

IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT
1008 WDA 2021

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

DEREK LEE

Appellant

REPLY 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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SUMMARY OF THE ARGUMENT

Appellant, Derek Lee, is appealing the imposition of a mandatory life sentence with no possibility of parole pursuant to his conviction for felony-murder in which he neither killed nor intended to kill. Mr. Lee asserts that this punishment violates his rights under the Eighth Amendment and Article, I, § 13 of the Pennsylvania Constitution. Mr. Lee argued in his principal brief that the proper constitutional standard for adjudicating his claims is the “categorical approach” set forth by the U.S. Supreme Court in determining whether death sentences and life sentences with no possibility of parole are unconstitutional when applied to certain categories of offenders and offenses with diminished culpability. Even if this Court does not interpret the Eighth Amendment to require this analytical approach, Article I, § 13 of the Pennsylvania Constitution should provide broader protections than the Eighth Amendment in this context. In his principal brief, Mr. Lee presented a fully-developed argument in support of this claim, as is required in *Commonwealth v. Edmunds*, 586 A.2d 887 (1991).

The Commonwealth nakedly asserts that the Eighth Amendment and Article I, § 13 of the Pennsylvania Constitution are co-extensive, thus this Court does not need to engage with Mr. Lee’s claim that Article I, § 13 should be interpreted to provide broader protections in this situation. The Commonwealth does not acknowledge Mr. Lee’s *Edmunds*-factor analysis, nor even cite to *Edmunds* in its

briefing. Contrary to the Commonwealth's position, courts must consider at least the four factors outlined in *Edmunds* when a litigant asserts that a provision of the Pennsylvania Constitution provides broader protections than an analogous provision of the federal constitution and the litigant adequately briefs the issue. Pennsylvania courts have routinely conducted an *Edmunds* analysis comparing the same analogous state and federal constitutional provisions to determine whether the provision of the Pennsylvania Constitution provides broader protections in the context of the factual and legal issues of that case. Mr. Lee has properly presented this claim in his principal brief, and the Commonwealth has offered no argument to refute his analysis.

The Commonwealth also asserts that the proper standard for analyzing Mr. Lee's claim that his punishment is unconstitutional is the "gross disproportionality" standard set forth in *Solem v. Helm*, 463 U.S. 277 (1983), and that, because the U.S. Supreme Court's decisions in *Miller v. Alabama*, 567 U.S. 460 (2012), and *Graham v. Florida*, 560 U.S. 48 (2010), were analyzing life-without-parole punishments with respect to juveniles and did not invalidate life-without-parole sentences altogether, Mr. Lee's reliance on them is misplaced.

Mr. Lee argued in his principal brief that the proper standard for analyzing his claims is the "categorical approach," which the U.S. Supreme Court has utilized in cases involving both death sentences and sentences of life imprisonment with no

possibility of parole. Under this approach, courts must determine whether there are mismatches between the culpability of a class of offenders and the severity of the punishment. While *Graham* and *Miller*, do not provide the substantive rule that renders Mr. Lee's punishment unconstitutional, they provided the proper analytical framework for adjudicating his claims by applying the categorical approach to sentences of life imprisonment with no possibility of parole. The Commonwealth has offered no argument that, under this analysis, Mr. Lee's sentence is constitutional. Mr. Lee's principal brief sets forth a fully-developed argument under this jurisprudence as to why imposing mandatory life imprisonment with no possibility of parole upon individuals who neither killed nor intended to kill is unconstitutional.

ARGUMENT

I. THE COMMONWEALTH IGNORES THE LEGAL STANDARD FOR DETERMINING WHETHER A STATE CONSTITUTIONAL PROVISION PROVIDES GREATER PROTECTION THAN ITS FEDERAL COUNTERPART

Appellant, Derek Lee, asserted on appeal and in the trial court that mandatorily-imposed life-without-parole sentence for felony-murder is unconstitutional under the Eighth Amendment to the United States Constitution and Article I, § 13 of the Pennsylvania Constitution. A provision of the Pennsylvania

constitution must provide at least as much protection as its analogous provision in the federal constitution. Mr. Lee argues that the state constitutional provision should be interpreted to provide broader protections than its federal counterpart in this instance and invalidate his sentence.

The Commonwealth asserts that Article I, § 13 of the Pennsylvania Constitution “provides no greater protection than the federal Constitution regarding the prohibitions against cruel and unusual punishments.” Brief for Appellee, 5 (citing *Commonwealth v. Baker*, 24 A.3d 1006, 1026 n. 20 (Pa. Super. 2011)). The Commonwealth relies on *Baker* for the proposition that courts need not engage in a separate analysis under the Pennsylvania Constitution because the Eighth Amendment and Article I, § 13 are co-extensive. The Commonwealth omits, however, that the appellant in *Baker* did not assert that Article I, § 13 should be read to provide broader protections than the Eighth Amendment, as Mr. Lee does in the instant matter. In fact, in his appeal to the Supreme Court, in which Mr. Baker also asserted that violations of the Eighth Amendment and Article I, § 13, the Supreme Court specifically noted that Baker did *not* argue that the Pennsylvania Constitution provides greater protection than its federal counterpart, nor did he brief a separate analysis under *Commonwealth v. Edmunds*, 586 A.2d 887 (1991), which is the standard for determining whether a state constitutional provision provides greater protection than an analogous federal provision. *Commonwealth v. Baker*, 78 A.3d

1044, 1048 (Pa. 2013). Because Mr. Baker did not raise these arguments or brief the four-factor *Edmunds* analysis, the Court analyzed the state and federal constitutional claims under the same standard. *Id.*

Unlike in *Baker*, Mr. Lee *does* assert that Article I, § 13 provides more protection than the Eighth Amendment and sets forth a fully-developed *Edmunds* factor analysis. Brief for Appellant, 33-53. *Edmunds* is clear that, where a party asserts that a state constitutional provision provides greater protection than an analogous federal constitutional provision, courts are required to conduct a separate analysis using the four factors set forth therein. *Edmunds*, 586 A.2d at 894-95. It is “important and necessary” to conduct this analysis “each time” a provision of the Pennsylvania Constitution is raised. *Id.* The Commonwealth neither acknowledges nor offers any rebuttal to Mr. Lee’s *Edmunds* factors analysis.

The Pennsylvania Supreme Court has rejected the argument advanced by the Commonwealth here – that a court need not conduct a separate state constitutional analysis where another court has previously decided that the state constitutional provision is co-extensive with an analogous federal provision in *Jubelirer v. Rendell*, 953 A.2d 514, 522 (Pa. 2008). The *Jubelirer* Court ultimately concluded that an *Edmunds* factor analysis was not required because there was no counterpart to the challenged Pennsylvania constitutional provision in the United States Constitution, but made clear that an *Edmunds* factor analysis appropriate when determining

whether a Pennsylvania constitutional provision provides greater protection than an analogous federal provision. *Id.* at 523-26. Pennsylvania courts have applied the *Edmunds* analysis in a variety of contexts to a variety of claims involving the Pennsylvania Constitution and an analogous federal constitutional provision. *See e.g. Pap's A.M. v. City of Erie*, 812 A.2d 591 (Pa. 2002) (comparing U.S. Const. Amend. I and Pa. Const. Art. I, § 7); *United Artists' Theater Circuit, Inc. v. City of Philadelphia*, 645 A.2d 612 (Pa. 1993) (comparing U.S. Const. Amend. V and Pa. Const. Art. I, § 10); *Blum by Blum v. Merrell Dow Pharms., Inc.*, 626 A.2d 537 (Pa. 1993) (comparing U.S. Const. Amend. VI and Pa. Const. Art. I, § 6).

The Pennsylvania Supreme Court has, in several cases, conducted an *Edmunds* factor analysis involving the same state and federal counterpart provisions to determine whether the state provision provides greater protections in a specific context or strand of jurisprudence involving those constitutional provisions. *See e.g. Edmunds*, 586 A.2d 887 (determining whether Pa. Const. Art. I, § 8 provided greater protection than the Fourth Amendment to the U.S. Constitution); *Commonwealth v. Alexander*, 243 A.3d 177 (Pa. 2020) (same); *Commonwealth v. Russo*, 934 A.2d 1199 (Pa. 2007) (same); *Commonwealth v. Glass*, 754 A.2d 655 (Pa. 2000) (same); *Commonwealth v. Cleckley*, 738 A.2d 427 (Pa. 1999) (same); *Commonwealth v. Matos*, 672 A.2d 769 (Pa. 1996) (same). In *Commonwealth v. Batts*, the Pennsylvania Supreme Court noted that courts had previously decided that Article I,

§ 13 is co-extensive with the Eighth Amendment in certain contexts, but only in cases involving distinct legal and factual questions, thus the Court conducted an *Edmunds* analysis with respect to the Article I, § 13 at issue. 66 A.3d 286, 297 n. 4 (Pa. 2013). The fact that courts have previously found that a Pennsylvania constitutional provision is co-extensive with its federal counterpart in a particular context does not abrogate the need for courts to conduct separate analyses under *Edmunds* when faced with a new claim arising under the same state constitutional provision.

In Mr. Lee’s principal brief, he sets forth a fully-developed argument that Article I, § 13 provides greater protection than the Eighth Amendment in this context. The Commonwealth did not address any of these factors, nor did it acknowledge the arguments raised by Mr. Lee.¹ Under *Edmunds*, courts must analyze at least four factors: 1) the text of the relevant constitutional provisions; 2) the history of the provision; 3) related case law from other states; and 4) policy considerations unique to Pennsylvania. *Edmunds*, 586 A.2d at 895.

¹ The Commonwealth does admit that “there are many appealing arguments” as to why someone who did not kill or intend to kill should not be held to the same level of culpability as someone who did, but asserts that these are “policy determinations for the legislature.” Brief for Appellee, 10. However, these policy arguments are directly relevant to the *Edmunds* factors and a determination as to whether Article I, § 13 should provide greater protection than the Eighth Amendment when considering whether someone convicted of felony-murder can be sentenced to mandatory life with no possibility of parole.

First, the text of Article I, § 13 of the Pennsylvania Constitution differs from the Eighth Amendment in that it prohibits “cruel punishments,” rather than “cruel and unusual punishments.” *See Baker*, 78 A.3d at 1054–55 (Castille, J., concurring) (recognizing textual distinctions between state prohibition on cruel punishments and federal prohibition against cruel and unusual punishment as providing potential basis for determining that Pennsylvania Constitution provides greater protection). The textual difference is not trivial, and finding that the difference is substantive would bring Pennsylvania in line with several other states. Brief for Appellant, 36-38.

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. *See* Brief for Appellant, 39-43.

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 cannot be ignored in interpreting the extent of the protections provided. *See* Brief for Appellant, 43-45.

Fourth, Pennsylvania-specific policy considerations weigh strongly in favor of interpreting Article I, § 13 to provide greater protection than the Eighth Amendment in the context of this case. Pennsylvania is an extreme outlier both

nationally and globally in sentencing people to die in prison, particularly when convicted of felony-murder. Pennsylvania stands virtually alone in mandating that anyone convicted of felony-murder is sentenced to life imprisonment with no possibility of parole. This sentencing practice reflects substantial racial bias and 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. *See* Brief for Appellant, 45-52.

II. THE COMMONWEALTH MISCHARACTERIZES APPELLANT'S CLAIM UNDER THE EIGHTH AMENDMENT AND THE GOVERNING LEGAL STANDARD

The Commonwealth argues that the proper analysis for determining whether Mr. Lee's punishment violates the Eighth Amendment is the gross disproportionality test set forth in *Solem v. Helm*, 463 U.S. 277 (1983) and *Commonwealth v. Proctor*, 156 A.3d 261 (Pa. Super 2017). Brief for Appellee, 5-6. The Commonwealth does not conduct any analysis under this test, but asserts that a life sentence with no possibility of parole for someone convicted of felony-murder is not grossly disproportionate. *Id.* at 7. The Commonwealth also argues that, because the U.S. Supreme Court's decisions in *Miller v. Alabama*, 567 U.S. 460 (2012), and *Graham*

v. Florida, 560 U.S. 48 (2010), were analyzing life-without-parole punishments with respect to juveniles and did not invalidate life-without-parole sentences altogether, Mr. Lee’s reliance on them is misplaced. Brief for Appellee, 7-9.

The Commonwealth mischaracterizes Mr. Lee’s argument with respect to invoking *Miller*, *Graham*, and other U.S. Supreme Court decisions that applied a categorical approach to determine whether a punishment was unconstitutional under the Eighth Amendment. *Miller* and *Graham* do not provide the substantive rule on which Mr. Lee is relying. Rather, they set forth the proper analytical framework to determine whether the punishment for his felony-murder conviction is constitutional. The Commonwealth correctly notes that the U.S. Supreme Court cases cited in Mr. Lee’s principal brief that were decided prior to *Graham* were premised on the notion that “capital punishment stands alone as the most severe punishment” and requires “special considerations regarding its application to a category of offenders.” Brief for Appellee, 9. The Commonwealth fails to acknowledge, however, that the analysis underlying *Graham* and *Miller*’s rulings were premised specifically on the similarities between life sentences with no possibility of parole and the death penalty – punishments so severe that they require a different analytical approach with respect to certain categories of offenders and offenses.

Miller and *Graham* both invoked the similarities between life sentences with no possibility of parole and the death penalty in determining that the categorical approach was the proper analytical framework. Central to the Court's rulings in *Graham* and *Miller* was the recognition 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," deprives them "of the most basic liberties," and denies all hope and possibility of redemption. *Id.* at 69-70. Because of these similarities between the death penalty and life sentences with no possibility of parole, courts should treat challenges to these punishments similarly. *Miller*, 567 U.S. at 475. While the gross disproportionality standard invoked by the Commonwealth ordinarily applies to constitutional challenges to a criminal punishment, *Graham* and *Miller* provided that the categorical approach, previously reserved only for challenges to death sentences, also applies to challenges to life sentences with no possibility of parole where the challenge is based on a category of diminished culpability.

While *Graham* and *Miller's* holdings were limited to the categories of diminished culpability at issue in those cases, the jurisprudential approach applies with equal force to other categories of diminished culpability that the Court has recognized. Under this categorical approach, courts must assess whether there is a

mismatch “between the culpability of a class of offenders and the severity of a penalty.” *Miller*, 567 U.S. at 461. 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.*

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. Mr. Lee’s offense falls within this category of diminished culpability. As is argued in detail in Mr. Lee’s principal brief, Pennsylvania’s mandatory sentence of life imprisonment with no possibility of parole is an extreme outlier in the United States and the punishment is excessive and does not sufficiently satisfy any legitimate penological purpose. Brief for Appellant, 20-33. Thus, Mr. Lee’s sentence is unconstitutional.

Furthermore, even if this Court does not determine that the categorical approach is required under the Eighth Amendment, this standard should be applied under the greater protections afforded by Article I, § 13 of the Pennsylvania Constitution, as argued above and more fully in Mr. Lee’s principal brief. The U.S.

Supreme Court's categorical approach, as applied in *Enmund, Graham, and Miller*, provides a clear standard that this Court should adopt in evaluating Mr. Lee's claim or on remand to the trial court.

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 Reply Brief for Appellant consists of 2,950 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 reply briefs shall not exceed 7,000 words.

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Certificate of Compliance – Public Access Policy

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

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July, 2022 this Reply Brief for Appellant was served via electronic filing by PACFile to the following:

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