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IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

v.

DEREK LEE,
Appellant.

BRIEF FOR AMICUS CURIAE PENNSYLVANIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF THE COMMONWEALTH OF PENNSYLVANIA

Appeal from the June 13, 2023 Decision of the Superior Court, 1008 WDA 2021, affirming the order entered December 19, 2016, in the Court of Common Pleas, Allegheny County, at CP-02-CR-16878-2014

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CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

STATEMENT OF AMICUS CURIAE

The Pennsylvania District Attorneys Association represents the interests of its member District Attorneys in the various counties in the Commonwealth of Pennsylvania. This Court's review of the constitutionality of the sentence for second-degree murder is of special interest to the PDAA. No other person or entity has authored any portion of this brief, in whole or in part, nor have any funds been expended by any person or entity in the preparation and filing of this brief outside of the Association.

SUMMARY OF ARGUMENT

Defendant's sentence is constitutional. His argument to the contrary is flawed for two primary reasons. First, his true concern is with who is subject to a conviction of second-degree murder (those convicted via criminal vicarious liability) and less with the sentence itself. Second, he merely presumes, rather than proves, that any second-degree murderer convicted via criminal vicariously liability has per se constitutionally significant diminished culpability. Absent actually making a convincing argument on this point (which defendant fails to do), no relief should follow.

The majority of the defense amici decline to address the limited constitutional question before this Court, instead encouraging this Court to further their own ideological goals through this case. Those few that do attempt to squarely meet the actual question presented suffer the same fatal flaw as defendant, namely assuming rather than proving the keystone issue of differing constitutional culpability.

The significant policy considerations raised by the defense amici are relevant and important but directed to the wrong body. It is the General Assembly, or the Governor, who should address the interconnected policy concerns they raise.

ARGUMENT

I. DEFENDANT'S SENTENCE IS CONSTITUTIONAL

Defendant argues that his sentence for committing second-degree murder is unconstitutional under both the Pennsylvania and United States Constitutions. This is a limited question, to which many of the arguments made by defendant and amici do not apply. It would be duplicative for the PDAA to undertake a detailed federal and state constitutional analysis of defendant's claim, and therefore it relies on the thorough briefing of the appellee on this point. Instead, the PDAA offers the following additional analysis.

In Pennsylvania any adult convicted of second-degree murder will be sentenced to life imprisonment without parole. 18 Pa.C.S. § 1102(b). Pursuant to the Prisons and Parole Code, the Pennsylvania Board of Probation and Parole is specifically prohibited from paroling an inmate condemned to death or serving a sentence of life imprisonment. 61 Pa.C.S. § 6137(a)(1) (formerly codified at 61 P.S. § 331.21).

Because the sentence here is a legislative determination, it carries a strong presumption of validity and of constitutionality. *Snider v. Thornburgh*, 436 A.2d 593 (Pa. 1981). One of the most fundamental principles of statutory

construction is the presumption that the legislature has acted constitutionally. *Commonwealth v. Turner*, 80 A.3d 754 (Pa. 2013). A statute will not be declared unconstitutional unless it clearly, palpably, and plainly violates the constitution. *Commonwealth v. Chmiel*, 416 610 A.2d 1058 (Pa. Super. 1992). Furthermore, a heavy burden rests on those who attack the constitutionality of Pennsylvania's legislative sentencing scheme. *Commonwealth v. Story*, 440 A.2d 488 (Pa. 1981). "Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. … [A] heavy burden rests on those who would attack the judgment of the representatives of the people." *Commonwealth v. Zettlemoyer*, 454 A.2d 937, 960 (Pa. 1982) (overruled on other grounds).

Defendant anchors his constitutional argument with the premise that he did not actually kill or intend to kill. He presumes that this fact has not only legal significance, but such import that it renders his sentence unconstitutional. But presuming it does not make it so. Our laws and courts have repeatedly said the opposite. The Crimes Code specifically provides that an accomplice to an enumerated felony resulting in a death is equally responsible as the principle. *See* 18 Pa.C.S. § 2502(b) and (d). "The malice or

intent to commit the underlying crime is imputed to the killing to make it second-degree murder, regardless of whether the defendant actually intended to physically harm the victim." *Commonwealth v. Rivera*, 238 A.3d 482, 500 (Pa. Super. 2020). Defendant fails to sufficiently explain how this statute, and more generally the doctrine of vicarious criminal liability, is unconstitutional itself so as to preclude the imposition of his sentence.[1] Defendant cannot justify a declaration that the second-degree murder statute, the sentencing statute, and the parole statute – which are inextricably intertwined as it relates to defendant's claim – are unconstitutional without proving (rather than presuming) that there is constitutionally legal significance to the difference between being the killer and being a killer via vicarious criminal liability.

So too does defendant fail to account for the consequences of such a holding. The impact of the ruling he asks for would be to declare the entire doctrine of vicarious criminal liability – as it relates to any crime, not just felony murder – constitutionally suspect. His argument does not

[1] Accomplice liability is codified in Pennsylvania, 18 Pa.C.S. § 306.

acknowledge – let alone wrestle with – the vast ripple effects across the whole of Pennsylvania's criminal justice system.

And, notably, defendant is not arguing that all those convicted of second-degree murder in Pennsylvania are serving an unconstitutional sentence. The reasoning behind this is obvious: some second-degree murderers are *more culpable* than even first-degree murderers. Some defendants convicted of second-degree murder did actually kill, but first they raped, robbed, kidnapped, or committed arson. It is entirely common[2] for a defendant to be convicted of second-degree murder where all the elements existed for a first-degree murder conviction. But because there was also another felony involved, the fact finder convicts of second-, not first-, degree murder. It is logical and just that these individuals are punished as severely as those first-degree murderers who only killed withs specific intent, but did not commit an additional enumerated felony.

[2] Based only on a preliminary search of the cases of ADAs in this office alone, we were able to quickly identify the following cases where a defendant was convicted of second-degree murder despite being the actual killer: *Commonwealth v. Johnson*, 2706 EDA 2013 (Pa. Super. 2015); *Commonwealth v. Saunders,* 2268 EDA 2013 (Pa. Super. 2015); *Commonwealth v. Vazquez*, 640 EDA 2016 (Pa. Super. 2017); and *Commonwealth v. Presley*, 3515 EDA 2013 (Pa. Super. 2013).

Taken together, defendant's arguments make one thing clear: the supposed unconstitutionality originates in *who* is subject to this sentence – not the sentence itself. One must then wonder if defendant's real challenge is not to his sentence, but to the doctrine of vicarious criminal liablity, without which he could not have been convicted of second-degree murder. Defendant's related argument – that his sentence was disproportionate – begins with the same assumption, namely that there is a constitutionally meaningful difference between being deemed a killer via one's own act and via criminal vicarious liability. The same faulty foundation undermines this argument as well.

The offense of felony-murder is undoubtedly one of the gravest and most serious which can be committed. The taking of a life during the commission of an enumerated felony demonstrates a disregard for the property, safety, sanctity, integrity, and especially, the life of the victim. Defendant has failed to prove that his sentence is unconstitutional where his argument truly goes to who is subject to it, and he presumes (rather than proves) that the distinction between legal and factual culpability is constitutionally fatal.[3]

[3] As described in more detail *infra*, while there are undoubtedly appealing arguments why a non-slayer should not be held to the same fate as the slayer,

II. THE DEFENSE AMICI PRIMARILY FOCUS ON POLICY RATIONALES FOR ABOLISHING THE SENTENCE, BUT NOT THE ACTUAL, LIMITED CONSTITUTIONAL QUESTION BEFORE THIS COURT.

A glut of amici filed briefs purporting to support defendant's argument that his sentence is unconstitutional. Upon examination, however, it is clear that most of these briefs do little to address the limited constitutional question before this Court, instead using this case (and perhaps even this Court) to shoehorn their ideological goals into a narrowly framed constitutional issue. These efforts should be rejected.

A. Briefs Unrelated to Constitutionality

Thirteen of the seventeen amici briefs have no central constitutional focus. Instead, they variously argue, for example, that family members deserve to have a say in sentencing (notably, the brief only focuses on family members who do not support life without parole; it is silent as to any family members of murder victims who may support the sentence);[4] that juvenile-lifers are,

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these are policy determinations are beyond the scope of the limited constitutional question before this Court and are appropriately addressed only by our legislature or Governor.

[4] Brief of Family Member and Loved Ones of Victims Killed by Murder

in their own view, capable of rehabilitation;[5] that clemency is ill-suited to address the problem and only our parole system can properly help these defendants;[6] and that life without parole sentences deprive judges of sentencing discretion[7] (ignoring that there are many mandatory sentences within our criminal justice system and that any ruling based in the constitutionality of mandatory minimums would have far-reaching implications).[8]

Others go further, using this case to encourage this Court to create policy change as to the age of majority,[9] to recognize that there is no penological purpose served by life sentences for any crime,[10] that courts are obligated to

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[5] Brief of Amici Curiae Avis Lee, Ghani Songster, Felix Rosado, Ricky Lee Olds, Paulette Carrington, and Terrell Carter

[6] Brief of Former Pardons Board Secretaries Brandon Flood and Celeste Trusty

[7] This Court has already rejected the assertion that the lack of judicial discretion in sentencing for second-degree murder is unconstitutional. *Commonwealth v. Cornish*, 370 A.2d 291, 293 (Pa. 1977).

[8] Brief of Former Prosecutors and Judges of Pennsylvania

[9] Brief of Juvenile Law Center, Youth Sentencing & Reentry Project, and Philadelphia Lawyers for Social Equity

[10] Brief of Criminologists and Law Professors

recognize inherent racial disparities in sentencing;[11] to second-guess juror intent when determining guilt;[12] and to discuss the practical and financial implications of incarcerating murderers for the entire course of their lives.[13]

None of these briefs squarely address whether defendant's sentence violates either the state or federal constitution. Many of them *wholly fail to cite the constitution*.[14] There can be little question that amici raise important policy questions warranting consideration by policy-makers. But, where they do nothing to address the question at issue, they provide little-to-no value to this Court in the limited task before it.

The PDAA wishes to particularly note that a single county-prosecutor, in its amicus, makes the bald declaration that failing to differentiate among

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[11] The Antiracism and Community Lawyering Practicum at Boston University School of Law, Fred T. Korematsu Center for Law and Equality, and the NAACP Legal Defense and Educational Fund, Inc.

[12] Brief of the Pennsylvania Innocence Project

[13] Brief of Former Department of Corrections Secretaries John Wetzel and George Little, and Executive Transforming Probation and Parole

[14] In particular, the Family of Murder Victims, Former Judges and Prosecutors, Former Juvenile Lifers, and the Philadelphia District Attorney's Office forego citing the federal and state constitutions.

levels of culpability erodes the public's respect for the law.[15] First, this argument fails to address the constitutionality of the sentence. Second, the PDAA wholly disagrees. Rather, it is behavior like this unsupported statement of a single district attorney, which does not even address the issue before this Court (thus pretending that arguments wholly separate from constitutional analysis should impact this Court's interpretation of the constitution) that really erodes the public's trust and the constitution itself.

B. Amici Addressing the Constitutional Question

Of the four briefs that squarely address the actual question before this Court, the brief of The Sentencing Project, et al., warrants discussion. First, like defendant, it assumes without proving that Pennsylvania's practice of imputing malice for second-degree murder from the underlying felony is constitutionally infirm. *See* Sentencing Project Amicus Brief at 7 (the felony-murder rule "waives" the element of intent); at 8 (felony murderers have "lesser culpability"). It argues that this infirmity is contrary to evolving standards of decency, and highlights the many other states in the nation that have moved away from the form of sentencing that Pennsylvania uses. *Id.*

[15] Amicus Brief of The Philadelphia District Attorney's Office

Critically, however, this only highlights the PDAA's point: the question of the continuing advisability of life without parole sentences is a matter for the legislature – just as it was in California, Minnesota, Colorado, Michigan, New Hampshire, Delaware, New Mexico, North Dakota, and Vermont.

The Scholars of 8th Amendment Law's amicus states that the United States Supreme Court "has applied the [federal] categorical approach beyond capital cases when there were mismatches between the culpability of a class of offenders and the severity of a penalty." 8th Amendment Scholars, at 9 (*citing Graham v. Florida*, 560 U.S. 48 (2010)). But this is an imprecise retelling of *Graham*. Although *Graham* did state, "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" the immediate next phrase clarified that it was distinguishing "between homicide and other serious violent offenses against the individual." *Id.*, at 69 (*citing Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008); *Edmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987); and *Coker v. Georgia*, 433 U.S. 584 (1977). The *Graham* court continued by explaining that "[s]erious nonhomicide crimes may be devastating in their harm ... but in terms of moral depravity and of the injury to the person and to the public, ... they cannot be compared

to murder in their severity and irrevocability. This is because [l]ife is over for the victim of the murderer, but for the victim of even a very serious nonhomicide crime, life ... is not over and normally is not beyond repair. Although an offense like robbery or rape is a serious crime deserving serious punishment, those crimes differ from homicide crimes in a moral sense." *Id.* (internal citations and quotations omitted). Thus, *Graham* viewed all forms of murder as the most severe and separate from other violent and non-violent crimes. But it did not suggest that there was necessarily a different level of moral depravity among differing gradations of murder.

This amicus also states that "to assess mismatches of culpability of a class of offenders and severity of the punishment, courts must consider various factors." 8th Amendment Brief, at 20. But this *pre-supposes that there is a mismatch* between the defendant and his punishment. The amicus, like defendant, side-steps proving this fundamental first inquiry, instead presuming that the supposed distinction between legal and factual culpability has constitutional significance.

To the extent amici makes any attempt to address this fundamental question, they rely on society's "evolving standard of decency," id., 21, but that reliance should result in removing this inquiry from the purview of the

courts, *see* Section III, *infra*. Moreover, it makes an argument about what policies are popular, not what is constitutional.

The amici briefs supporting defendant hardly do so. Most do not even pretend to be relevant to the limited constitutional question before this Court. The small remainder make the same fundamental assertion defendant does, and likewise fail to actually prove that there is constitutional significance to the legal conclusion that defendant is equally as liable as a defendant who actually kills.

III. TO THE EXTENT THERE IS A PROBLEM IN NEED OF A SOLUTION, THIS COURT IS THE WRONG BRANCH OF GOVERNMENT TO ADDRESS IT.

The PDAA agrees that the issue of mandatory life without parole sentences for those convicted of second-degree murder by virtue of the doctrine of conspiratorial liability warrants exploration. In particular, several defense amici present cogent and even compelling policy arguments for review. Yet the PDAA stresses that there is a critical difference between whether a doctrine of criminal vicarious liability that results in mandatory life without parole sentences for some second-degree murders is unconstitutional, and whether it is unwise, or no longer representative of society. It is for this reason that the PDAA urges this Court to address only

the limited constitutional issue before it, and to itself encourage those branches of our government – the General Assembly and the Governor – who are empowered to draft legislation on behalf of the citizens of this Commonwealth to squarely address this issue and the significant arguments raised by the amici.

This Court has recently reiterated that our state's evolving standards of decency should generally be left to our General Assembly to decide. *Commonwealth v. Hairston*, 249 A.3d 1046, 1058 (Pa. 2021). Indeed, this Court recently highlighted its limited role because "it is our function to ensure that constitutional bounds are not overreached, while at the same time recognizing that it is the General Assembly's primary responsibility in choosing between competing political, economic and social pressures." Id., fn. 8 (internal quotations and citations omitted).

Moreover, should this Court reach beyond the limited constitutional issue before it in order to address these larger questions, it would be doing exactly that which the amici believe Pennsylvania law currently is – an outlier. Amici go to great lengths to explain how beyond the mainstream Pennsylvania is on this issue. In so doing they hide a critical fact: most of the states that have changed their position on the appropriate sentence for

felony murderers convicted via criminal vicarious liability did so through *legislative* action (not through court decisions). Indeed, several of the amici cite to these laws while concurrently encouraging this Court to do what the state supreme courts of most other states have not. If this Court is concerned about remaining consistent with the "mainstream" approach to reforming this tangled issue, it would allow the legislature or the Governor to address the issue and amend the second-degree murder statute, the parole statute, and the vicarious liability statute in a manner that coherently addresses the many interconnected forces at play. Indeed, the General Assembly currently has active legislation that undertakes reforms.[16] For this Court to do anything more than answering the limited constitutional question would be to make Pennsylvania an outlier because then the courts, rather than the legislature, was the governmental body that addressed the larger policy considerations.

The question of what sentence should apply to felony murder in this Commonwealth calls for a systemic approach, which means a solution

[16] *See* Proposed Legislation: https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2023&sessInd=0&billBody=H&billTyp=B&billNbr=2296&pn=3108

through legislation. There is no singular way to reform felony murder sentencing because there are so many interconnected components. Only the process of legislation, based in compromise and deriving from the legislators role representing the people, can make and implement such changes to policy. As it was in *Batts*, this litigation is ill-suited to the goal of reforming felony murder, its sentence, and criminal vicarious liability because in the Constitution this Court "has expressed a reluctance to go further than what is affirmatively commanded by the High Court without a common law history or a policy directive from our Legislature." 66 A.3d at 296.

The PDAA encourages this Court to find that defendant's sentence is constitutional and to otherwise encourage the appropriate branches of government to address the legitimate policy concerns highlighted by defendant and his amici.

CONCLUSION

WHEREFORE, the Pennsylvania District Attorneys Association, amicus curiae, respectfully requests that the Superior Court's Judgment and Order be affirmed.

Respectfully submitted,

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CERTIFICATION

I hereby certify pursuant to Pa.R.A.P. 531 (b)(3) that this amicus brief does not exceed the 7,000-word count limit.

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.

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Date: June 28, 2024

PROOF OF SERVICE

I, Catherine B. Kiefer, hereby certify that on June 28, 2024 I filed the foregoing amicus brief through this Court's PACFILE electronic filing system and thereby served the following parties:

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