated: September 22, 2021