Received 4/26/2024 7:25:36 AM Supreme Court Western District

Filed 4/26/2024 7:25:00 AM Supreme Court Western District
3 WAP 2024

IN THE SUPREME COURT OF PENNSYLVANIA
No. 3 WAP 2024

COMMONWEALTH OF PENNSYLANIA,
Appellee,

v.

DEREK LEE,
Appellant.

BRIEF OF *AMICI CURIAE* SCHOLARS OF EIGHTH AMENDMENT LAW IN SUPPORT OF APPELLANT ON THE MERITS

Appeal from the Judgment of the Superior Court of Pennsylvania at No. 1008 WDA 2021 dated June 13, 2023, Affirming the Judgment of Sentence of the Court of Common Pleas of Allegheny County at CP-02-CR-0016878-2014 dated December 19, 2016

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae are Eighth Amendment scholars with expertise in the law, policy, and theory of punishment. *Amici* have a strong interest in the development and understanding of Eighth Amendment protections and related, often more expansive, state constitutional doctrines. *Amici* share their expertise to explain why Pennsylvania's mandatory imposition of life without parole ("LWOP") for people convicted of second-degree murder violates the Eighth Amendment and Article I § 13 of the Pennsylvania Constitution, which is, at a minimum, co-extensive with the U.S. Constitution. *Amici* show that condemning people like Appellant to die in prison when they have not killed or intended to take a life is categorically disproportionate and unconstitutional.

RULE 531(B)(2) CERTIFICATION

Pursuant to Rule 531(b)(2), *amici* certify that no person or entity was paid in whole or in part to prepare this brief. Only *pro bono* counsel authored this brief.

SUMMARY OF ARGUMENT

Amici submit this brief in support of Appellant, Derek Lee, a man convicted at age 26 of felony murder and condemned to die in prison even though he never killed anyone and did not intend to take a life. Pennsylvania law mandates life

[1] Each *amicus curiae* is listed at the end of this brief.

sentences for second degree murder, 18 Pa. C.S. § 1102(b), and permanently bars parole for people serving life sentences, 61 Pa. C.S. § 6137(a)(1). For people who did not kill or intend to kill, this severe, mandatory punishment is categorically disproportionate and violates the Eighth Amendment and Article I § 13 of the Pennsylvania Constitution.

Specifically, the Eighth Amendment prohibits severe punishments that are disproportionate as applied to crimes that do not reflect the worst offenses and when imposed upon categories of offenders who are not the most culpable. This categorical approach has led to constitutional bars on the execution of children, people with intellectual disability and people who have not killed or intended to kill, including those convicted of felony murder.

Significantly, since 2010, the Supreme Court has also applied these principles to severe noncapital punishments in the context of juvenile LWOP. Two longstanding principles undergird those decisions and are equally applicable to adults. *First*, severe punishments, including LWOP, must be proportionate to the offense and the culpability of the class of offenders punished. *Second*, people who do not kill or intend to kill are categorically less deserving of the most extreme punishments.

This categorical approach applies here where Appellant challenges a sentencing practice that applies to an entire class of people condemned to die in

prison even though they did not kill or intend to take a life. *Amici* show that this excessive punishment is inconsistent with evolving standards of decency that mark the progress of maturing societies. Pennsylvania is an outlier: an overwhelming majority of states and the international community reject this extreme and disproportionate punishment, which does not serve valid penological objectives.

In sum, Pennsylvania's mandatory imposition of LWOP for people convicted of felony murder who did not kill or intend to kill violates the Eighth Amendment and Article I § 13 of the Pennsylvania Constitution. Accordingly, the Court should reverse and vacate Mr. Lee's judgment of sentence and remand for resentencing that complies with the Federal and State Constitutions.

ARGUMENT

I. THE EIGHTH AMENDMENT BARS SEVERE PUNISHMENTS THAT ARE DISPROPORTIONATE TO THE CRIME AND THE CULPABILITY OF THE CLASS OF PERSONS PUNISHED.

The U.S. Supreme Court has long recognized that certain severe sentencing practices may be *categorically* disproportionate and therefore cruel and unusual punishment when applied to a class of people with diminished culpability. *Enmund v. Florida*, 458 U.S. 782, 788 (1982); *Graham v. Florida*, 560 U.S. 48, 61 (2010). Developments in Eighth Amendment jurisprudence over the last two decades make clear that LWOP, as the "lengthiest possible incarceration," is "akin to the death penalty" and should be treated "similarly to that most severe punishment." *Miller v.*

Alabama, 567 U.S. 460, 475 (2012); *see also Graham*, 560 U.S. at 69; *Montgomery v. Louisiana*, 577 U.S. 190 (2016). Though these recent cases involved juvenile LWOP, they were consistent with a long line of precedents recognizing that adult offenders do not warrant the most severe punishments either because of the nature of the offense or the offenders' characteristics. *See, e.g.*, *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (barring death penalty for rape because "in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder"); *Enmund*, 458 U.S. at 797 (barring death penalty for felony murder where person did not kill or intend to kill because the crime is not "so grievous an affront to humanity that the only adequate response may be the penalty of death"); *Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (barring death penalty for people with intellectual disability because "society views [these] offenders as categorically less culpable than the average criminal"). Accordingly, and as explained more below, the Supreme Court's categorical approach to proportionality applies when the severe punishment of LWOP is imposed upon a class whose crimes do not reflect the worst offenses or who have categorically diminished culpability whether they are adults or juveniles.

A. The Categorical Approach to Proportionality Governs Challenges to Punishment Practices Like This One That Apply to Entire Classes of Offenders.

The Eighth Amendment bars not only cruel and unusual methods of punishment, but also punishment that is disproportionate to the crime committed.

Graham, 560 U.S. at 61. The Court first recognized this over a century ago in *Weems v. United States*, 217 U.S. 349, 367 (1910), stating "that punishment for crime should be graduated and proportioned to [the] offense." This proportionality requirement mirrors deeply rooted common law principles and the English Bill of Rights, upon which the Eighth Amendment was modeled. *See Solem v. Helm*, 463 U.S. 277, 285–86 (1983) ("When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights, they also adopted the English principle of proportionality."); Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1064 (2004) (tracing the principle back to the Magna Carta); John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 926–27 (2011) (showing that the English Bill of Rights, Anglo-American tradition, and the text of the "Cruel and Unusual Punishments" Clause all reflect a proportionality requirement).

Today, the proportionality principle has a dispositive role in Eighth Amendment jurisprudence. The Court recognizes that "protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment." *Montgomery*, 577 U.S. at 206. Enforcing the guarantee of proportionate punishment requires disentangling two strands of Eighth Amendment analysis. *See Graham*, 560 U.S. at 59.

The first approach balances factors to assess whether a particular sentence is grossly disproportionate to the specific crime committed by the defendant. *See* Alison Siegler & Barry Sullivan, *"'Death Is Different' No Longer":* Graham v. Florida *and the Future of Eighth Amendment Challenges to Noncapital Sentences*, 2010 SUP. CT. REV. 327, 331-32. The second approach, which was originally limited to capital sentences, assesses whether a punishment is excessive as applied to a category of offenses or offenders. *Graham*, 560 U.S. at 60.

Within the first "gross disproportionality" approach, which is not at issue in Mr. Lee's challenge, the Court assesses whether the punishment imposed is excessive based upon a comparison between the "'gravity of the offense and the severity of the sentence.'" *Id.* If that analysis results in an "inference of gross disproportionality'" the Court compares the defendant's sentence to those of others sentenced for the same offense within and outside the jurisdiction. *Id.* (quoting the "controlling opinion" of Justice Kennedy in *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991)). It is "'the rare case in which this threshold comparison…leads to an inference of gross disproportionality.'" *Id.* (quoting *Harmelin*, 501 U.S. at 1005).

Indeed, commentators have long criticized this case-by-case comparison as a weak form of Eighth Amendment enforcement. *See* Siegler & Sullivan, at 330 (noting that "judges applying a fact-dependent balancing test on a case-by-case basis were likely to place too much weight on the nature and specifics of the offense, while

giving too little attention to" the class of offenders' diminished culpability). As a signatory to this brief, Professor Rachel Barkow, has explained, the Court does not infer gross proportionality unless it concludes that the state lacked a "reasonable basis for believing" that the punishment would serve *any* legitimate penological interest. Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1156–57 (2009). This is an obviously low threshold to vault and typically cuts off further analysis leading courts to overlook "just how excessive" particular sentences may be. *Id.* In fact, "out of the millions upon millions of noncapital sentences imposed, the Court has found only one term of confinement to be [grossly] disproportionate and that lone occurrence was [more than forty] years ago." *Id.* at 1162.[2]

Under this form of proportionality review, the Court has upheld a sentence of twenty-five years to life under California's recidivist statute for a person who stole three golf clubs valued at approximately $1,200. *See Ewing v. California*, 538 U.S. 11 (2003) (plurality opinion). It has likewise upheld a mandatory LWOP sentence for a first-time offender charged with cocaine possession. *Harmelin*, 501 U.S. 957. And the Court has upheld a mandatory life sentence for a person who committed

[2] This outlier was *Solem v. Helm*, 463 U.S. 277 (1983), which held that a LWOP sentence for the crime of passing a worthless check was grossly disproportionate.

three low-level theft offenses that totaled no more than $230. *Rummel v. Estelle*, 445 U.S. 263 (1980). Critically, this extremely deferential review of individual sentences is not at issue here because the challenge is not to the proportionality of Mr. Lee's sentence alone, but to the unconstitutionality of mandatory LWOP for felony murder in Pennsylvania.

Rather, Mr. Lee's challenge invokes the second form of proportionality analysis whereby the Court has recognized categorical restrictions on disproportionate punishment. *Graham*, 560 U.S. at 60. This approach considers whether a punishment is categorically excessive when applied to a class of offenders based upon "the nature of the offense" or "the characteristics of the offender." *Id.*

For example, the Court has held that capital punishment is categorically excessive when applied to nonhomicide offenses, including rape and felony murder where the defendant did not kill or intend to take a life. *See Kennedy v. Louisiana*, 554 U.S. 407 (2008) (rape); *Coker*, 433 U.S. at 584 (same); *Enmund*, 458 U.S. at 782 (felony murder). The Court has likewise prohibited the death penalty as disproportionate based upon the characteristics of the class of people convicted. *See Roper v. Simmons*, 543 U.S. 551 (2005) (juveniles); *Atkins*, 536 U.S. 304 (people with intellectual disabilities).

Although the Supreme Court first recognized the categorical approach in the capital context, in the last two decades, it has followed the categorical approach with

respect to severe, noncapital punishments too. *See Graham*, 560 U.S. at 61; *Miller*, 567 U.S. at 470; *Montgomery*, 577 U.S. at 193. This has rightly exposed extreme sentences like LWOP, which the Court had long sanctioned under the toothless gross proportionality balancing approach, to the closer scrutiny that the categorical approach demands. *See* Douglas A. Berman, Graham *and* Miller *and the Eighth Amendment's Uncertain Future*, 27-WTR CRIM. JUST. 19, 21, 23 (2013) (noting that *Graham* and *Miller* eroded the "longstanding distinction in Eighth Amendment jurisprudence between capital and noncapital sentences").

In sum, "gross proportionality" is not at issue here because that analysis is limited to assessing "a particular defendant's sentence." *Graham*, 560 U.S. at 61-62. Here, "a sentencing practice itself is in question," because LWOP is challenged for "an entire class of offenders" who did not kill or intend to take a life. *Id.* The Court has made clear that in instances such as the present case "the categorical approach" followed in "*Atkins*, *Roper*, and *Kennedy*" governs. *Id.*

B. LWOP Is Now Recognized as One of the Most Severe Punishments, Subject to Categorical Proportionality Analysis.

The Court's juvenile LWOP decisions established that LWOP is one of the law's most severe punishments that can be categorically disproportionate and excessive when imposed upon people with diminished culpability. *Graham*, 560 U.S. at 61; *Miller*, 567 U.S. at 470; *Montgomery*, 577 U.S. at 193. While the Court first recognized the categorical approach in the capital context, neither the Eighth

Amendment's text, its history, nor its "logic" limit it to capital punishment. *See* Barkow, *supra* at 1179; Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 189 (2008) (noting that the "very same reasoning" regarding "reduced culpability" of certain offenders could apply to other serious punishments).

Indeed, the categorical approach can no longer be explained by the notion that "death is different." *See Gregg v. Georgia*, 428 U.S. 153, 188 (1976). Although "the Eighth Amendment applies . . . with special force" to the death penalty, *Roper*, 543 U.S. at 568, because it is "'unique in its severity and irrevocability,'" *Enmund*, 458 U.S. at 797 (quoting *Gregg*, 428 U.S. at 187), the Court has applied the categorical approach beyond capital cases when there were "mismatches between the culpability of a class of offenders and the severity of a penalty." *Miller*, 567 U.S. at 470; *Graham*, 560 U.S. at 61. The severity of LWOP was essential to this reasoning.

Graham noted that LWOP "share[s] some characteristics with death sentences that are shared by no other sentences." 560 U.S. at 61 (quoting *Gregg*, 428 U.S. at 187). It recognized that as "the second most severe penalty permitted by law," LWOP, like the death penalty, "alters the offender's life by a forfeiture that is irrevocable" depriving him "of the most basic liberties." *Id.* at 69–70. LWOP is especially harsh, *Graham* further reasoned, because it denies all hope of redemption;

future behavior or rehabilitation do not matter. *Id.* at 70. *Miller* echoed this conclusion, noting that LWOP, as the "lengthiest possible incarceration," is "akin to the death penalty" and should be treated "similarly to that most severe punishment." 567 U.S. at 475.

These decisions make clear that with respect to Eighth Amendment proportionality "'[d]eath is different' no longer." *Graham*, 560 U.S. at 103 (Thomas, J., dissenting). *Graham* crossed "the clear and previously unquestioned divide between capital and noncapital cases." William W. Berry III, *More Different Than Life, Less Different Than Death: The Argument for According Life Without Parole Its Own Category of Heightened Review Under the Eighth Amendment After* Graham v. Florida, 71 OHIO ST. L.J. 1109, 1122–23 (2010).

Moreover, although this jurisprudence addressed juveniles, *Graham*, *Miller*, and *Montgomery* in no way limited earlier Eighth Amendment precedent recognizing the diminished culpability of certain classes of adults based upon their characteristics or the nature of their offenses. *See, e.g.*, *Atkins*, 536 U.S. 304 (recognizing diminished culpability based upon intellectual disability); *Coker*, 433 U.S. at 598 (recognizing death as "an excessive penalty for the rapist who, as such, does not take human life"); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (same as to child rape); *Enmund*, 458 U.S. 782 (recognizing the diminished culpability of a person convicted of felony murder where the person did not kill or intend to kill).

Those decisions remain central to proportionality analysis irrespective of which severe punishment is at issue. The juvenile LWOP cases are not to the contrary.

To be sure, *Graham*, *Miller*, and *Montgomery* recognized that juvenile offenders are generally less culpable than adult offenders due to their "lack of maturity," susceptibility "to negative influences" and because they are still developing. *See Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 569–70). But the decisions never suggested that youth was *the sole basis* for finding diminished culpability when comparing a class of offenders to the harshness of LWOP. *See* Michael M. O'Hear, *Not Just Kid Stuff? Extending* Graham *and* Miller *to Adults*, 78 MO. L. REV. 1087, 1087 (2013) (suggesting *Graham* and *Miller* justify applying the categorical proportionality approach "to new cases presenting reasonably analogous considerations").

Additionally, *Graham* deemed mandatory LWOP to be a disproportionate punishment for reasons in addition to the offender's youth. 560 U.S. at 69. The Court held that LWOP was constitutionally disproportionate as compared to *both* the nature of the offense (there, a nonhomicide crime), and the characteristics of the juveniles impacted by such sentences. 560 U.S. at 69. The Court reasoned that "a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." *Id.* Because both the "age of the offender and the nature of the crime" were relevant to *Graham*'s proportionality analysis, it would profoundly misread the

Court's juvenile LWOP cases to conclude that they foreclose categorical proportionality review of LWOP for groups of offenders other than children. Rather, the juvenile LWOP cases establish that the Court now considers LWOP one of the most severe penalties such that courts must evaluate whether a "mismatch" exists between that harsh punishment and "the culpability of a class of offenders" subjected to it. *See Miller*, 567 U.S. at 470.

C. Longstanding Supreme Court Precedent Recognizes That People Who Do Not Kill or Intend to Kill Are Categorically Less Deserving of the Most Extreme Punishments.

The Supreme Court's recognition in *Graham* that people who do not kill or intend to kill are categorically less deserving of the most severe punishments was not a new principle specific to juveniles. 560 U.S. at 69 (citing *Kennedy*, 554 U.S. at 407; *Enmund*, 458 U.S. at 782; *Tison v. Arizona*, 481 U.S. 137, 158 (1987); *Coker*, 433 U.S. at 584). Rather, the Court established this principle long before its juvenile LWOP cases in a line of decisions recognizing "diminished culpability, not as a function of the defendant's class or status, but rather his offense." *See* Perry L. Moriearty, *Implementing Proportionality*, 50 U.C. DAVIS L. REV. 961, 979 (2012); *Graham*, 560 U.S. at 60 (categorical rules fall into two subsets: the "nature of the offense" and "the characteristics of the offender").

Indeed, the Supreme Court has long held that the Eighth Amendment prohibits the death penalty for nonhomicide crimes because the most severe punishments must

be reserved for the worst offenses, which involve killing. *See Kennedy*, 554 U.S. at 446–47; *Coker*, 433 U.S. at 598 (plurality opinion); *Enmund*, 458 U.S. at 797. In *Kennedy v. Louisiana*, the Court explained that this line exists "between homicide and other serious violent offenses" because though serious nonhomicide crimes "may be devastating in their harm," they differ from murder "'in terms of moral depravity and of the injury to the person and to the public.'" 554 U.S. at 438 (quoting *Coker*, 433 U.S. at 598 (plurality opinion)); *Enmund*, 458 U.S. at 797 (robbery was not "'so grievous an affront to humanity that the only adequate response may be . . . death'") (quoting *Gregg*, 428 U.S. at 184). In *Graham*, the Court applied this rationale to LWOP, stating that though offenses like robbery and rape are serious crimes, they "differ from homicide crimes in a moral sense." 560 U.S. at 69.

The Court's 1982 decision in *Enmund v. Florida*, 458 U.S. 782, further explained why people who do not kill or intend to kill are categorically less deserving of the most extreme punishments. In *Enmund*, the Court addressed whether the Eighth Amendment prohibited the death penalty for a man convicted of felony murder where he drove the getaway car for friends who robbed and killed two victims. *Id.* at 784. In concluding that the death penalty was categorically disproportionate, the Court emphasized that the "focus must be on *his* culpability, not that of those who committed the robbery and shot the victims." *Id.* at 798 (emphasis in original). The Court reasoned that the Eighth Amendment bars the most

severe punishments for someone who, though involved in a felony resulting in death, "does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Id.* at 797.

Graham relied upon *Enmund* to reaffirm as to LWOP that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." 560 U.S. at 69 (citing *Enmund*, 458 U.S. 782 and other decisions).[3] *Graham* thus makes clear that the diminished culpability of people who do not kill or intend to kill is central to proportionality analysis whether the penalty is death or LWOP. *Id.*

II. EIGHTH AMENDMENT STANDARDS SET THE MINIMUM FLOOR OF PROTECTION PROVIDED BY ARTICLE I, SECTION 13 OF THE PENNSYLVANIA CONSTITUTION, BUT DO NOT LIMIT THE STATE CONSTITUTION'S PROTECTION AGAINST DISPROPORTIONATE PUNISHMENT.

Article I § 13 of the Pennsylvania Constitution is, at a minimum, coextensive with the Eighth Amendment. *See Commonwealth v. Edmunds*, 586 A.2d 887, 894

[3] *Graham* cited *Tison v. Arizona*, 481 U.S. 137 (1987), as consistent with this principle. There, the Court affirmed the death penalty for felony murder where defendants helped their father and his cellmate escape from prison and later kidnap a family. *Id.* The sons were "actively involved in every element of the kidnaping-robbery" and were "physically present during the entire sequence of criminal activity culminating in the murder." *Id.* at 158. The Court reasoned that "knowingly engaging in criminal activities known to carry a grave risk of death represent[ed] a highly culpable mental state" that contrasted with the defendant in *Enmund* who neither "actually killed, attempted to kill, or intended to kill." *Id.* at 150 (citing *Enmund*, 458 U.S. at 798).

(Pa. 1991) ("[T]he federal constitution establishes certain minimum levels which are 'equally applicable to the [analogous] state constitutional provision.'") (quoting *Commonwealth v. Sell*, 470 A.2d 457 (Pa. 1983)). This brief by Scholars of Eighth Amendment Law is therefore relevant to both issues for which this Court granted the Petition allowing appeal: whether Pennsylvania's mandatory imposition of LWOP for people who did not kill or intend to kill violates the Eighth Amendment and whether it violates Article I § 13 of the Pennsylvania Constitution.

Amici defer to the Appellant's application of the *Edmunds* factors, *see* Brief of Appellant, Point I.A, which this Court utilizes to analyze the scope of rights under the Pennsylvania Constitution. *Edmunds*, 586 A.2d at 894-95 (setting forth factors). Notwithstanding that analysis, however, two principles are clear. *First*, the doctrine set forth in Point I of this brief, delineating the Eighth Amendment's categorical prohibitions on disproportionate punishments, dictates the minimum guarantees of Article I, § 13 of the Pennsylvania Constitution. *Id. Second*, the U.S. Supreme Court's Eighth Amendment jurisprudence does not limit the scope of Article I, § 13's protection because State Constitutions can, and often do, provide more robust protection for individual liberties, including, protection against cruel and unusual punishment. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) ("[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal

Constitution" because without the "independent protective force of state law. . .the full realization of our liberties cannot be guaranteed."); JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 3 (2022) (calling for "renewed attention…[to] the role of state constitutions" in balancing power and securing freedom).

Indeed, state courts have repeatedly invalidated disproportionate sentences under state constitutional provisions even where the Supreme Court upheld such sentences under the Eighth Amendment. *See* Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 69-72 (2008). For example, in *Harmelin v. Michigan*, the U.S. Supreme Court held that an LWOP sentence for drug possession was not grossly disproportionate under the Eighth Amendment. 501 U.S. at 961, 994. The Michigan Supreme Court, however, later ruled that the LWOP penalty upheld by the U.S. Supreme Court violated the Michigan Constitution, finding the state's cruel punishment provision to be broader than its federal counterpart. *People v. Bullock*, 485 N.W.2d 866, 872, 876 (Mich. 1992) (concluding under the Michigan Constitution's guarantee of proportionate punishment that it would "be profoundly unfair to impute full personal responsibility and moral guilt to defendants for any and all collateral acts,

unintended by them").[4] Similarly, the Indiana Supreme Court vacated a six-year sentence for selling fake marijuana under the Indiana Constitution's guarantee of proportionate punishment, acknowledging that the state provision provided more protection than the Eighth Amendment. *Conner v. State*, 626 N.E.2d 803, 806 (Ind. 1993). And the Supreme Court of Iowa vacated a defendant's sentence after rejecting the Eighth Amendment's "toothless" gross disproportionality doctrine in favor of a more stringent approach under the Iowa Constitution. *State v. Bruegger*, 773 N.W.2d 862, 883, 886 (Iowa 2009).

Juvenile sentencing law is another important area where state supreme courts have interpreted state constitutional limitations on punishment to exceed the protections of the Federal Constitution, even while building upon *Roper*, 543 U.S. at 575, *Graham*, 560 U.S. at 74, and *Miller*, 567 U.S. at 465. The Iowa Supreme Court, for example, held that *all* mandatory minimum sentences for juveniles violate the Iowa Constitution, *see State v. Lyle*, 854 N.W.2d 378, 400 (Iowa 2014), as do *all* LWOP sentences for juveniles, *see State v. Sweet*, 879 N.W.2d 811, 832 (Iowa 2016). Earlier this year, the Massachusetts Supreme Judicial Court ruled that LWOP

[4] Additionally, in *People v. Dipiazza*, 778 N.W.2d 264, 273-74 (Mich. Ct. App. 2009), the Court of Appeals in Michigan held that requiring the defendant to register as a sex offender for ten years under the Sex Offender Registration Act ("SORNA") was "cruel or unusual punishment" under the Michigan Constitution even though the Supreme Court said that being placed on the sex offender registry was "nonpunitive" for purposes of the Eighth Amendment. *See Smith v. Doe*, 538 U.S. 84, 96 (2003).

sentences for late adolescents aged 18, 19 and 20 violate that state's constitution. *Commonwealth v. Mattis*, 224 N.E.3d 410, 428 (Mass. 2024). Three years earlier, the Washington Supreme Court also declared that mandatory LWOP sentences for juveniles under 21 violate the cruel punishment provision of the Washington Constitution. *In re Monschke*, 482 P.3d 276, 288 (Wash. 2021). In 2022, the New Jersey Supreme Court held that a mandatory 30-year parole ineligibility period for juveniles violated the cruel punishment provision of the State Constitution such that juveniles may petition a court to review their sentence after serving 20 years. *State v. Comer*, 266 A.3d 374, 399 (N.J. 2022); *see also State v. Zuber*, 152 A.3d 197, 212 (N.J. 2017) (holding that lengthy de facto life sentences for youth violate the New Jersey Constitution).

These decisions interpreting the cruel punishment and proportionate sentencing provisions of state constitutions more broadly than the Federal Constitution, even while building upon Eighth Amendment jurisprudence and rationales in the process, are instructive. They demonstrate that while Eighth Amendment doctrine dictates the minimum protections of Article I § 13 of the Pennsylvania Constitution, it in no way limits the full scope of state constitutional protection against LWOP sentences for people who have not killed or intended to take a life.

III. PENNSYLVANIA'S MANDATORY LWOP FOR PEOPLE CONVICTED OF FELONY MURDER WHO DID NOT KILL OR INTEND TO KILL IS CATEGORICALLY DISPROPORTIONATE UNDER THE EIGHTH AMENDMENT AND ARTICLE I § 13 OF THE PENNSYLVANIA CONSTITUTION.

For all the reasons set forth above, the Supreme Court's categorical approach to proportionate punishment governs the assessment of the extreme punishment at issue here: mandatory imposition of LWOP for people convicted of second-degree murder. 18 Pa. C.S. § 1102 (b); 61 Pa. C.S. § 6137. This law violates the Eighth Amendment and Article I § 13 of the Pennsylvania Constitution because it condemns all people convicted of second-degree murder to die in prison even when, like Appellant, they did not kill or intend to take a life.[5]

To assess "mismatches between the culpability of a class of offenders and the severity of a penalty[,]" *Miller*, 567 U.S. at 470, courts must first consider whether there are "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

[5] Pennsylvania treats felony murder as second-degree murder. 18 Pa. C.S. §2502(b). A person can be charged with felony murder if a death occurs during the commission or attempted commission of a felony even if the person was an accomplice and even if they did not recklessly cause the death or intend to cause it. *Id.* All people convicted of second-degree murder in Pennsylvania receive mandatory life sentences. 18 Pa. C.S. § 1102(b) ("[A] person who has been convicted of murder of the second degree . . . shall be sentenced to a term of life imprisonment.").

question." *Id*. at 67. Finally, courts assess "whether the challenged sentencing practice serves legitimate penological goals." *Id.* Applying this framework, it is clear that mandatory LWOP for people like Appellant who did not kill or intend to kill is unconstitutionally disproportionate. *See Graham*, 560 U.S. at 68.

A. A National Consensus Rejects LWOP for People Convicted of Felony Murder Who Did Not Kill or Intend to Take a Life.

Most states do not impose mandatory LWOP on those convicted of felony murder where a person did not kill or intend to take a life, demonstrating a national consensus against such severe and disproportionate punishments. *See* ANDREA LINDSAY, PHILADELPHIA LAWYERS FOR SOCIAL EQUITY, LIFE WITHOUT PAROLE FOR SECOND-DEGREE MURDER IN PENNSYLVANIA: AN OBJECTIVE ASSESSMENT OF SENTENCING 42 (2021) [hereinafter *PLSE Report*]. In assessing whether a sentence is disproportionate, the Court looks beyond historical views of prohibited punishments because the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). "Evolving standards of decency" are reflected in objective indicia of society's standards, including laws, recent legislation, including trends in legislation, the frequency with which an authorized penalty is used, and broader social and professional consensus. *See Graham*, 560 U.S. at 62–67; *Atkins*, 536 U.S. at 313–17. Other countries' practices are also relevant. *See Graham*, 560 U.S. at 80–82.

Evaluating each of those metrics here, a national consensus rejects mandatory life-without-parole punishment for people convicted of felony murder where the person has not killed, intended to kill, or acted with reckless disregard to the risk that a life will be taken. *See PLSE Report*, *supra* at 5. Pennsylvania is one of only nine "states that mandate an LWOP sentence for all adults convicted under its felony murder rule." Nazgol Ghandnoosh, Emma Stammen & Connie Budaci, Sentencing Project, *Felony Murder: An On-Ramp for Extreme Sentencing*, 5 (2022) (listing Arizona, Iowa, Louisiana, Michigan, Mississippi, Nebraska, North Carolia, South and Dakota among these states) [hereinafter *Extreme Sentencing*]. But even within this minority of states, there are limitations and signs that things may be changing. Iowa, for example, on the face of its statute limits LWOP for felony murder to first degree murder where the "person kills another person while participating in a forcible felony." *See* Iowa Code § 707.2(1)(b). Earlier this year, legislators in Arizona prosed reforms to eliminate felony murder for people who did not kill or intend to kill. Meg O'Conner, *Arizona Bills Would Ban Felony Murder Law—Used to Charge Bystanders for Shootings by Police*, THE APPEAL, Feb. 6, 2024.[6]

[6] *available at* https://theappeal.org/arizona-bill-would-ban-felony-murder-law-jacob-harris/#:~:text=Senate%20Bill%201422%20removes%20the,they%20did%20not%20kill%20anyone.

Indeed, most states do not impose *mandatory* LWOP for felony murder where the person has not killed, intended to kill, or acted with reckless disregard to the risk that a life will be taken. *See Extreme Sentencing*, *supra* at 24. Several states have rejected felony murder altogether. *See* Paul H. Robinson & Tyler Scot Williams, *Mapping American Criminal Law: Ch. 5 Felony-Murder Rule* 2 (2017)[7] (citing Arkansas, Hawaii, Kentucky, Michigan, New Hampshire, New Mexico, and Vermont as states that have "effectively rejected the felony-murder rule" because either they have no felony murder statute at all like Hawaii and Kentucky or "the culpability required for it is the same as that required for murder liability"); Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 402, 440 (2011).

Among states that authorize LWOP for felony murder, several only do so where there is proof of "at least recklessness as to causing the death of another human being." ROBINSON & WILLIAMS, *supra* at 3–4 (listing Illinois and North Dakota among this group); *see also* Cal. Penal Code § 189(e) (2021) (reflecting recent change in the law to require person to have actually killed or to have acted with reckless indifference to human life with major participation in the felony).

This landscape shows that a clear majority of states—which may continue to grow given the trend of legislative attention—reject LWOP for felony murder where

[7] *Available at* https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2721&context=faculty_scholarship

the person has not killed, intended to kill, or acted with reckless disregard to the risk that a life will be taken. Indeed, the "consistency of the direction of change" is relevant to the demonstrated consensus against LWOP for people convicted of felony murder. *See Graham*, 560 U.S. at 62–67; *Atkins*, 536 U.S. at 313–17. Last year, Minnesota changed its laws to limit felony murder only to those who kill. *See* Minn. Stat. § 609.05 (2023); *see also* Sarah Stillman, *Sentenced to Life for an Accident Miles Away*, THE NEW YORKER, Dec. 11, 2023 (noting that after analyzing data and empirical research, a Minnesota "task force concluded that the felony-murder charge 'does not deter behavior' and 'does not reduce the risk of re-offense'" but intensified racial inequities). Of the states that have moved away from felony murder, six of them have done so in the last forty years, showing a trend away from this punishment. *See* ROBINSON & WILLIAMS, *supra* at 2 n.3.

Even among those states that retain felony murder as a crime, some have recently reduced the mandatory sentence for it from LWOP to a maximum term of years. *See, e.g.*, Colo. Rev. Stat. § 18-3-103 (2021); S.B. 21-124, 73rd Gen. Assemb., Reg. Sess. (Colo. 2021); Alex Burness, *Colorado Is Changing How It Sentences People Found Guilty of Felony Murder*, DENVER POST (Apr. 27, 2021, 11:45 AM) (noting that in 2021 Colorado's Governor signed into law a new sentencing scheme for felony murder that eliminates automatic LWOP in favor of sentences "between

16 and 48 years").[8] Other states like California have recently added intent elements to their felony murder rules. Jazmine Ulloa, *California Sets New Limits on Who Can Be Charged with Felony Murder*, L.A. TIMES (Sept. 30, 2018, 9:40 PM).[9] These measures further indicate a growing recognition that the harshest punishments should be reserved for the worst crimes, rather than when someone does not kill or intend to kill. *See* Jamiles Lartey, *New Scrutiny on Murder Charges Against People Who Don't Actually Kill*, THE MARSHALL PROJECT, Mar. 18, 2023 (describing recent legislative proposals to limit the doctrine).[10]

In contrast to this trend, Pennsylvania is an outlier with respect to its aggressive and extensive use of LWOP. It has one of the highest populations of people serving LWOP sentences, second only to Florida, whose general and incarcerated populations are double those of Pennsylvania. ABOLITIONIST LAW CENTER, A WAY OUT: ABOLISHING DEATH BY INCARCERATION IN PENNSYLVANIA 16 (2018). Pennsylvania alone houses 10% of the country's LWOP population. *PLSE Report*, *supra* at 4. As of 2019, of the 5,436 people serving LWOP sentences in Pennsylvania, 1,166 (roughly 21%) were serving it for felony murder. *Id.* This shows

[8] *available at* https://www.denverpost.com/2021/04/26/colorado-felony-murder-prison-changes-bill-signed/.
[9] *available at* https://www.latimes.com/politics/la-pol-ca-felony-murder-signed-jerry-brown-20180930-story.html.
[10] *available at* https://www.themarshallproject.org/2023/03/18/felony-murder-law-alabama-pennsylvania-arizona.

that Pennsylvania's mandatory LWOP for felony murder imposes one of the law's harshest punishments at a uniquely staggering scale. *PLSE Report*, *supra* at 43 (noting that "Pennsylvania is a national exception").

The international consensus likewise strongly rejects LWOP for felony murder. Other countries have increasingly recognized the felony murder rule to be unjust and disproportionate. *See Enmund*, 458 U.S. at 796 n.22 (showing that in 1982 the felony murder doctrine had "been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe"). LWOP 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).[11]

In sum, there is a national and international consensus against mandatory LWOP for felony murder where a person does not kill or intend to kill. These objective indicia of society's standards demonstrate that Pennsylvania's mandatory LWOP for people convicted of felony murder who did not kill or intend to kill is categorically disproportionate under the Eighth Amendment*, see Graham*, 560 U.S. at 62–67; *Atkins*, 536 U.S. at 313–17, and therefore under Article I § 13 of the Pennsylvania Constitution as well.

[11] *available at* https://www.sentencingproject.org/publications/no-end-in-sight-americas-enduring-reliance-on-life-imprisonment/.

B. Pennsylvania's Mandatory LWOP for People Convicted of Felony Murder Who Did Not Kill or Intend to Kill Does Not Serve Legitimate Penological Interests.

The Court also must exercise its independent judgment to consider whether the severity of Pennsylvania's mandatory LWOP for people convicted of felony murder is categorically disproportionate and whether the challenged sentencing practice serves legitimate penological interests. *Graham*, 560 U.S. at 67. Both inquiries show that for people who did not kill or intend to kill Pennsylvania's mandatory LWOP for felony murder violates the Eighth Amendment and therefore Article I § 13 of the Pennsylvania Constitution.

As set forth in Part IC, *supra*, a long line of Eighth Amendment precedents establish that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." *Graham*, 560 U. S. at 69 (citing *Kennedy*, 554 U.S. at 407; *Enmund*, 458 U.S. at 782; *Tison*, 481 U.S. at 137; *Coker*, 433 U.S. at 584). And as set forth in Part IB, the Court has already recognized that LWOP is one of the most severe punishments "akin to the death penalty" which should be treated "similarly to that most severe punishment." *Miller*, 567 U.S. at 475. Indeed, because only three men have been executed by the Commonwealth since 1976,[12] LWOP is de facto the most

[12] *Execution Database*, DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/executions/execution-database.

severe punishment in Pennsylvania today. This precedent and the exercise of the Court's independent judgment should lead this Court to conclude that there is a profound "mismatch" between LWOP's severity and the diminished culpability of people convicted of felony murder who have not killed or intended to kill. *Miller*, 567 U.S. at 470.

Moreover, as applied to this class of offenders, Pennsylvania's mandatory LWOP for felony murder does not further legitimate penological interests. As *Graham* recognized, when a person does not kill or intend to kill "retribution does not justify imposing the second most severe penalty" on that less culpable person. 560 U.S. at 72. The U.S. Supreme Court has applied this reasoning to adults. *See Enmund*, 458 U.S. at 801 ("Putting [defendant] to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts.").

Mandatory LWOP for felony murder also does not serve the penological goal of deterrence because no one is likely to be deterred from committing harms that they never intended or directly caused in the first place. *See Enmund*, 458 U.S. at 799 (doubting that threat of the death penalty for felony murder would "measurably deter one who does not kill and has no intention or purpose that life will be taken"). Incapacitation also fails as a penological justification for mandatory LWOP given

that most people convicted of felony murder in Pennsylvania, like Appellant who was 26, have been imprisoned for crimes committed in their mid-twenties or younger. *Extreme Sentencing*, *supra* at 2 (noting that in Pennsylvania "three-quarters of people serving LWOP for felony murder in 2019 were age 25 or younger at the time of their offense"). *Graham* rejected incapacitation as a justification for LWOP, refusing to assume that a juvenile who committed a nonhomicide crime "forever will be a danger to society." *Graham*, 560 U.S. at 72. Rehabilitation also does not justify LWOP for felony murder here given that this punishment "foreswears" rehabilitation altogether. *Id.* at 74. The class of offenders at issue here are reasonably analogous to those in *Graham* as none of them killed or intended to kill anyone, making "incorrigibility" speculative. Indeed, the concept of rehabilitation is a "moot concern" in the context of LWOP. Berry, *supra* at 1135.

Because no penological purpose justifies Pennsylvania's mandate of imprisonment until death for a class of people convicted of felony murder whose culpability is diminished because they did not kill or intend to kill, the sentencing practice challenged here is categorically disproportionate. As such, it violates the Eighth Amendment of the U.S. Constitution and Article I § 13 of the Pennsylvania Constitution.

CONCLUSION

For all these reasons, the sentence in this case violates the Eighth Amendment and the Cruel Punishments Clause of the Pennsylvania Constitution, which is at least as protective as the U.S. Constitution. This Court should reverse and vacate Mr. Lee's judgment of sentence and remand for resentencing that complies with the Federal and State Constitutions.

Dated: April 25, 2024

Respectfully submitted,

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CERTIFICATES

The undersigned hereby certifies that the length of the foregoing brief complies with the 7,000-word limit set forth in Pa.R.A.P. 531(b)(3) for an *amicus curiae* brief and the typeface requirements of Pa.R.A.P. 124(a)(4). The word count as identified in the Microsoft Word processing system is 6,925.

The undersigned hereby certifies that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

The undersigned hereby certifies that this brief is being filed via PACFile on April 26, 2024, and therefore it is being electronically served upon counsel for the Appellant and Appellee.

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