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IN THE SUPREME COURT OF PENNSYLVANIA

No. 3 WAP 2024

COMMONWEALTH OF PENNSYLVANIA,

Respondent,

v.

DEREK LEE,

Petitioner.

BRIEF OF *AMICUS CURIAE* GOVERNOR JOSH SHAPIRO

ON APPEAL FROM THE DECISION OF THE SUPERIOR COURT OF PENNSYLVANIA AT NO. 1008 WDA 2021 DATED JUNE 13, 2023 AFFIRMING THE SENTENCE OF THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY AT NO. CP-02-CR-0016878-2014 DATED DECEMBER 19, 2016

Date: April 26, 2024

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Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Josh Shapiro was sworn in as the 48th Governor of Pennsylvania on January 17, 2023. Immediately prior, he had served as Attorney General of Pennsylvania since 2017. Gov. Shapiro files this brief as *amicus curiae* pursuant to Pennsylvania Rule of Appellate Procedure 531.

Gov. Shapiro has an interest in this matter as the Commonwealth's chief executive, where his duties involve ensuring that justice is administered fairly and constitutionally throughout the Commonwealth. Additionally, Gov. Shapiro's role includes overseeing Pennsylvania's Department of Corrections (DOC) and the Pennsylvania Parole Board (Parole Board). The DOC houses most Pennsylvania inmates serving life sentences, and the Board is responsible for, among other things, deciding whether inmates who have served their minimum sentences should be released from incarceration subject to parole.

No person other than the *amicus curiae* and the Governor's Office of General Counsel paid in whole or in part for the preparation of the *amicus curiae* brief or authored in whole or in part the *amicus curiae* brief.

SUMMARY OF ARGUMENT

Pennsylvania currently punishes both first degree murder and second degree murder the same, despite clear differences in these crimes. A first degree murder conviction requires specific intent to kill; second degree murder, which covers homicide committed during the course of certain felonies, does not. In fact, to be convicted of second degree murder, a person need not be the killer or even be aware that there was a killing, as long as it occurred during the course of a listed felony. As a result, under current law, an offender who points a gun to a person's head and pulls the trigger receives the same mandatory life sentence as the getaway driver of a robbery where a co-conspirator unexpectedly shot and killed someone. Both offenders should be punished severely, but they should not be punished the same. This sentencing scheme is not only unjust; it is unconstitutional.

Mandatory sentences of life in prison without parole for second degree murder violate the Pennsylvania Constitution's prohibition on cruel punishments. While some instances of second degree murder might warrant such a sentence, it should not be required in all cases. In fact, Pennsylvania is an outlier among the states, joining only Louisiana in requiring life without parole in all felony murder convictions. Instead, judges should be given appropriate discretion to impose a proper minimum sentence, based on the facts of the case and the characteristics of the offender, within reasonable statutory limits. These considerations would

include the particular impact of the crime on victims. This system works for other crimes of homicide below first degree murder, and there is no reason that it would not work for second degree murder.

Finally, although there are hundreds of offenders currently serving life sentences following a conviction for second degree murder, this Court should refrain from making any decision about how to handle these individuals. Such a decision is not necessary in this case, and retroactive application of a new right without proper consideration would place substantial and unnecessarily burdens on the legal system. The decision as to how to implement a new constitutional rule should be left to the legislative and executive branches. Just as these branches promptly implemented a new statutory sentencing system for juveniles after the Supreme Court held life without parole sentences unconstitutional for offenders under the age of 18, they can and should be given the opportunity here to move Pennsylvania's sentencing system forward.

Gov. Shapiro respectfully requests that the Court hold that a mandatory sentence of life in prison without parole for second degree murder violates Article I, Section 13 of the Pennsylvania Constitution.

ARGUMENT

I. LIFE WITHOUT PAROLE SENTENCES FOR SECOND DEGREE MURDER CAN, IN SOME CASES, INFLICT CRUEL PUNISHMENT VIOLATING THE PENNSYLVANIA CONSTITUTION

A. Sentencing Courts Can and Should Consider Particular Facts of Each Case Before Imposing a Sentence of Life Without Parole for Second Degree Murder

1. Second Degree Murder Can Involve a Wide Variety of Culpable Conduct

First degree murder is "the most severe breach of the law of this Commonwealth and is therefore subject to our most severe penalty." *Commonwealth v. Fowler*, 451 Pa. 505, 515, 304 A.2d 124, 129 (1973). "To obtain a conviction for first-degree murder, the Commonwealth must demonstrate that a human being was unlawfully killed, that the defendant was the killer, and that the defendant acted with malice and a specific intent to kill." *Commonwealth v. Laird*, 605 Pa. 137, 149, 988 A.2d 618, 624-25 (2010) (citing 18 Pa. C.S. § 2502(a)). The sentence for first degree murder is either life in prison without parole or death. 18 Pa. C.S. § 1102(a). However, Pennsylvania has executed only three individuals since 1976, and none since 1999. Further, shortly after taking office, Gov. Shapiro announced that he will not issue any death warrants through the remainder of his term. As a result, those convicted of first degree murder are all effectively serving, as they should, a sentence of life without parole.

Second degree murder in Pennsylvania codifies the common law crime of felony murder. Second degree murder is a criminal homicide which occurs while the defendant "was engaged as a principal or an accomplice in the perpetration of a felony." 18 Pa. C.S. § 2502(b). The predicate felonies for second degree murder include "robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping." 18 Pa. C.S. § 2502(d). For second degree murder, the malice element of the crime of murder is inferred from the commission of the felony, such that any killing—even one that is unintentional—carries an imputation of malice as if the defendant committed the killing. *Commonwealth v. Tarver*, 493 Pa. 320, 328, 426 A.2d 569, 573 (1981).

Unlike first degree murder, a person can be convicted of second degree murder without being the killer and without having any intent to kill. According to DOC estimates based on a review of case files, in about half of second degree murder cases the defendant was the killer, with the remaining half split between cases where the defendant was clearly not the killer and cases in which it was not clear. Notwithstanding the differences, a conviction for second degree murder results in the same mandatory minimum sentence as those convicted of first degree murder—life in prison without the possibility of parole.

This is simply wrong.

Because of the wide range of potential culpable conduct for second degree murder, justice demands an equally wide range of potential sentences. While some conduct constituting second degree murder will warrant imposing a sentence of life without parole, some conduct will not. Judges, who are accustomed to applying sentencing discretion to particular facts of a given case, should be given latitude to impose an appropriate and just punishment on each person convicted of second degree murder, based on each defendant's particular culpability. Yet the Pennsylvania sentencing scheme does not give judges this discretion.

The mandatory minimum sentence for second degree murder should not be the same as for first degree murder. Because it currently is, some sentences for second degree murder in Pennsylvania can constitute "cruel punishment" in violation the Pennsylvania Constitution.

2. Imposing the Same Mandatory Minimum for All First and Second Degree Murders Violates Section 13

The Pennsylvania Constitution prohibits imposing "cruel punishments." Pa. Const. art. I, § 13 ("Section 13"). This right is generally coextensive with the Eighth Amendment of the United States Constitution, which bars "cruel and unusual punishments." *Commonwealth v. Real Prop. & Improvements Commonly Known As 5444 Spruce St., Philadelphia*, 574 Pa. 423, 427-28, 832 A.2d 396, 399 (2003) (citing U.S. Const. am. VIII ("Eighth Amendment")). However, prior cases finding Section 13 and the Eighth Amendment coextensive "arose only in discrete

contexts," like the death penalty, the ban on excessive fines, and prison conditions. *Commonwealth v. Baker*, 621 Pa. 401, 419, 78 A.3d 1044, 1055 (2013) (Castille, C.J., concurring) (citing *Commonwealth v. Batts*, 620 Pa. 115, 135 n.5, 66 A.3d 286, 298 n.5 (2013)). This Court has not yet determined whether Section 13 affords greater protections than the Eighth Amendment in the context of sentencing for second degree murder convictions.

To decide whether the Pennsylvania Constitution affords greater rights than the United States Constitution, this Court applies the standard outlined in *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (Pa. 1991). Under the *Edmunds* test, parties in their briefing are required to "discuss and develop at a minimum the following four factors: 1) text of the Pennsylvania constitutional provision; 2) history of the provision, including Pennsylvania case-law; 3) related case-law from other states; 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence." *Commonwealth v. Alexander*, 664 Pa. 145, 163-64, 243 A.3d 177, 188 (2020) (cleaned up). As noted in Judge Dubow's concurring opinion in the Superior Court, this Court should apply the *Edmunds* test here "to determine whether the rights that the Pennsylvania Constitution grants to defendants are still coextensive to the rights that Eighth Amendment grants to defendants" in the context of mandatory sentence of life without parole for second degree murder.

Commonwealth v. Lee, 301 A.3d 899, 2023 WL 3961802, at *4 (Pa. Super. June 13, 2023) (unpublished) (Dubow, J., concurring).

While the full *Edmunds* analysis can be left to the parties and to the Court, Gov. Shapiro's role gives him unique insight into the particular policy concerns implicated by imposing a mandatory sentence of life without parole for all second degree murder convictions. In sum, Gov. Shapiro recognizes that mandatory life without parole might be appropriate in ***some*** cases, but it should not be required in ***all*** cases. Section 13, by its text and as a matter of policy, bars imposing a sentence of life without parole in a second degree murder case without considering any mitigating factors, including whether the defendant was the actual killer.

a) There Is No Clear Constitutional Authority Guiding the Court in This Case

While the Eighth Amendment generally permits mandatory sentences of life without parole for some crimes including but not limited to murder, it is not clear that the federal constitutional reasoning would apply to the Pennsylvania Constitution. In the controlling case on the limits of life without parole as punishment under the Eighth Amendment, *Harmelin v. Michigan*, 501 U.S. 957 (1991), the Supreme Court upheld a statute requiring a sentence of life without parole for possession of more than 650 grams of cocaine. *Id.* at 961. The bulk of the Supreme Court opinion examined the claim that the sentence was unconstitutionally disproportional, ultimately holding that the Eighth Amendment

contains no proportionality requirement outside the context of the death penalty. *Id.* at 965, 990-94. Separately—and more notably for this case—the Supreme Court rejected the argument that it was unconstitutional to impose "a mandatory sentence of such severity, without any consideration of so-called mitigating factors." *Id.* at 994. However, the Court's analysis turned on the specific language of the Eighth Amendment, observing that "[s]evere, mandatory penalties ***may be cruel, but they are not unusual*** in the constitutional sense, having been employed in various forms throughout our Nation's history." *Id.* at 994-95 (emphasis added).

In other words, the federal constitutional question rested on the foundation that a punishment must be both cruel and unusual to be unconstitutional, and the result was a holding that the mandatory sentence at issue was not unusual. The text of Section 13, by contrast, bars punishment only if it is cruel. Under *Harmelin's* logic, the same case under the Pennsylvania Constitution might have had a different outcome in this particular case. Because *Harmelin* allows that a mandatory life sentence without taking into account mitigating factors might be cruel, its reasoning would not foreclose a decision extending Section 13 to exactly the situation presented in this case.

Later Eighth Amendment cases addressed mandatory life sentences in the context of juvenile offenders. In *Miller v. Alabama*, 567 U.S. 460 (2012), the Supreme Court held that a mandatory life without parole sentence for a juvenile

violated the Eighth Amendment because it made "youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence," which presented "too great a risk of disproportionate punishment" to survive constitutional scrutiny. 567 U.S. at 479. *Miller* turned on the immutable characteristics of youth, and those concerns are not present in the context of an adult offender. For that reason, it is appropriate to require life without parole for adults convicted of first degree murder, where there was a specific intent to kill. But for someone convicted of second degree murder—when the defendant might have been merely a getaway driver or a lookout, lacking any specific intent to kill—the same concerns reflected in *Miller* resurface. The large variety of criminal intent and culpable behavior which can result in a second degree murder conviction create enough differences among potential offenders such that those differences "counsel against irrevocably sentencing [all offenders] to a lifetime in prison." *See Miller*, 567 U.S. at 480. An approach allowing, but not requiring, a sentence of life without parole would promote justice by permitting judges "to take into account the differences among defendants and crimes" when imposing a sentence. *See id.* at 480 n.8.

This Court has not addressed the constitutionality of a mandatory life without parole sentence for second degree murder. Indeed, even the Superior Court has not addressed it substantively in some time—although life without parole sentences were recently affirmed in *Commonwealth v. Delacruz*, 277 A.3d 1168

(Pa. Super. 2022) and *Commonwealth v. Rivera*, 238 A.3d 482 (Pa. Super. 2020), both cases simply applied as binding precedent a decision more than four decades old in *Commonwealth v. Middleton*, 467 A.2d 841 (1983). This case presents the opportunity to revisit the issue, after *Miller* and through a more modern lens.

b) Mandatory Life Without Parole for Second Degree Murder Does Not Sufficiently Promote the Purposes of Sentencing

One factor in this *Edmunds* analysis requires the Court to analyze "policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence." *Edmunds*, 526 Pa. at 390, 586 A.2d at 895. Gov. Shapiro sits in a unique position to lend support to the conclusion that policy concerns weigh strongly in favor of concluding that judicial sentencing discretion is constitutionally required for second degree murder.

As this Court has repeatedly expressed, "sentencing serves many purposes, including 'protection of society, general deterrence (example to others), individual deterrence, rehabilitation, and retribution (punishment, vengeance, desserts).'" *Commonwealth v. Coleman*, 285 A.3d 599, 613 (Pa. 2022) (quoting *Commonwealth v. Williams*, 539 Pa. 249, 252, 652 A.2d 283, 284-85 (1994)). Imposing a mandatory sentence of life without parole for second degree murder, however, does not substantially advance these purposes.

Neither type of deterrence is served by imposing a mandatory sentence for second degree murder that is the same for first degree murder. To be sure, substantial punishment is required for the type of dangerous felonies that are predicates for second degree murder. And severe sentences for second degree murder—including longer sentences than would be imposed for those felonies if there was no killing—are warranted. But deterrence requires escalating consequences for escalating crimes, and the current felony murder sentencing scheme does not achieve this goal. It provides the same mandatory sentence with or without an intent to kill, which means that there is no added punishment for an intentional killing. By punishing crimes the same whether or not a defendant intended to kill, the system, counterintuitively, does not offer any deterrence for the intent to kill.

The United States Supreme Court used this reasoning in *Enmund v. Florida*, 458 U.S. 782 (1982), which found it unconstitutional to impose the death penalty for felony murder. The Court reasoned that the defendant, who had participated in a robbery resulting in a homicide, "did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed." *Id.* at 798. *Enmund* rejected the rationale that the threat of imposing the death penalty "will measurably deter one who does not kill and has no intention or purpose that life will be taken." *Id.* at 799; *see also United States v. Savage*, 970 F.3d 217, 283 (3d

Cir. 2020) (calling it "of central importance" to the outcome of *Enmund* that he "did not intend to kill anyone"). The same rationale applies here. Because Pennsylvania requires the same mandatory minimum sentence for both first and second degree murder, no deterrent purpose is served by mandating life without parole absent an intent to kill.

Additionally, rehabilitation as a purpose of sentencing is completely undermined by a sentence of life without parole for second degree murder. Simply put, there is no purpose for rehabilitation when there is no chance of release. *See Graham v. Florida*, 560 U.S. 48, 74 (2010) (life without parole "forswears altogether the rehabilitative ideal"). While some crimes of second degree murder might warrant surrendering this goal—like when the defendant was directly responsible for the killing—others may not. Sentencing judges are in the position to analyze both the facts of a case and the circumstances of an offender to determine whether this is appropriate. Finally, while a severe sentence for a felony resulting in a death might help to protect society and punish the consequences of the wrongdoing, these alone cannot justify a life sentence in all second degree murder cases.

Although severe sentences are appropriate in all cases, and life without parole might be appropriate in some cases, mandatory life sentences for all second

degree murder is sufficiently inconsistent with the purposes of punishment such that it rises to the level of cruel punishment barred by Section 13.

c) Unnecessarily Housing Prisoners—Particularly Elderly Prisoners—Places Financial Strains on the Commonwealth and Detracts from Other Law Enforcement Priorities

One function of DOC is to house offenders, often for years at a time, and it performs this difficult function admirably. However, we should not be asking for DOC to perform this function unnecessarily, because, in addition to interest of justice described above, to do so burdens the Commonwealth—that is, taxpayers—with unnecessary costs.

According to its internal records, the Pennsylvania Department of Corrections currently houses 1,042 inmates serving life sentences after a second-degree murder conviction. A more detailed breakdown of the population of those convicted of second degree murder follows below:

AGE	#	%
<30	43	4%
30 to <40	170	16%
40 to <50	255	24%
50 to <60	263	25%
60 to <70	236	23%
70+	75	7%
TOTAL	**1042**	**100%**

TIME SERVED (Years)	#	%
<10 Years	128	12%
10 to <20 Years	248	24%
20 to <30 Years	284	27%
30 to <40 Years	270	26%
40+ Years	112	11%
TOTAL	**1042**	**100%**

Of these inmates, 381 are currently age 50 or older and also have served 30 years or more in prison on their current sentence. DOC estimates that it costs over $66,000 per year to house an inmate. For inmates who are elderly (50+) and infirm, that number jumps to over $217,000 per year.

The potentially unnecessary costs here are not insignificant, particularly considering that most inmates convicted of second degree murder who might have otherwise been eligible for parole will have been incarcerated for decades, and are likely to be elderly by prison standards. They are, in other words, the most expensive inmates to house, in addition to being far removed from the crimes they committed. While cost should not guide sentencing decisions, it provides an added reason for this Court to carefully consider the current mandatory sentencing regime.

B. The Pennsylvania Parole Board Can Decide the Appropriateness of Parole for Second Degree Murderers

A sentence of life in prison with the possibility of parole presents only that—the ***possibility*** of parole. Just as some sentences may warrant imposing a

sentence of life without parole, not all individuals who are eligible for parole will be granted parole.

The Parole Board is experienced, qualified, and capable of deciding who should be paroled and who should not. In deciding whether parole is appropriate, the Parole Board applies the statutory criteria:

> (1) The nature and circumstances of the offense committed.
>
> (2) Any recommendations made by the trial judge and prosecuting attorney.
>
> (3) The general character and background of the inmate.
>
> (4) Participation by an inmate sentenced after February 19, 1999, and who is serving a sentence for a crime of violence as defined in 42 Pa.C.S. § 9714(g) (relating to sentences for second and subsequent offenses) in a victim impact education program offered by the Department of Corrections.
>
> (5) The written or personal statement of the testimony of the victim or the victim's family submitted under section 6140 (relating to victim statements, testimony and participation in hearing).
>
> (6) The notes of testimony of the sentencing hearing, if any, together with such additional information regarding the nature and circumstances of the offense committed for which sentence was imposed as may be available.
>
> (7) The conduct of the person while in prison and his physical, mental and behavioral condition and history, his history of family violence and his complete criminal record.

61 Pa. C.S. § 6135(a). And the Parole Board does so regularly. By way of example, in February 2014 alone the Parole Board considered 614 cases, granting parole in 246. Just as it does with other individuals who have committed violent crimes, the Parole Board is capable of deciding whether an offender convicted of second degree murder might be an appropriate candidate for parole after decades of confinement. These decisions would arise in the normal course, and they would not impose any meaningful extra burden. There is no reason why the Parole Board could not decide parole for a lookout at a robbery, when it is already deciding parole for others convicted of third degree murder, manslaughter, and other serious crimes.

C. Lee's Sentence of Life Without Parole May Be Appropriate

Just as the Supreme Court held in *Miller* with respect to juveniles, a life without parole sentence for second degree murder may be appropriate under some circumstances, "but only so long as the sentence is not mandatory." *Jones v. Mississippi*, 593 U.S. 98, 106 (2021) (citing *Miller*). That is, once a sentencing court considered mitigating factors and other input, like victims' rights, it can constitutionally determine that a sentence of life without parole is warranted.

That could be the case for Lee. This Court should focus its instant decision on process—the sentence as a mandatory minimum—and not on whether the facts of Lee's offense might or might not warrant a lesser punishment. That decision is

best left to the lower courts to consider. And as this Court held in *Commonwealth v. Felder*, 269 A.3d 1232 (Pa. 2022), the sentencing court should exercise its discretion as set forth in 42 Pa. C.S. § 9721(b) considering all appropriate sentencing factors, including any mitigating factors of the offender and the offense. *See id.* at 1245. For Lee, there may be no such mitigating factors, but that should not stop this Court from announcing a new and proper constitutional rule.

II. COURT SHOULD NOT ADDRESS RETROACTIVITY IN THIS CASE

A. Retroactivity Requires a Different Legal Analysis and Would Improperly Expand the Holding Beyond Lee's Case

As this Court has explained, a new constitutional rule in the criminal law context "applies to all criminal cases still pending on direct review." *Commonwealth v. Olson*, 655 Pa. 511, 519-20, 218 A.3d 863, 868 (2019) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004)). However, a newly announced rule "does not apply, as a general matter, to convictions that were final when the new rule was announced." *Id.* (quoting *Montgomery v. Louisiana*, 577 U.S. 190 (2016)). As announced in the plurality opinion in *Teague v. Lane*, 489 U.S. 288 (1989), which is applied in Pennsylvania, there are two categories of exceptions to this which must be applied retroactively: (1) a new substantive rule, and (2) a "much narrower class" of "watershed" procedural rules. *Id.* Substantive rules are those "forbidding criminal punishment of certain primary conduct" or "prohibiting a certain category of punishment for a class of defendants because of their status or

offense." *Id.* (quoting *Montgomery*, 577 U.S. at 198). Substantive rules "set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose," whereas procedural rules "do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004)).

This Court need not, and should not, address retroactivity in this case. This is a direct appeal of Lee's sentence. *See Lee*, 2023 WL 3961802, at *1 (noting that this appeal arises "the PCRA court reinstated [Lee's] post-sentence and appellate rights"). That means that the question before the Court is only whether Lee's sentence is constitutional. The question of whether a new right is substantive or procedural, and thus whether it should be applied retroactively, is not before the Court.

The "simple yet fundamental principle of judicial restraint" counsels that "[i]f it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 348 (2022) (Roberts, C.J., concurring in the judgment); *accord Commonwealth v. Mason*, 665 Pa. 230, 247 A.3d 1070, 1076 n.9 (2021) (declining to address an issue that was not "squarely before the Court"). In this case, the principle of judicial

restraint means that any decision should be limited to the question of whether a ***mandatory*** sentence of life without parole for second degree murder is constitutional. Retroactivity is a question for another day.

B. Immediate Retroactivity Would Unnecessarily Strain the Legal System

As noted above, there are currently just over 1,000 inmates serving life sentences for second degree murder. If a new constitutional rule is applied retroactively, it could require resentencing for each of those inmates. This would undoubtedly strain legal resources, requiring revisiting facts of cases that are, in some cases, decades old. This task would prove more difficult than one recently undertaken when juvenile life sentences were declared invalid.

Since *Miller* and *Montgomery*, as of March 31, 2024, 497 juvenile offenders have been resentenced. As discussed below, these juveniles were resentenced in light of a new sentencing structure that the legislature implemented shortly after *Miller*. A new, immediately retroactive constitutional right for all those with final sentences for second degree murder would require twice as many reviews, without the benefit of the type of legislative action that took place after *Miller*. And, as noted above, it is less likely to result in sentencing changes than juvenile resentencings did because there are no immutable characteristics of second degree murderers that make them different from first degree murderers.

Due to the strain on the legal system from immediate retroactivity, and because there may be other solutions, this Court should decide in this case only that the right exists, not whether it is retroactive.

C. The General Assembly Should Craft a Solution to the Problem of Retroactivity

Once this Court decides that mandatory life without parole for second degree murder violates Section 13, it should allow the General Assembly to decide the best way to implement the new requirement for currently sentenced inmates. The legislature, working with local prosecutors, DOC, and the Parole Board, can and should develop a solution for this constitutional and administrative problem.

Pennsylvania's reaction to the *Miller* decision shows that the General Assembly can act quickly. Mere months after the Supreme Court's decision in 2012 barring mandatory life without parole sentences for juveniles, the legislature passed Act 204, which established a new sentencing scheme for juveniles convicted of murder. 18 Pa. C.S. § 1102.1. And that sentencing scheme did not merely implement *Miller* reflexively—it thoughtfully crafted different mandatory minimum sentences based on the age of the offender. *See, e.g., id.* § 1102.1(a) (providing for a minimum sentence of 35 years for an offender 15 years of age or older and 25 years for an offender under 15). It also, notably, differentiated between first and second degree murder, providing lower mandatory minimum sentences for the latter. *Compare id.* § 1102.1(a) *with* § 1102.1(c). While there was

confusion in this Court (and others) related to implementing *Miller* and *Montgomery*, *see Felder*, 269 A.3d at 1241-46 (describing evolving case law), and there will certainly be differences in how the General Assembly might handle second degree murder convictions, our post-*Miller* experience demonstrates that Pennsylvania's legislative branch can act quickly and justly.

One key difference between the right asserted here and the one asserted in *Miller* is that resentencing those convicted of second degree murder will likely result in far fewer changes to the minimum sentence than what happened for juveniles after *Miller*. That is because *Miller's* finding of unconstitutional punishment relied on the inherent characteristics of children that makes them different from adults; it noted that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." 567 U.S. at 472. Those "distinctive attributes" did not vary case-to-case. There are no similar inherent characteristics of second degree murderers.

The General Assembly, working with the Governor's Office, is the best place to start crafting a solution for this problem. Legislation can be drafted that addresses the problem, in a manner that can be fairly and expeditiously administrated by the justice system. Any case that might result in a sentence of less than life without parole must include a robust notification and meaningful input

process for families of murder victims. *See generally* 18 P.S. § 11.201 (listing rights of crime victims). This Court should encourage that process, beginning with deciding that imposing a mandatory sentence of life without parole for second degree murder violates the Pennsylvania Constitution.

CONCLUSION

WHEREFORE, Gov. Shapiro respectfully requests that the Court hold that a mandatory sentence of life in prison without parole for second degree murder violates Article I, Section 13 of the Pennsylvania Constitution.

Date: April 26, 2024

Respectfully submitted,

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CERTIFICATION PURSUANT TO Pa. R.A.P. 127

I certify that this filing 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.

Date: April 26, 2024

By: /s/ Stephen R. Kovatis_____

STEPHEN R. KOVATIS
Deputy General Counsel