[J-60-2024]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

TODD, C.J., DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, McCAFFERY, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 3 WAP 2024
	:	
Appellee	:	Appeal from the Order of the
	:	Superior Court entered June 13,
	:	2023, at No. 1008 WDA 2021,
v.	:	Affirming the Order of the Court of
	:	Common Pleas of Allegheny County
	:	entered December 19, 2016, at No.
DEREK LEE,	:	CP-02-CR-0016878-2014.
	:	
Appellant	:	ARGUED: October 8, 2024

OPINION

CHIEF JUSTICE TODD **DECIDED: MARCH 26, 2026**

In this appeal by allowance, we granted allocatur to consider whether a mandatory sentence of life imprisonment without the possibility of parole for a felony murder conviction violates the Eighth Amendment to the United States Constitution or Article I, Section 13 of the Pennsylvania Constitution.[1] For the reasons that follow, we determine that a mandatory life without parole sentence for all felony murder convictions, absent an assessment of culpability, is inconsistent with the protections bestowed upon our citizens

[1] The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Article I, Section 13 of the Pennsylvania Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." Pa. Const. art. I, § 13.

under the "cruel punishments" clause of our Commonwealth's organic charter.[2] Thus, we reverse the order of the Superior Court, vacate Appellant's judgment of sentence, and remand for resentencing. However, as we have done under similar circumstances, we stay our order for 120 days to provide a reasonable amount of time for the General Assembly to consider remedial measures.

I. Facts and Procedural History

Leonard Butler, Tina Chapple, and their 9-year-old son, also named Leonard, shared a residence in the Elliott neighborhood of Pittsburgh, Pennsylvania. On October 14, 2014, at approximately three o'clock in the afternoon, while their son was attending school, two men entered the residence. Chapple was upstairs, but was called to come down from the second-floor bedroom to the living room by Butler. When she entered the living room, she observed two males with guns and partially covered faces. Both Butler and Chapple were herded into the basement of the home, and then were forced to kneel. Both males yelled at Butler to give up his money and, several times, one used a taser on Butler. One of the men, referred to by Chapple in interviews with police as "the meaner one," and later identified as Appellant Derek Lee, pistol-whipped Butler in the face before taking his watch and running up the stairs. The second male, later identified as Paul Durham, remained with the couple. Butler began to struggle with Durham over the gun, and a shot was fired which killed Butler.

Later, during the police investigation of the murder, it was determined that a rental vehicle under Appellant's name was parked outside of Butler and Chapple's home around the time of the shooting. On October 29, 2014, Chapple was shown a photo array by

[2] Generally speaking, "the legislative intent to forever bar parole eligibility for all individuals convicted of second-degree murder is best described as part of the judgment of sentence." *Scott v. Pennsylvania Board of Probation and Parole*, 284 A.3d 178, 192 (Pa. 2022).

police and positively identified Appellant as one of the men involved in the incident, but not the shooter. Trial Court Opinion, 3/23/22, at 1-2.

Ultimately, Appellant was arrested and charged with homicide, burglary, robbery – serious bodily injury, and criminal conspiracy. After trial, a jury found Appellant guilty of felony murder, statutorily defined as second degree murder in Pennsylvania's Crimes Code, robbery – infliction of serious bodily injury, and conspiracy. He was found not guilty of first degree murder.

On December 19, 2016, Judge David Cashman sentenced Appellant to serve a mandatory term of life in prison without the possibility of parole for his second degree murder conviction. The court sentenced Appellant to serve a consecutive term of 10 to 20 years in prison for his criminal conspiracy conviction and imposed no further penalty on the robbery charge. Appellant's co-defendant, Durham, was also convicted of second degree murder and sentenced to life imprisonment without parole.

By way of legal background, Pennsylvania's version of the felony murder rule is legislatively defined as murder of the second degree, and is set forth in 18 Pa.C.S. § 2502(b). Murder of the second degree is a criminal homicide "when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony." *Id*. The phrase "perpetration of a felony," in turn, is limited to the eligible felonies that serve as the foundation for second degree murder: the "act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping." 18 Pa.C.S. § 2502(d). Thus, one may be convicted of second degree murder if a death occurs during the commission or attempted commission of an enumerated felony to which one was a principal or accomplice. 18 Pa.C.S. § 2502(b), (d). Importantly, an individual may be convicted of

second degree murder regardless of an intent to kill; rather, "the malice necessary to make a killing, even an accidental one, murder, is constructively inferred from the malice incident to the perpetration of the initial felony." *Commonwealth ex rel. Smith v. Myers*, 261 A.2d 550, 553 (Pa. 1970); *Commonwealth v. Yuknavich*, 295 A.2d 290, 292 (Pa. 1972); *Commonwealth v. Tarver*, 426 A.2d 569, 573 (Pa. 1981). Thus, the only relevant intent is that to commit the underlying felony.

Moreover, the Crimes Code further provides that those convicted of second degree murder shall be sentenced to a mandatory term of life imprisonment, 18 Pa.C.S. § 1102,[3] and pursuant to the Prisons and Parole Code, without the possibility of parole, 61 Pa.C.S. § 6137(a)(1).[4] *See also Scott*, 284 A.3d at 191 (determining that those individuals convicted of second degree murder are ineligible for parole as a part of their sentence).

Appellant did not file a post-sentence motion or a direct appeal; however, proceeding under the Post Conviction Relief Act ("PCRA"), on November 4, 2020, the PCRA court reinstated Appellant's post-sentence and appellate rights. PCRA Court Order, 11/5/20, at 1.

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[3] Section 1102(b) provides: "(b) Second degree.--Except as provided under section 1102.1, a person who has been convicted of murder of the second degree, of second degree murder of an unborn child or of second degree murder of a law enforcement officer shall be sentenced to a term of life imprisonment." 18 Pa.C.S. § 1102(b).

[4] Section 6137(a)(1) provides:

> The board may parole subject to consideration of guidelines established under 42 Pa.C.S. § 2154.5 (relating to adoption of guidelines for parole) or subject to section 6137.1 (relating to short sentence parole) and such information developed by or furnished to the board under section 6174 (relating to right of access to offenders), or both, *and may release on parole any offender to whom the power to parole is granted to the board by this chapter, except an offender condemned to death or serving life imprisonment. . . .*

61 Pa.C.S. § 6137(a)(1) (emphasis added).

Represented by counsel from the Abolitionist Law Center, Appellant filed a motion for modification of sentence, arguing that his mandatory sentence of life without parole was unconstitutional under the Eighth Amendment to the United States Constitution and Article I, Section 13 of the Pennsylvania Constitution. The trial court, per Judge Elliot Howsie, denied relief.[5] It rejected Appellant's argument that a sentence of life without parole when imposed on a defendant who did not kill or intend to kill as part of their crime was unconstitutional, dismissed his request that the court interpret the Pennsylvania Constitution's prohibition against cruel punishments to provide greater protections than the United States Constitution, and explained that arguments regarding the severity of punishment were policy questions for the legislature. Thus, the trial court denied Appellant's post-sentence motion on July 26, 2021. Appellant appealed to the Superior Court.

A three-judge panel of the Superior Court affirmed in an unpublished decision authored by Judge Judith Olsen.[6] *Commonwealth v. Lee*, 1008 WDA 2021, 2023 WL 3961802 (Pa. Super. filed June 13, 2023). Before the Superior Court, Appellant argued (again) that his mandatory sentence of life imprisonment without the possibility of parole was unconstitutional under the Eighth Amendment to the United States Constitution, as he was convicted of second degree murder and did not kill or intend to kill anyone during the commission of a robbery, and, thus, because of his diminished culpability, such a sentence was unduly harsh in relation to legitimate penological purposes, and out of step with modern national and international standards. While acknowledging the Superior Court's 2020 decision in *Commonwealth v. Rivera*, 238 A.3d 482, 501-03 (Pa. Super.

[5] Appellant's case was transferred to Judge Howsie upon Judge Cashman's retirement.

[6] The majority opinion was joined by Judge James Gardner Colins. Judge Alice Beck Dubow concurred in the result.

2020), in which the court rejected the same claim, Appellant nevertheless identified an analytical construct under the Eighth Amendment, which considers whether a punishment is grossly disproportionate to the offense, and which does so under a different standard than that previously applied only in the death penalty context, citing *Solem v. Helm*, 463 U.S. 277 (1983) and *Commonwealth v. Middleton*, 467 A.2d 841 (Pa. Super. 1983). Appellant's reasoning was that, under the United States Supreme Court's decisions in *Graham v. Florida*, 560 U.S. 48 (2010), *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016), life without parole sentences were sufficiently similar to the death penalty that they could be unconstitutional when applied to people with categorically-diminished culpability based on their offense or characteristics.

Relying largely upon its own and our Court's prior precedent, the Superior Court rejected Appellant's logic, explaining that the Eighth Amendment does not require uniformity in penological approaches across the various states, and that there is no precedent holding that the Eighth Amendment prohibits a mandatory sentence of life without parole for an adult convicted of second degree murder. Moreover, the Superior Court determined that it was bound by its decision in *Rivera*, as well as prior case law, which determined that the imposition of the mandatory punishment of a life sentence without parole for second degree murder did not constitute cruel and unusual punishment under the United States Constitution. The Superior Court pointed out that *Graham*, *Miller*, and *Montgomery* all involved juveniles, who as a class are constitutionally distinct from adults for purposes of sentencing, and, thus, these United States Supreme Court precedents were inapplicable, as Appellant was not a juvenile at the time he committed the robbery.

The Superior Court then turned to Appellant's claim that his mandatory sentence of life imprisonment without the possibility of parole is unconstitutional under Article I, § 13 of the Pennsylvania Constitution. The court dismissed this argument in light of our Court's decisions repeatedly and unanimously holding that "the rights secured by the Pennsylvania prohibition against 'cruel punishments' are coextensive with those secured by the Eighth and Fourteenth Amendments." *Lee*, 2023 WL 3961802, at *4 (quoting *Commonwealth v. Zettlemoyer*, 454 A.2d 937, 967 (Pa. 1982), *abrogated on other grounds by Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003)). The Superior Court concluded that, because Appellant's Eighth Amendment claim failed, his Article I, Section 13 claim likewise failed, and affirmed Appellant's judgment of sentence.

Judge Dubow concurred, agreeing with the majority's conclusion that the court was bound by existing case law which upholds the mandatory imposition of life without parole for a defendant convicted of second degree murder under both the United States and Pennsylvania Constitutions. Judge Dubow suggested, however, that in light of changes in other states' case law and research and policy concerns regarding the criminal justice system, our Court should revisit the factors set forth in *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), and reconsider whether a mandatory minimum sentence of life without parole imposed for all second degree murder convictions is constitutional under Article I, Section 13 of the Pennsylvania Constitution. Appellant sought further review in our Court.

II. Issues

We granted review limited to two issues. We first agreed to address whether Appellant's mandatory sentence of life imprisonment with no possibility of parole is violative of the Eighth Amendment to the United States Constitution where he was convicted of second degree murder but did not kill or intend to kill and, therefore, had

categorically diminished culpability under the Eighth Amendment. We also granted review to consider whether Appellant's mandatory sentence of life imprisonment with no possibility of parole is constitutional under Article I, Section 13 of the Pennsylvania Constitution, where he did not kill or intend to kill, and whether Article I, Section 13 provides greater protections in those circumstances than the Eighth Amendment to the United States Constitution. *Commonwealth v. Lee*, 313 A.3d 452 (Pa. 2024) (order).

The constitutional validity of a statute presents a pure question of law and, as with any question of law, our standard of review is *de novo* and our scope of review is plenary. *Commonwealth v. Baker*, 78 A.3d 1044, 1047 n.3 (Pa. 2013); *Robinson Township, Washington County v. Commonwealth*, 83 A.3d 901, 943 (Pa. 2013). Moreover, regarding any constitutional challenge to legislation, the challenger bears the heavy burden of demonstrating that the statute "clearly, palpably, and plainly violates the Constitution," as we presume that our sister branches act in conformity with the Constitution. *Stilp v. Commonwealth*, 905 A.2d 918, 939 (Pa. 2006). Finally, while the parties do not expressly characterize this appeal as a facial or an as-applied challenge to a mandatory sentence of life without parole, we conclude Appellant raises a facial challenge. Specifically, a facial contest examines a law's constitutionality based on its text alone without considering the facts or circumstances of a particular case. The court does not look beyond the statute's explicit requirements or speculate about hypothetical or imaginary cases. *Germantown Cab Company v. Philadelphia Parking Authority*, 206 A.3d 1030, 1041 (Pa. 2019). Conversely, an as-applied contest of a statute is more limited. Such approach does not assert that a law is unconstitutional as written, but only that its application to a particular person under particular circumstances deprives that individual of a constitutional right. While "as-applied challenges require application of the [law] to be ripe, facial challenges are different, and ripe upon mere enactment of the

ordinance." *Philadelphia Entertainment & Development Partners, L.P. v. City of Philadelphia*, 937 A.2d 385, 392 n.7 (Pa. 2007). Here, Appellant challenges the mandatory nature of the life without parole sentencing scheme as unconstitutional on the basis that the statutory framework fails to provide all individuals convicted of felony murder a process by which to determine individual culpability. As the statutory scheme, by its terms, does not provide any process in which an individual's culpability may be taken into account, we conclude that Appellant's attack is a facial challenge to a mandatory sentence of life without parole for second degree murder.

III. Background Considerations

A. The Felony Murder Doctrine

Before analyzing the two issues on which we granted review, we believe it beneficial to consider, as a general matter, the meaning and origins of the felony murder rule and a life without parole sentence. Broadly stated, felony murder is a murder committed in the course of the commission of another felony. The essential element which distinguishes first degree from lesser grades of murder is the specific intent to kill. *Commonwealth v. Moore,* 373 A.2d 1101 (Pa. 1977) (citing cases). In contrast, the intent necessary to establish felony murder is constructively inferred from the malice incident to the perpetration of an underlying felony. *Tarver,* 426 A.2d at 573. Thus, under the felony murder rule, and unlike most other crimes, the defendant's intent as to the commission of a murder is immaterial. *See Myers*; *Yuknavich*; *Tarver*, *supra*.

The origin of the common law felony murder doctrine is uncertain, and can be traced to different sources. Dolly Prabhu, *A Lifetime for Someone Else's Crime: The Cruelty of Pennsylvania's Felony Murder Doctrine*, 81 U. Pitt. L. Rev. 439, 443-45 (2019). However, a 1797 description of the felony murder doctrine, written by Sir Edward Coke, is often pointed to as the source of the common law rule:

> If the act be unlawful it is murder. As if A. meaning to steale a deere in the park of B., shooteth at the deer, and by the glance of the arrow killeth a boy that is hidden in a bush: this is murder, for that the act was unlawfull, although A. had no intent to hurt the boy, nor knew not of him. But if B. the owner of the park had shot at his own deer, and without any ill intent had killed the boy by the glance of his arrow, this had been homicide by misadventure, and no felony.

Id. at 443 (quoting *People v. Aaron*, 299 N.W.2d 304, 309 (Mich. 1980) (quoting Edward Coke, The Third Part of the Institutes of the Laws of England 56 (E. & R. Brooke 1797))). Yet, this description appears to have been an unwarranted extension of another passage, written by the 13th century English jurist Henry de Bracton, who offered that an unintentional killing during the commission of a lawful activity was not blameworthy; however, an unintentional killing which occurred during the commission of unlawful activity was. *Id*. at 443-44. The difference being that, while these descriptions suggest that a killing which occurred during the course of a felony would be "blameworthy" and unlawful, there was no suggestion in Bracton's understanding that such an act would constitute *murder*, as proffered by Sir Coke, a crime at the time which was limited in nature, and that today, except for felony murder, requires a culpable *mens rea* in regard to the act of killing. *Id*. at 444. This distinction, however, as a practical matter, made little difference, as at early common law, virtually all felonies were punishable by death; thus, it was "of no particular moment whether the condemned was hanged for the initial felony or for the death accidentally resulting from the felony." *Aaron*, 299 N.W.2d at 310-11. Notably, in England, the birthplace of the felony murder doctrine, the rule was rarely invoked and ultimately eliminated in 1957. Prabhu, at 444.

Various justifications undergird the felony murder doctrine, and commentators have differed on the initial justifications in English common law. Some argue that there was little need for the felony murder doctrine as all felonies traditionally warranted capital

execution; however, execution rates varied according to the felony. Michael T. Moore, Jr., *Felony Murder, Juveniles, and Culpability: Why the Eighth Amendment's Ban on Cruel and Unusual Punishment Should Preclude Sentencing Juveniles Who Do Not Kill, Intend to Kill, or Attempt to Kill to Die in Prison*, 16 Loy. J. Pub. Int. L 99, 104-05 (2014). One modern justification for the doctrine is to deter accidental or negligent deaths during the commission of a felony. The other primary justification is retribution, which is rooted in its common law ancestry. *Id*. at 105. Moreover, some contend that the felony murder rule is compatible with notions of law and order, protecting the public against those who introduce unwarranted and unnecessary threats of death into citizens' daily lives, and so acts as a safeguard against the risks of armed robbery, burglary, rape, and similar crimes, communicating to felons the consequences of their actions and comforting victims of such crimes, by reflecting the significance of an innocent victim's life. James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces That Shape Our Criminal Law*, 51 Wash. & Lee L. Rev. 1429, 1463-65 (1994).

American felony murder principles were enacted primarily by legislatures in the mid-19th century, and were developed in an effort to reform the law of homicide by codifying its objective and subjective elements. Guyora Binder, *The Culpability of Felony Murder*, 83 Notre Dame L. Rev. 965, 976-79 (2008). Numerous states adopted felony murder statutes, which were initially applied to all felonies regardless of their dangerousness. The first felony murder statute was passed in Illinois in 1827 and, by the end of the 19th century, nineteen states had adopted differing kinds of felony murder statutes. Moore, Jr. at 104-05.

However, early on, both the English and American courts observed the harshness of the rule and began to limit its application. Jason M. Cieslik, J.D., *A New Approach to Felony Murder in Illinois*, 42 N. Ill. U. L. Rev. 243, 246-48 (2022). In many cases, the

felony murder rule was restricted to felonies that involved a high risk that someone might be killed, and states that embraced the felony murder doctrine have limited the rule by, *inter alia*, setting forth specific felonies which would qualify and strictly interpreting proximate or legal cause. *Id*. Though still applied in most states, the doctrine has been limited by every state in some regard to diminish its harshness, confining its application to felonies inherently dangerous to life; some applying the rule only to those who committed the actual killing; and a few abolishing the doctrine altogether. Prabhu, at 445. Another approach taken by some states is to limit the severity of the punishment, such as by imposing life without parole sentences only for intentional murder or especially violent crimes, or setting the minimum sentence for felony murder as low as five years imprisonment. *Id*.

As for Pennsylvania's experience with the felony murder doctrine, after gaining independence from England, a number of the new states began legislative efforts to codify the crime of murder. This was done, in part, to limit the use of the death penalty. Legislative reform in the late 1700s involved dividing murder into degrees, and this uniquely American approach to homicide jurisprudence originated with Pennsylvania's 1794 statute. As discussed in greater detail below, this statute was a result of a reformation movement to reduce and differentiate penalties that was inspired by Enlightenment figures such as Montesquieu and Beccaria, and was promoted by, *inter alia*, James Wilson, Benjamin Rush, and Pennsylvania Supreme Court Justice William Bradford. Guyora Binder, *The Origins of American Felony Murder Rules*, 57 Stan. L. Rev. 59, 119 (2004). Indeed, a 1792 report by Justice Bradford for Pennsylvania's Governor recommended that the death penalty should be reserved for "deliberate assassination." *Id*. This report prompted a resolution by one legislative house that "all murder . . . perpetrated by means of poison, or by lying in wait, or by any other kind of wilful,

deliberate and premeditated killing shall be deemed murder in the first degree," and that all other kinds of murder shall be murder in the second degree. *Id*. The next year, a bill along these lines was presented to both houses; however, during legislative debates, the offense of murder committed in the course of certain enumerated felonies was added to the category of first degree murder. *Id*.

While the 1794 statute did not formulate a felony murder rule, or define the elements of murder at all, it identified participation in certain felonies as a grading element that aggravated murder liability. Thus, it prescribed that "all murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder of the second degree . . . ." Act of Apr. 22, 1794, ch. 1766, § 2, 1794 Pa. Laws 186, 187.

After various amendments over the years, as noted above, Pennsylvania's current felony murder rule, statutorily identified as murder of the second degree, is set forth in 18 Pa.C.S. § 2502(b). Murder of the second degree is a criminal homicide "when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony." *Id*. The phrase "perpetration of a felony" in turn, restricts the felonies that serve as the foundation for second degree murder to the "act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping." 18 Pa.C.S. § 2502(d). Thus, if a death occurs during the commission or attempted commission of an enumerated felony to which an individual was a principal or accomplice, that person may be charged with second degree murder.

B. Life Without Parole

Parole is a penological disposition for prisoners who appear to have the potential for rehabilitation outside of prison. Parole does not alter the sentence, and the convict remains in the legal custody, and under the control, of the state. A parolee is subject to the conditions of parole and a return to prison for their breach. *Com. ex rel. Sparks v. Russell*, 169 A.2d 884, 885 (Pa. 1961). Parole is a matter of grace and mercy shown to a prisoner who has demonstrated to the Parole Board's satisfaction his future ability to function as a law-abiding member of society upon release before the expiration of his maximum sentence. *Rogers v. Pennsylvania Board of Probation & Parole*, 724 A.2d 319, 322-23 (Pa. 1999). Thus, as the phrase suggests, a sentence of life without the possibility of parole prohibits a prisoner from eligibility for such disposition. The Crimes Code *mandates* a life without parole sentence for those convicted of second degree murder. 61 Pa.C.S. § 6137(a)(1).

As to the origins of a sentence of life without parole, such punishment did not exist at common law. In the early 20th century, the reformist zeal of the Progressive Era spawned greater enthusiasm for early release, beginning a 70-year expansion of work-release programs and halfway houses, and earlier parole-eligibility dates. Notes, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 Harv. L. Rev. 1838, 1839 (2006). At the same time, effective prison sentences in states that adopted parole grew longer, as legislatures and judges felt free to impose higher sentences when they knew that those sentences might not be served in full. Moreover, many parolees found it difficult to abide by their conditions of parole. A list of Progressive Era parole violations in various states included going into debt, public speaking, cohabitation outside marriage, and political activity. *Id*. The end result was that the availability of parole often led to effectively longer sentences.

From the early 20th century through the 1970s, the sentence of life without parole, as we now know it, did not exist, as this period was characterized by increased availability of parole and, more broadly, increased indeterminate sentencing. The federal government reduced parole eligibility for life prisoners to ten years in 1976. *Id*. at 1840. By then, American support for the death penalty had reversed several times, decreasing until the Supreme Court struck down all existing death penalty laws in *Furman v. Georgia*, 408 U.S. 238 (1972), and subsequently increasing as state after state repassed capital statutes as well as life without parole statutes. *Id*. at 1840-41. In Pennsylvania, a life without parole sentence did not exist until the Parole Act of 1941, which gave the Parole Board the exclusive power to grant parole for all individuals *except* those sentenced to life, essentially making every life sentence a life without parole sentence by default.

Finally, that felony murder convictions in Pennsylvania carry a mandatory sentence of life imprisonment without parole, makes it an arguable outlier compared to most other states. Indeed, only four other states have a similar mandatory life without parole sentence, without exceptions, for second degree murder. *See* Iowa, Iowa Code § 707.2, § 902.1; Louisiana, La. Rev. Stat. § 14:30.1(A)(2), § 14:30.1(B); Mississippi, Miss. Code § 97-3-19(2)(e), § 47-7-3(1)(c); North Carolina, N.C. Gen. Stat. § 14-17(a).[7]

IV. Eighth Amendment

We first consider Appellant's arguments under the Eighth Amendment to the United States Constitution. Specifically, Appellant sets forth what he believes to be the

[7] We point out that there is some controversy as to the number of states that mandate a life without parole sentence, without exception, for felony murder. *See*, *e.g.*, Philadelphia District Attorney's Office Brief at 8 (asserting two states); Office of the Attorney General Brief at 8 (asserting eight states); Scholars of the Eighth Amendment Brief at 22 (asserting nine states); Pennsylvania Prison Society Brief at 23 (asserting 10 states); The Sentencing Project Brief at 7-8 (asserting 11 states). We merely note that certain of the states counted by these *amici* contain the possibility of compassionate parole or release. *See*, *e.g.*, Arizona, A.R.S. § 31-233; Florida, F.S.A. § 947.149; South Dakota, SDCL § 24-15A-55.

two lines of United States Supreme Court case law interpreting the Eighth Amendment: (1) decisions considering whether a term of years sentence is grossly disproportionate to the offense; and (2) cases analyzing whether a capital punishment or life without parole sentencing practice is excessive as applied to a category of offenders or offenses. Appellant submits that only the second categorical approach is applicable in this matter.

Supporting his categorical approach challenge, Appellant traces a line of high Court decisions beginning with *Enmund v. Florida*, 458 U.S. 782 (1982), in which the United States Supreme Court recognized that defendants convicted of felony murder who did not kill or intend to kill have a categorically diminished culpability and could not be sentenced to death. Appellant notes that the *Enmund* decision differentiated the culpability for sentencing purposes of those who had a specific intent to kill and those convicted of felony murder. Appellant stresses that the *Enmund* Court emphasized that the focus was on determining the culpability of the defendant which in turn impacted the proportionality of the punishment. According to Appellant, defendants who did not kill, attempt to kill, or intend to kill are less morally culpable and, thus, less deserving of the most severe punishments.

Appellant then offers a more recent line of cases involving the category of juvenile offenders. Appellant contends that, beginning with *Graham*, and including *Miller*, the high Court has applied a categorical approach previously reserved for the death penalty and expanded it to a sentence of life without parole. In Appellant's view, the Supreme Court reasoned that, because a life without parole sentence was sufficiently similar to the death penalty, the same level of scrutiny and protection was required under the Eighth Amendment.

Specifically, under this approach, courts survey whether there are "'objective indicia of society's standards, as expressed in legislative enactments and state practice,'

to determine whether there is a national consensus" rejecting the sentence as excessive. *Graham*, 560 U.S. at 61. Appellant proffers that this analysis also includes recent trends among the states and internationally with respect to imposing a particular sentence upon a certain category of offenders or type of offense. Appellant maintains that courts also assess whether the punishment is disproportionate when comparing the culpability of the class of offender with the severity of the punishment and whether the sentence adequately serves legitimate penological goals when applied to the particular category of offenders or offense. Appellant stresses the focus on culpability in this series of cases, specifically, that it is the defendant's culpability and not that of the other actors who committed the crime, emphasizing that those defendants who did not kill, attempt to kill, or intend to kill are less morally culpable than those who do and, thus, less deserving of the most severe punishment. Indeed, Appellant highlights that the *Graham* Court stressed that "a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability," first because of youth, and second because of the nature of the offense. *Id*. at 69. According to Appellant, these decisions established that the high Court's jurisprudence prohibits the most severe punishments for categories of offenders with diminished culpability and are applicable to one sentenced to life without parole with no meaningful opportunity for release.

Applying these tenets to the matter *sub judice*, Appellant proffers that the *mens rea* required in order to be convicted of second degree murder is merely the intent to engage in the underlying felony, as the malice necessary to support murder, even an accidental one, is constructively inferred from the malice incident to committing the initial felony. Here, Appellant claims that he did not kill or have the intent to kill, and indeed, was found not guilty of first degree murder, and, thus, has a categorically diminished culpability under the Eighth Amendment. Continuing, Appellant asserts that, because he

had no intent to kill, and a punishment of life without parole is sufficiently similar to the death penalty, a life without parole sentence is unduly harsh in relation to legitimate penological purposes, and so it is violative of the Eighth Amendment. Moreover, Appellant maintains that Pennsylvania's punishment of life without parole for second degree murder is severe and outside of the national consensus and international standards and is inconsistent with legitimate penological goals, as it fails to promote deterrence, rehabilitation, and incapacitation. Appellant submits that even retribution ─ that is, punishment in proportion to the heinousness of the criminal act ─ is unprincipled in this area, as the life without parole sentence is identical to that imposed upon those whose culpability is greater.

Numerous *amici* have submitted briefs on whether a punishment of life without parole for second degree murder violates the Eighth Amendment. While a number of these briefs largely track Appellant's arguments, certain contentions merit mention. Specifically, *Amici* Scholars of Eighth Amendment Law stress the comparative nature of a sentence of life without parole to the death penalty and urge that the two should be treated similarly. In this vein, *Amici* argue that for individuals who did not kill or intend to kill, the severe punishment of mandatory life imprisonment without parole violates the Eighth Amendment. While observing that the United States Supreme Court's categorical approach was first recognized in the capital context and was extended to noncapital punishments when it was applied to juveniles, *Amici* submit that this approach should be extended to classes of adults with a diminished culpability based upon their characteristics or the nature of their offenses. Finally, Juvenile Law Center, Youth Sentencing & Reentry Project and Philadelphia Lawyers for Social Equity highlight that current research indicates that there is little difference developmentally between young

people under the age of 18 and young adults 18 and older, rendering extreme punishments for felony murder inappropriate for both categories of adults.

The Commonwealth counters first by emphasizing the presumption of constitutionality that an enactment by the General Assembly enjoys ─ unless clearly, palpably and plainly violative of the Constitution ─ and the heavy burden of persuasion on challengers to the constitutionality of a statute. On the merits, the Commonwealth asserts that the Eighth Amendment does not require strict proportionality between crime and sentence, but only prohibits sentences grossly disproportionate to a crime. The Commonwealth offers the three-prong test for evaluating whether a sentence is grossly disproportionate, which assesses: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed upon other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions, citing *Solem*, 463 U.S. at 292. The Commonwealth then pivots and challenges Appellant's reliance upon *Miller*. According to the Commonwealth, while *Miller*, which focused on juveniles, may have altered the three-prong test to some degree, it did not invalidate a punishment of life without parole altogether, but focused on the fact that juveniles do not have the mental capacity to appreciate their actions. Thus, while seemingly applying a categorical approach, the Commonwealth maintains that the *Miller* Court recognized that life without the possibility of parole is not cruel or unusual as applied to adults, and offers various decisions finding that *Miller* does not apply to adults who possess the same or similar cognitive disabilities as minors, citing *Commonwealth v. (Avis) Lee*, 206 A.3d 1, 9 (Pa. Super. 2019); *Commonwealth v. Olds*, 192 A.3d 1188, 1196 (Pa. Super. 2018) (finding that consistent with *Miller*, a state may set a mandatory maximum term of life imprisonment so long as defendants receive an opportunity for parole based upon demonstrated maturity and rehabilitation). Accordingly, the Commonwealth believes a

mandatory sentence of life imprisonment without parole for a conviction for second degree murder, even for a non-slayer, is not grossly disproportionate.

The Commonwealth also rejects Appellant's reliance upon the United States Supreme Court's decisions such as *Enmund* (barring death penalty for person convicted of felony murder who was not the slayer), as those decisions involved capital punishment, the most severe punishment requiring special considerations regarding its application to certain categories of offenders. Likewise, the Commonwealth distinguishes Appellant's reliance upon cases such as *Graham* and *Miller*, as those decisions involved juveniles, a unique category of offenders. The Commonwealth challenges Appellant's attempt to characterize persons such as himself who were convicted of felony murder, but who were not the actual slayer, as a special class akin to juveniles who had diminished culpability, and submits that this argument is actually a challenge to the felony murder rule which rests culpability upon each participant in the underlying felony equally, and not a challenge to his sentence. The Commonwealth, citing various decisions by our Court, maintains that when one engages in certain enumerated felonies and a killing occurs, the finder of fact is to infer the killing was malicious as the individual engaged in a felony of such a dangerous nature and the actor knew or should have known that death might result from the felony. Thus, the malice necessary to render a killing, even an accidental one, a murder, is constructively inferred from the malice incident to the perpetration of the initial offense. The Commonwealth points out that a greater penalty is in fact imposed for murder of the second degree than imposed for murder of the third degree, even though third degree murder is malicious. Ultimately, while the Commonwealth acknowledges that there may be persuasive arguments why a non-slayer should not be held to the same degree of culpability as the slayer, it stresses that these are policy decisions for the General Assembly.

Furthermore, the Commonwealth argues that the Eighth Amendment does not require strict proportionality between crime and sentence, but forbids only extreme sentences which are "grossly" disproportionate to the crime. Commonwealth's Brief at 8. The Commonwealth offers that, in *Miller*, the United States Supreme Court held that life imprisonment without parole was unconstitutionally cruel when imposed upon a defendant convicted of murder who was under the age of 18 at the time the crime was committed. According to the Commonwealth, however, the high Court did not strike life without parole *in toto*, but centered its categorical analysis on the fact that juveniles, who fall within a unique category of offenders, lack the mental capacity and maturity to appreciate their actions, and possess an underdeveloped sense of responsibility. Therefore, while a juvenile is not absolved of responsibility for his or her actions, he or she is not as morally reprehensible as an adult. As a result, the Commonwealth concludes that a sentence of life without parole for one convicted of second degree murder, even for a non-slayer, is not grossly disproportionate, and so is constitutional under the Eighth Amendment.

Two *Amicus* briefs were filed on behalf of the Commonwealth. The Office of the Attorney General explains that, while policy arguments may be compelling to alter the sentence of life without parole for one convicted of second degree murder, it stresses that policy determinations are for the legislative and executive branches, and not the judiciary. While focusing on the constitutionality of a sentence of life without parole for second degree murder under the Pennsylvania Constitution, *Amicus* offers that the Governor's expanded use of commutation could be an effective way forward. Similarly, the Pennsylvania District Attorneys Association points out that significant policy considerations are raised by Appellant and *amici* in support of him, and are worthy of exploration, however, they are directed to the "wrong body," and are more properly made

to the General Assembly and Governor; indeed, *Amicus* notes that most of the *amicus* briefs in support of Appellant offer only policy arguments and are devoid of constitutional analysis.

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.[8] The prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." *Roper v. Simmons*, 543 U.S. 551, 560 (2005). This right "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned'" to both the offender and the offense. *Id*. (quoting *Weems v. United State*s, 217 U.S. 349, 367 (1910)). Thus, the idea of proportionality is central to the Eighth Amendment. *Graham*, 560 U.S. at 59.

What constitutes "cruel and unusual punishments" has been defined in two lines of United States Supreme Court decisions. In the first line of decisions, the high Court considered the proportionality between the crime committed and the sentence imposed. The Court has been clear, however, that the Eighth Amendment does not mandate strict proportionality between the crime and sentence. Indeed, "only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality" is cruel and unusual punishment implicated. *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring). Appellant does not rely upon a strict proportionality approach, however, and, thus, we turn to the second line of decisions embodying a categorical approach.

In a series of Eighth Amendment cases, the United States Supreme Court has adopted a categorical approach to determining whether a punishment was violative of the

[8] The Eighth Amendment applies to the states by virtue of the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 666-67 (1962).

Eighth Amendment, primarily in the arena of juvenile offenders. The high Court first recognized this categorical approach in the capital context. Beginning with *Enmund v. Florida*, 458 U.S. 782 (1982), the United States Supreme Court, in an opinion authored by Justice Byron White, recognized that defendants convicted of felony murder who did not kill, attempt to kill, or intend to kill have a categorically diminished culpability and so could not be sentenced to death. The high Court found that, in the context of a robbery that ended in murder, Florida's identical treatment of both Enmund, who drove the getaway vehicle and who did not kill or intend to kill, and the robbers who killed the victims, was impermissible under the Eighth Amendment. *Id*. at 798. The Court noted that "American criminal law has long considered a defendant's intention ─ and therefore his moral guilt ─ to be critical to 'the degree of [his] criminal culpability.'" *Id*. at 800 (citation omitted). Thus, the Supreme Court determined that, for purposes of capital punishment, criminal culpability of one who did not kill, attempt to kill, or intend to kill, must be limited to participation in the underlying felony, and any punishment must be tailored to personal responsibility and moral guilt. *Id*. at 801; *see also Kennedy v. Louisiana*, 554 U.S. 407 (2008) (finding capital punishment excessive when applied to rape where the defendant did not kill or intend to take a life).

Twenty-three years later, in *Roper v. Simmons*, 543 U.S. 551 (2005), the Court concluded that the Eighth Amendment prohibits capital punishment for murderers who were under 18 at the time of their crimes. Justice Anthony Kennedy, writing for the majority, relied on evolving scientific knowledge regarding adolescent development, particularly that juveniles have a relative "lack of maturity" and an "underdeveloped sense of responsibility;" youth are more vulnerable to "outside pressures" or "peer pressure;" and a juvenile's character is "not as well formed" as that of an adult. *Id*. at 569-70. The high Court, adopting a categorical rule, prohibited the death penalty for defendants who

committed their crimes as juveniles, due to their lessened culpability, reasoning that they were less deserving of the most severe punishment.

Five years later, in *Graham v. Florida*, 560 U.S. 48 (2010), the Supreme Court, in an opinion again penned by Justice Kennedy, held that the mandatory life without parole sentencing of juvenile nonhomicide offenders constitutes cruel and unusual punishment based upon the limited culpability of youth as well as the severity of life without parole sentences, as akin to capital punishment. Like in *Roper*, the Court emphasized the distinctive attributes of youth which undercut any penological justification for imposing a sentence of death. Importantly, the *Graham* Court likened life without parole for juveniles to the death penalty, implicating a line of capital decisions in which sentencing authorities were required to consider the defendant's characteristics and the details of the offense that he committed before imposing capital punishment. It bears noting, however, that *Graham* did not bar a sentence of life without parole for offenders who were under 18 and committed *homicide*. The *Graham* Court stated: "There is a line 'between homicide and other serious violent offenses against the individual.'" *Id*. at 69.

This changed two years later in the high Court's landmark decision in *Miller v. Alabama*, 567 U.S. 460 (2012). In *Miller*, the Supreme Court addressed the issue of whether the imposition of a mandatory sentence of life imprisonment without parole upon juveniles for their conviction of murder violated the Eighth Amendment's prohibition against cruel and unusual punishment. The Supreme Court, in an opinion authored by Justice Elena Kagan, first explained the rationale behind the Eighth Amendment as guaranteeing "individuals the right not to be subjected to excessive sanctions" which right "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned' to both the offender and the offense." *Id*. at 469 (citations omitted). In finding such mandatory sentences were barred, the Court relied upon two lines of

precedent that reflected the Court's concern for proportionate punishment. *Id.* at 470. The first line of decisions embraced categorical bans on sentencing practices based on the incongruity between the culpability of the class of offenders and the severity of a penalty. The Court reasoned that juveniles are constitutionally distinct from adults for sentencing purposes due to their diminished culpability, lack of maturity, underdeveloped sense of responsibility, and vulnerability to outside pressures and negative influences, as well as the greater prospects for reform, which rendered them less deserving of the most severe penalties. *Id.* at 471. In describing these most severe penalties, the high Court, relying on *Graham*, again likened a sentence of life without parole to the death penalty, noting that both sentences possessed common characteristics "shared by no other sentences." *Id*. at 474. The Court made clear that "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." *Id.* at 473. The second line of decisions upon which the Court relied involved the imposition of capital punishment which required sentencing authorities to "consider the characteristics of a defendant and the details of his offense before sentencing him to death." *Id.* at 470. The *Miller* Court determined that "the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." *Id.*

Significantly, the Court explained that mandatory life imprisonment without parole could not be imposed upon minors absent an individualized consideration of "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480. Finally, the *Miller* Court stressed that, after individualized assessment of the juvenile defendant, a mandatory life without parole sentence for a juvenile could still be a viable sentence. The high Court's *Miller* decision was consistent with its line of cases concerning certain classes of individuals subject to a sentence of life

without parole, and, in the case of juveniles, mandated an individualized assessment of circumstances, such as "immaturity, impetuosity, and failure to appreciate risks and consequences," the defendant's family and home environment, the circumstances of the homicide, and the possibility of rehabilitation. *Id.* at 477-78. *Miller* was later clarified in *Montgomery*, *supra*, as providing not merely a procedural protection but, critically, a substantive federal constitutional protection, making retroactive *Miller*'s prohibition against sentencing juvenile homicide offenders to a mandatory sentence of life in prison without possibility of parole. Most recently, however, in *Jones v. Mississippi*, the Court decided that a juvenile homicide offender *may* be sentenced to life without parole, and that the sentencing tribunal was not required to make a separate factual finding regarding the minor's permanent incorrigibility before imposing a discretionary sentence of life without parole on such offender. 593 U.S. 98, 106-07 (2021). Rather, the sentence must not be mandatory, and a sentencer must follow a certain process – considering an offender's youth and attendant characteristics, diminished culpability and heightened capacity for change – before imposing a life without parole sentence. *Id*. 108-09. The Court reasoned that such sentencing procedure ensured that the sentencing tribunal afforded individualized consideration to, among other things, the defendant's "chronological age and its hallmark features." *Id*. at 109.

While broader principles regarding culpability and the requirement of individualized assessment before imposing a mandatory sentence of life without parole may be drawn from these decisions, it is inescapable that the categorical focus in all of these cases was either on capital punishment, or that the offender was under the age of 18.[9] In *Miller*, the

[9] To illustrate, in *Harmelin v. Michigan*, 501 U.S. 957 (1991), a defendant was sentenced to a mandatory life without parole term for possessing more than 650 grams of cocaine. The Supreme Court rejected Harmelin's constitutional challenge to his sentence, reasoning that "a sentence which is not otherwise cruel and unusual" does not "becom[e] so simply because it is 'mandatory.'" *Id*. at 995. Thus, while the high Court mandated (continued…)

Supreme Court noted that "*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Miller*, 567 U.S. at 472. Indeed, the decisions were based upon science and the physical distinctions between adult and juvenile brains. For example, in *Graham*, the Supreme Court distinguished between the two as follows:

> [D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. See Brief for American Medical Association et al. 16-24; Brief for American Psychological Association et al. 22-27. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. *Roper*, 543 U.S., at 570, 125 S.Ct. 1183. It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."

Graham, 560 U.S. at 68.

Thus, for Eighth Amendment purposes, "children are constitutionally different from adults for purposes of sentencing." *Montgomery*, 577 U.S. at 206, and the line of high Court decisions in *Miller*, *Montgomery*, and *Jones* did not question or reform the age-based bright line first drawn in *Roper*. While certain scholarship may suggest a broader

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individualized sentencing in the context of capital punishment, it has refused to extend that requirement to nonjuvenile, noncapital cases. Moreover, the *Miller* Court distinguished its prior decision in *Harmelin*, noting that it had "nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders." *Miller*, 567 U.S. at 481.

interpretation of these cases,[10] we find that the United States Supreme Court's decisions employing a categorical approach, whether involving the death penalty with diminished culpability, or regarding the sentencing of the distinct class of juveniles to mandatory life without parole are, under the Eighth Amendment, distinguishable from an analysis of the mandatory sentencing of adults to life without parole and, at least at this juncture, without additional guidance from the high Court, provides no relief to Appellant.

V. Article I, Section 13

A. Arguments

Having first looked to the United States Constitution and determining that it cannot be said that Appellant's sentence of mandatory life imprisonment without parole for his conviction of second degree murder constitutes cruel and unusual punishment under the Eighth Amendment, we continue with Appellant's contention that our state constitution affords greater safeguards than its federal counterpart.

In addressing the constitutionality of a mandatory sentence of life without parole for felony murder under the Pennsylvania Constitution, Appellant stresses, as an introductory matter and throughout his brief, that felony murder does not require any level of criminal intent with respect to the death that occurred during the perpetration of the underlying felony, but rather the malice essential for a conviction of murder is imputed to the defendant from the intent to commit the underlying felony. Moreover, Appellant emphasizes that the defendant need not directly cause the death of the victim in order to be found guilty of felony murder; rather, when a killing occurs during the commission of certain felonies, the actual killer and all who participated ─ including, for example, the driver of a getaway vehicle ─ are all equally guilty of second degree murder. Appellant

[10] See Gertner, *Miller v. Alabama: What It Is, What It May Be, and What It Is Not*, 78 Mo. L. Rev. 1041 (Fall 2013); O'Hear, *Not Just Kids Stuff? Extending Graham and Miller to Adults*, 78 Mo. L. Rev. 1087 (Fall 2013).

points out that the felony murder rule has faced harsh condemnation, including an admonishment by our Court in *Myers*, 261 A.2d at 553-54 (recognizing criticism of the rule as "highly punitive and objectionable as imposing the consequences of murder upon a death wholly unintended," characterizing it as "non-essential," and offering that it is "very doubtful that it has the deterrent effect its proponents assert"). Finally, Appellant challenges the broad application our 1982 decision in *Zettlemoyer*, in which we found the federal constitutional right against cruel and unusual punishment, and the state constitutional right against cruel punishment, to be co-extensive; he offers that members of our Court have suggested that the decision was claim specific and did not foreclose the possibility that our Constitution provides greater protection than the federal charter, citing *Baker*, 78 A.3d at 1053 (Castille, C.J., concurring) (explaining that "[t]his Court is not obliged by existing precedent to proceed in lockstep in approaching state constitutional 'cruel punishment' claims" and rejecting notion that "all claims arising under Article I, Section 13 should be treated as if they were subject to the same standards that would govern an equivalent Eighth Amendment claim").

Appellant, recognizing the four-prong test for determining whether greater rights exist under the Pennsylvania Constitution than its federal counterpart, then sets forth a comprehensive *Edmunds* analysis. Beginning with the text of the two provisions, Appellant contends that the Pennsylvania Constitution's prohibitory language against "cruel punishments inflicted," Pa. Const. art. I, § 13, is broader in protection than the textually distinct amendment to the United States Constitution, which safeguards against "cruel and unusual punishments." U.S. Const. amend. VIII. Appellant focuses on the term "unusual" contained in the federal Constitution and asserts that this term has been given a distinct meaning, as interpreted by the United States Supreme Court, citing *Harmelin*, 501 U.S. at 967 (noting the difference between "cruel" and "unusual" in the

federal Constitution); *see also Bucklew v. Precythe*, 587 U.S. 119, 130-31 (2019) (explaining that "Americans in the late 18th and early 19th centuries described as 'unusual' governmental actions that had 'fall[en] completely out of usage for a long period of time'").

According to Appellant, Pennsylvania's failure to use the term "unusual" in conjunction with the term "cruel" is meaningful. Appellant avers that, as a result, the Pennsylvania provision is broader. Specifically, the Pennsylvania provision is not burdened with the requirement that a challenged punishment be both contrary to the common law and not continually imposed for a long period under the common law, to be deemed to be unconstitutional.

Appellant proffers that the history of Section 13 of our Constitution confirms that the framers had a unique understanding of cruelty, believing only deterrence and reformation justified a punishment, and anything that was unnecessary to support those aims was considered to be unjustly harsh, *i.e.*, cruel. Appellant's Brief at 17 (citing Kevin Bendesky, *"The Key-Stone to the Arch": Unlocking Section 13's Original Meaning*, 26 U. Pa. J. Const. L. 201, 201 (2023)). Appellant adds that the theme of proportionate crimes also served as a foundation of the history of the constitutional provision and that these principles ─ that the punishments should be proportionate to the needs of deterrence and rehabilitation ─ became the basis for the Constitution's prohibition against "cruel punishments." Bendesky at 241. According to Appellant, these principles were historically aligned with life without parole sentences, as exemplified by the routine use of clemency for those who had demonstrated rehabilitation, at least until the state's statutory mandate that those serving a life sentence be ineligible for parole and the recent decline in the use of commutation.

As to case law from other jurisdictions, Appellant points to certain states which interpret their constitution's "cruel" or "cruel or unusual" punishment clauses as providing

broader protection than the Eighth Amendment to the federal Constitution. While recognizing that other states have either found their constitutional provision to be co-extensive with the Eighth Amendment, or have not engaged in a substantive analysis of the matter, Appellant submits that these decisions represent a trend towards finding independent meaning to state constitutions, and urges our Court to follow these states and find that our state's cruel punishments clause provides greater protection than the Eighth Amendment.

Appellant also offers that policy considerations, especially Pennsylvania's outlier status in imposing life without parole for felony murder, support a broader understanding of Article I, Section 13. Specifically, Appellant notes that, other than Florida, Pennsylvania incarcerates the highest number of individuals serving life without parole sentences. This, according to Appellant, is a result of Pennsylvania's status as one of only nine states and the federal government that mandates life without parole for felony murder. Appellant surveys the global status of life without parole sentences and points to the United Nations Human Rights Committee's November 2023 observations in which it requested that the United States "consider establishing a moratorium on the imposition of sentences of life imprisonment without parole." Concluding Observations on the Fifth Periodic Report of the United States of America, CCPR/USSA/CO/5, 12 (December 7, 2023), International Covenant on Civil and Political Rights, available at https://docs.un.org/en/CCPR/C/USA/CO/5. Appellant maintains that bringing the Commonwealth more in line with contemporary practices supports a broader interpretation of our Constitution's proscription against cruel punishments. Appellant also claims a racial disparity in application of the felony murder rule in Pennsylvania, and asserts that incarcerating elderly convicts for life wastes resources and does not further public safety. As a result, Appellant stresses that the substantial costs associated with

incarcerating the elderly, including expenditures for the specialized medical needs of an aging prison population, could be utilized for "programming that would improve public safety, such as rehabilitative, vocational, and educational programs as well as reentry and transition services." Appellant's Brief at 40.

In light of these considerations, Appellant argues that our Commonwealth's cruel punishments clause should be interpretated to afford broader protections than the Eighth Amendment and requests that we adopt a proportionality standard which would prohibit punishments that are excessive in relation to their deterrence and rehabilitation effects. Applying such construct here, Appellant asserts that a life without parole sentence for a felony murder conviction is excessive in relation to deterrence or rehabilitation goals, and that his sentence constitutes cruel punishment for purposes of Article I, Section 13 of our Constitution, and so should be overturned.

Sixteen *amicus* briefs have been filed on behalf of Appellant. While some echo Appellant's reasoning, certain *amici*, discussed below, provide additional insights as to the constitutionality of the punishment for felony murder. Specifically, *Amicus* Governor Josh Shapiro offers that there are clear differences in the crimes of first degree murder and second degree murder, and they can involve a wide variety of culpable conduct; however, the punishment is largely the same. Governor Shapiro maintains that while, in some instances, a second degree murderer may warrant a sentence of life without parole, it should not be mandated in all situations. Governor Shapiro submits that imposing the same sentence for all first and second degree murders renders it unconstitutional under Article I, Section 13. Moreover, according to Governor Shapiro, a judge should have discretion to impose a minimum sentence based upon the facts and circumstances of the case, within reasonable statutory limits, including the impact of the crime upon its victims. In the Governor's view, a sentence of mandatory life imprisonment without parole for

felony murder does not promote the purposes of punishment — deterrence and rehabilitation — and leads to the unnecessary housing of prisoners, placing financial strains on the Commonwealth. Finally, Governor Shapiro urges that our Court find the current punishment to be unconstitutional and leave to the legislature and executive branches how to implement a new constitutional rule, and asks that we refrain from determining the retroactive nature of its application.

The Pennsylvania Prison Society, American Civil Liberties Union of Pennsylvania, American Civil Liberties Union, the Roderick and Solange Macarthur Justice Center, and Professor Michael Meranze offer the rich history behind the adoption of Section 13, through which Pennsylvania led the country in the application of Enlightenment principles to penal systems, focusing on reformation and deterrence; as a result, they submit a mandatory sentence of life without parole for felony murder is manifestly cruel.

Former Department of Corrections Secretaries John Wetzel and George Little and Executives Transforming Probation and Parole offer policy reasons to find a life without parole sentence for felony murder to be unconstitutional: stressing the enormous, and in their view, unnecessary, cost of keeping individuals who are often persons convicted at a very young age and who are incarcerated for their entire lives, as well as inhibiting correctional leaders' ability to direct resources and invest in individuals who could benefit from rehabilitation efforts. *Amici* also remind the Court that making a class of individuals eligible for parole does not mandate that they would receive parole, as they would be subject to a public safety review.

Criminologists and Law Professors dissect the four purposes of sentencing: retribution, rehabilitation, deterrence, and incapacitation, and conclude that a life without parole sentence for felony murder is inconsistent with all four penological purposes. Likewise, Power Interfaith/Power Live Free note that life without parole sentences are

inconsistent with the values of redemption and rehabilitation, and assert that 73.3% of those convicted of felony murder in Pennsylvania were 25 years or younger when committing the offense; 80% of those convicted were people of color; and just under 70% were Black, despite that Black people comprise roughly 12% of the Commonwealth's population.

Special Rapporteur on Contemporary Forms of Racism and U.N. Expert Mechanism to Advance Racial Justice and Equality in Law Enforcement offer that Pennsylvania's use of life without parole sentences is out of step with most regions of the world, which rarely employ life sentences, even with parole; violates international human rights law; and disproportionately impacts "Black and Latinx" Pennsylvanians, in violation of international human rights treaties. The Antiracism and Community Lawyering Practicum at Boston University School of Law *et al.*, echo the significant racial disparities in the application of Pennsylvania's felony murder statute.

Family Members and Loved Ones of Victims Killed by Murder offer personal testimonies of individuals who lost family members and close friends to murder, who believe that the values of mercy and redemption require that those sentenced to life without parole for second degree murder be given an opportunity to make efforts to repair the harm that they caused and make positive contributions to society outside of prisons. Similarly, Avis Lee, *et al.*, offer the stories of individuals, formerly serving life without parole sentences, who aver that such a sentence is ineffective for achieving the penological purposes of rehabilitation and accountability. Related thereto, Former Judges and Prosecutors of Pennsylvania add that not only does a life sentence without parole alter the offender's life by a "forfeiture that is irrevocable," it also prevents judges and prosecutors from considering each individual's intent, prior criminal history, or lack thereof, personal background, and other factors that would be relevant in determining an

appropriate sentence. *Amici* Brief at 5. Philadelphia District Attorney's Office echoes these concerns, and argues that treating all offenders the same regardless of culpability results in citizens less likely to respect such laws as they are perceived as unjust and unfair.

In response, the Commonwealth takes the position that Article I, Section 13 offers no greater protections than afforded by the Eighth Amendment to the United States Constitution and contends that a life without parole sentence for a felony murder conviction does not violate either Constitution. Specifically, the Commonwealth first emphasizes that a statute will not be deemed to be unconstitutional unless it clearly, palpably, and plainly violates our organic charter; that all doubts are to be resolved in finding that the legislative enactment passes constitutional muster; and that a challenger to the constitutionality of a statute bears a very heavy burden.

The Commonwealth asserts that Appellant's argument that his sentence is disproportionate to his culpability is actually a challenge to his felony murder conviction and an attempt to escape the consequences of being an accomplice. The Commonwealth explains that when a killing occurs in the commission of a felony, all who participate therein are equally guilty of murder, citing *Yuknavich*, *supra*. Moreover, the Commonwealth stresses that, under the common law, felony murder imputes malice where it may not exist expressly and "the malice necessary to make a killing, even an accidental one, murder, is constructively inferred from the malice incident to the perpetration of the initial felony," quoting *Myers*, 261 A.2d at 553. Indeed, the Commonwealth points out that the legislature assigned a greater penalty for second degree murder when compared to third degree murder, even though the latter is malicious. This, according to the Commonwealth, is permissible, as the law seeks to provide a greater deterrent to engaging in particularly dangerous felonies, such as those

triggering the felony murder rule. In the Commonwealth's view, this defeats Appellant's argument that he is less culpable than his principals and deserving of a lesser sentence. The Commonwealth emphasizes that not only is it reasonable to charge an individual with the knowledge that the natural and probable consequences of engaging in certain felonies may well result in death or grievous bodily harm to those involved, but that it is for the General Assembly to define grades of murder and to assign sentences to them, including life without parole and death.

The Commonwealth refutes Appellant's analysis regarding the Pennsylvania Constitution and specifically his *Edmund*s analysis, beginning with our Court's decision in *Zettlemoyer*, which held that the rights secured by Pennsylvania's constitutional prohibition against "cruel punishments" are co-extensive with those secured by the Eighth and Fourteenth Amendments to the United States Constitution. As to the constitutional text, the Commonwealth challenges Appellant's conclusion that the Eighth Amendment does not apply to punishments that have been continuously applied, whereas the Pennsylvania Constitution does, as the Commonwealth submits that, in various United States Supreme Court decisions, the defendants were challenging punishments that had been continuously used for years, and the high Court found them to be violative of the Eighth Amendment, citing *Graham* and *Enmund*. As to a historical analysis, the Commonwealth acknowledges that while Pennsylvania was progressive regarding punishment, as exemplified by the legislature's limitation on capital punishment solely for first degree murder in 1794, it contends that this merely demonstrates such changes are for the "political will of the people acting through their elected legislators," and, thus, fails to support a finding that our Constitution intended greater protections than the federal counterpart. Commonwealth's Brief at 20-21.

As to other states' case law, the Commonwealth offers that, while other states have provided greater protections than the federal Constitution, they have done so in their treatment of juveniles sentenced to life without parole, and none address adults convicted of felony murder. The Commonwealth highlights that, while certain states have eschewed automatic sentences of life without parole for adults, these changes have been affected through legislative enactments, citing legislation in California, Cal. Penal Code Ann. § 188-89; Colorado, Colo. Rev. Stat. Ann. § 18-1.3-401; and Minnesota, Minn. Stat. Ann. § 609.05. Finally, as to policy concerns, the Commonwealth contests Appellant's assertion that Pennsylvania is an outlier regarding the number of individuals serving life without parole as a function of our sentencing scheme for murder generally, and proffers that, of the 5,375 persons serving life without parole, 1,063 were serving sentences for second degree murder, and that Appellant fails to account for how many of these individuals were "non-slayers," the class which Appellant is attempting to demonstrate is disproportionately punished. Commonwealth's Brief at 25. The Commonwealth also maintains that incarceration costs are for the legislative and executive branches to determine. Finally, the Commonwealth emphasizes that life without parole is subject to the Governor's power to commute of a life sentence to a term of years, which places that individual within the jurisdiction of the Parole Board. Indeed, the Commonwealth notes that, while the practice was curtailed for a certain period beginning with Governor Richard Thornburgh, such commutations were significantly increased under Governor Tom Wolf, with 101 hearings held in September of 2015 resulting in 53 commutations. Moreover, while a 1997 amendment to our Constitution required a unanimous Parole Board to recommend a commutation of a life sentence, this, according to the Commonwealth, reflected the will of the people and could be undone if the citizens so desired. Thus, the Commonwealth

submits that our Court should reject the suggestion that Article I, Section 13 offers any greater protection than the Eighth Amendment to the United States Constitution.

Pennsylvania District Attorneys Association has filed an *amicus* brief on behalf of the Commonwealth. Like the Commonwealth, *Amicus* challenges Appellant's argument as an attack on who is subjected to a conviction of second degree murder, rather than to the sentence itself. Specifically, *Amicus* proffers that Appellant has merely presumed, rather than proven, that any second degree murderer convicted of a crime through vicarious liability did not kill or intend to kill, *i.e.*, has a *per se* constitutionally significant diminished culpability. Indeed, *Amicus* points out that the Crimes Code provides that an accomplice to an enumerated felony that results in death is equally responsible as the principal; thus, the malice or intent to commit the underlying crime is imputed to the killing to make it a second degree murder, regardless of whether the defendant intended to physically harm the victim. This, according to *Amicus*, is where Appellant's argument falls short, as he has not established the unconstitutionality of the statute by providing that there is a constitutional significance to the difference between being the killer and being a killer through vicarious liability. *Amicus* warns that finding the statute to be unconstitutional would make constitutionally suspect the entire doctrine of vicarious criminal liability, as it relates to any crime and not simply felony murder. *Amicus* emphasizes that some second degree murderers are more culpable than first degree murderers as they killed, but first raped, robbed, kidnapped, or committed arson. *Amicus* also points out that Appellant's related argument that his sentence was disproportionate rests on the same faulty foundation that there is a constitutionally valid distinction between being a killer through one's own act and through criminal vicarious liability, and urges for redress through the legislature and not through the courts. *Amicus* also takes issue with

numerous *amicus* briefs filed in support of Appellant, which offer policy considerations regarding the felony murder rule, but which *Amicus* contends are solely for the legislature.

The Office of the Attorney General has also filed an *amicus* brief in support of the Commonwealth, advocating for change in the felony murder statute, but stressing that such change is for the legislature.[11] According to *Amicus*, nothing in the history of the "cruel punishments" clause suggests an intent to bar the punishment of life without parole for felony murder, and, rather, that the passing of legislation immediately after the adoption of the clause punishing felony murder by death suggests the opposite. Contesting Appellant's claim that Pennsylvania is an outlier, *Amicus* offers numerous states which mandate life without parole for at least certain individuals who commit felony murder. *Amicus* also warns that any consideration of the culpability of a defendant will be treated as an element of the offense, requiring findings by a jury proven beyond a reasonable doubt. Finally, *Amicus* argues that, while there may be compelling policy arguments in favor of statutory reform, such policies alone cannot render a punishment unconstitutional, and such reforms based upon policies are properly for the legislative and executive branches who have the power and resources to craft a just and fair punishment for the crime of felony murder.

B. *Edmunds* Analysis

The movement beginning in the 1970s of renewed interest in the rights bestowed to citizens under their state charters is commonly called the "New Judicial Federalism."[12]

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[11] The Office of the Attorney General's motion for leave to file a supplemental Amicus Brief is granted.

[12] *See* William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); Robert J. Smith *et al*., *State Constitutionalism and the Crisis of Excessive Punishment*, 108 Iowa L. Rev. 537, 568–69 (2023) ("There is a recently reinvigorated dialogue among jurists and scholars aimed at restoring the primacy of state constitutions and state courts in enforcing individual rights. This dialogue, which focuses on 'whether state forums might yield the greatest or optimal level of rights protection, at (continued…)

In *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), our Court set forth the now-familiar framework for undertaking an independent analysis of the rights bestowed upon our citizens by our Commonwealth's Constitution, in contrast to those granted under the United States Constitution. Per *Edmunds*, litigants and courts must, in contrast to the relevant federal constitutional provision, review (1) the text of the Pennsylvania Constitutional provision; (2) the history of the provision, including Pennsylvania case law; (3) related case law from other states; and (4) policy considerations, including issues of state and local concern and their applicability in modern Pennsylvania jurisprudence. *Id*. at 895. Based on these factors, we address whether Pennsylvania's Constitution provides rights beyond the minimum floor established by the United States Constitution. *Id*, at 894.

1. Text

Following our *Edmunds* protocol, we begin by examining the language of the coordinate federal and state constitutional provisions. As noted, the Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Article 1, Section 13 states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." Pa. Const. art. I, § 13.

Thus, on its face, Article I, Section 13, which forbids "cruel punishments," is distinct from its federal counterpart. Moreover, Section 13 seemingly offers broader protection than the Eighth Amendment's ban on the imposition of "cruel *and unusual* punishments."

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least on some issues,' is accompanied by a recent and modest uptick in state courts interpreting their constitutional provisions more broadly than related federal provisions spanning topics from takings clause cases to marriage equality to searches and seizures to enforcing voting rights." (internal citations omitted)).

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However, certain prior case law suggests that this clear textual distinction is of no moment. *See Commonwealth v. Batts*, 66 A.3d 286, 298 (Pa. 2013) ("*Batts I*") (in declining to give meaning to the textual difference of "cruel" versus "cruel and unusual," the Court explained that "[w]e find the textual analysis provided by Appellant and his *amici* to carry little force. The purport of the argument is that this Court should expand upon the United States Supreme Court's proportionality approach, not that it should derive new theoretical distinctions based on differences between the conceptions of 'cruel' and 'unusual'"); *Commonwealth v. Means*, 773 A.2d 143, 151 (Pa. 2001) (plurality) ("A comparison of the text does not advance a basis for distinct treatment under either document."); *Zettlemoyer*, *infra* (determining that Section 13's cruel punishments provision was co-extensive with the Eighth Amendment); *cf. Trop v. Dulles,* 356 U.S. 86, 100 n.32, (1958) (plurality) (suggesting that most of the judicial decisions have treated "cruel and unusual" as, essentially, an amalgam)).

Yet, when read closely, we find a basis for a substantive distinction between the two constitutional provisions. One basis for a distinct approach comes from a fuller exploration of the meaning of the terms "cruel" and "unusual." Recently, the United States Supreme Court, in *City of Grants Pass, Oregon v. Johnson*, traced the history of the Eighth Amendment and clarified that "[p]unishments . . . were 'cruel' because they were calculated to 'superad[dition]'of 'terror, pain, or disgrace.' . . . And they were 'unusual' because, by the time of the Amendment's adoption, they had 'long fallen out of use.'" 603 U.S. 520, 542 (2024) (citations omitted); *see also Graham*, 560 U.S. at 62-67 (finding life without parole for nonhomicide offenses committed by juveniles "exceedingly rare," that is, "unusual"); *Kennedy*, 554 U.S. at 422-26 (determining a death sentence for the rape of a child was not permitted in 45 states, and, thus, evidence of a "national consensus" against the sentence); *Harmelin*, 501 U.S. at 967 (noting difference between "cruel" and

"unusual" punishments in the federal charter and offering that "a disproportionate punishment can perhaps always be considered 'cruel,' but it will not always be (as the text also requires) 'unusual'"); John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 N.W. U. L. Rev. 1739, 1745 (2008) ("As used in the Eighth Amendment, the word 'unusual' was a term of art that referred to government practices that are contrary to 'long usage' or 'immemorial usage.'"). This analysis strongly suggests that the term "unusual" has an independent meaning and substantive import regarding the Eighth Amendment and supports an understanding that the cruel punishments provision in the Pennsylvania Constitution, which does not use the term "unusual," has a distinct meaning and application.

It follows that the omission of the term "unusual" from Article I, Section 13 of the Pennsylvania Constitution excludes the requirement that a challenged sentence be contrary to long-standing practice or contrary to the common law. This pronounced limit found in the Eighth Amendment is meaningful and substantive, supporting a finding that our Constitution provides broader protections than its federal counterpart. *Accord People v. Bullock,* 485 N.W.2d 866, 872 n.11 (Mich. 1992) (considering Michigan's Constitution which prohibits "cruel or unusual" punishment, Mich. Const. art. I, § 16, and offering that "[t]he set of punishments which are *either* 'cruel' *or* 'unusual' would seem necessarily broader than the set of punishments which are *both* 'cruel' *and* 'unusual'" (emphasis original)).

2. History

The history of Article I, Section 13, the original meaning of that provision, as well as the framers' intent regarding the adoption of the Eighth Amendment, provide additional insights into whether Section 13 grants greater safeguards to our citizens than set forth in the federal Constitution.

In considering the history of the Eighth Amendment, the United States Supreme Court has explained that the framers looked to English history as a source. Specifically, over 30 years ago, Justice Antonin Scalia penned a concurring opinion in *Harmelin*, reasoning that the original meaning of the Eighth Amendment could be traced back to England's 1689 Declaration of Rights, which prohibited "cruell and unusuall Punishments." *Harmelin*, 501 U.S. at 967-68 (Scalia, J. concurring). The requirement that a punishment not be "unusuall" was "primarily a requirement that judges pronouncing sentence remain within the bounds of common-law tradition," *id*. at 973-74; that is, that sentences be "regularly or customarily employed," *id*. at 976. Almost 20 years later, the high Court explained that the English approach embraced retribution as a justification for punishment and that the Eighth Amendment originally sought to prohibit only methods of punishment armed with a "(cruel) 'superadd[ition]' of 'terror, pain, or disgrace.'" *Bucklew*, 587 U.S. at 133 (quoting *Baze v. Rees*, 553 U.S. 35, 48 (2008)).[13] More specifically, as Justice Neil Gorsuch, writing for the Court, explained in *Bucklew*:

> Methods of execution like [dragging the prisoner to the place of execution, disemboweling, quartering, public dissection, and burning alive] readily qualified as "cruel and unusual," as a reader at the time of the Eighth Amendment's adoption would have understood those words. They were undoubtedly "cruel," a term often defined to mean "[p]leased with hurting others; inhuman; hard-hearted; void of pity; wanting compassion; savage; barbarous; unrelenting," 1 S. Johnson, A Dictionary of the English Language (4th ed. 1773), or

[13] *See Harmelin*, 501 U.S. at 959 (Kennedy, J., joined by O'Connor and Souter, JJ.) (recognizing a variety of legitimate penological goals based on theories of retribution, deterrence, incapacitation, and rehabilitation, but holding that the Eighth Amendment did not mandate adoption of any one such scheme); *Graham*, 560 U.S. at 71 ("Retribution is a legitimate reason to punish, but it cannot support the sentence at issue here. Society is entitled to impose severe sanctions on a juvenile nonhomicide offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense. But '[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.'").

> "[d]isposed to give pain to others, in body or mind; willing or pleased to torment, vex or afflict; inhuman; destitute of pity, compassion or kindness," 1 N. Webster, An American Dictionary of the English Language (1828). And by the time of the founding, these methods had long fallen out of use and so had become "unusual." 4 Blackstone, *supra,* at 370; Banner 76; *Baze*, 553 U.S. at 97, 128 S.Ct. 1520 (THOMAS, J., concurring in judgment); see also Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739, 1770-1771, 1814 (2008) (observing that Americans in the late 18th and early 19th centuries described as "unusual" governmental actions that had "fall[en] completely out of usage for a long period of time").

Bucklew, 587 U.S. at 130-31. Consistent therewith, Justice Gorsuch, again writing for the high Court in *City of Grants Pass, Oregon v. Johnson*, stressed the framers' intent to prohibit certain savage punishments that were no longer employed, adding:

> We have previously discussed the Clause's origins and meaning. In the 18th century, English law still "formally tolerated" certain barbaric punishments like "disemboweling, quartering, public dissection, and burning alive," even though those practices had by then "fallen into disuse." *Bucklew v. Precythe*, 587 U.S. 119, 130, 139 S.Ct. 1112, 203 L.Ed.2d 521 (2019) (citing 4 W. Blackstone, Commentaries on the Laws of England 370 (1769) (Blackstone)). The Cruel and Unusual Punishments Clause was adopted to ensure that the new Nation would never resort to any of those punishments or others like them. Punishments like those were "cruel" because they were calculated to " 'superad[d]' " " 'terror, pain, or disgrace.' " 587 U.S., at 130, 139 S.Ct. 1112 (quoting 4 Blackstone 370). And they were "unusual" because, by the time of the Amendment's adoption, they had "long fallen out of use." 587 U.S., at 130, 139 S.Ct. 1112. Perhaps some of those who framed our Constitution thought, as Justice Story did, that a guarantee against those kinds of "atrocious" punishments would prove "unnecessary" because no "free government" would ever employ anything like them. 3 J. Story, Commentaries on the Constitution of the United States § 1896, p. 750 (1833). But in adopting the Eighth Amendment, the framers took no chances.

Johnson, 603 U.S. at 542. Thus, the Eighth Amendment proscribed only methods of punishment inflicting the superaddition of pain beyond death, and permitted those punishments which had not fallen out of use as they were not unusual.

Whereas the United States Supreme Court found that the original understanding of the Eighth Amendment deemed only barbaric *and* long-disused punishments to be unconstitutional, this may be contrasted with Pennsylvania's framers' understanding of Section 13. The Pennsylvania constitutional provision forbidding "cruel punishments" was adopted in 1790, and has remained unchanged in all subsequent amendments to our charter. Constitution of 1790, art. IX, § 13. Critically, and to highlight important context, the "cruel punishments" clause was ratified one year before the Eighth Amendment was adopted. Thus, the meaning of the Pennsylvania provision was not intended to mirror the Eighth Amendment, rather, it was the Pennsylvania Constitution which served as the predecessor to the federal Constitution, and whose authors chose to veer from the Pennsylvania Constitution in fashioning the Eighth Amendment.

The original Pennsylvania Constitution of 1776 failed to contain any reference to cruel punishments. Noted Pennsylvania constitutional scholars suggested that the reason for the omission was unknown. *See* Bruce Ledewitz, *Bail, Fines and Punishments*, The Pennsylvania Constitution, A Treatise on Rights and Liberties, (Gormley ed. 2004) § 16.1, p. 518. This was curious, as, at this time, Pennsylvania largely based its Declaration of Rights on the Virginia Declaration of Rights which contained a prohibition on "cruel and unusual punishments." *Id*. Similarly, there was no clear explanation why, in 1790, when certain Declaration of Rights provisions were amended, the "cruel punishments" language was added without any reference to "unusual" punishments, as found in the Virginia charter. *Id*.

In recent groundbreaking scholarship, however, Kevin Bendesky, in his article *"The Key-Stone to the Arch": Unlocking Section 13's Original Meaning*, 26 U. Pa. J. Const. L. 201 (2023), offers an explanation. Early reforms in punishment began at the time of the Revolution and continued through the adoption of Pennsylvania's first constitution. Indeed, Pennsylvania led the country in penal reform. These reforms manifested themselves in Article I, Section 13, which, despite numerous amendments to the Constitution, has remained unchanged.

As explained above, the federal drafters, based upon England's 17th century Declaration of Rights, barred punishments which were cruel, and which were not regularly or customarily imposed. Thus, the framers were not necessarily concerned with the severity of a punishment in and of itself, for, to be prohibited, the punishment had to also be unusual, *i.e.*, long disused. By contrast, Pennsylvania's founding fathers and constitutional framers exhibited a particular sensitivity to one's culpability from the earliest days of the Colonies.

Our Commonwealth's founder William Penn recoiled from English penal codes and, relying upon long-standing Quaker ideals, embraced a "distinctly Pennsylvanian" view of punishment, forged by his and his followers' experience after fleeing persecution in England, and which resulted in the enactment of his own code of criminal law. *Id*. at 236. Later, the Pennsylvania drafters of our Constitution, who eschewed a requirement of unusualness, "perceive[d] . . . that the severity of the criminal law" they inherited from England was "an exotic plant and not the native growth of Pennsylvania," *id*. at 213 (quoting William Bradford, *An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania* 20 (T. Dobson, 1793) ("Bradford")) — and so rejected "[c]ruel and sanguinary punishments," especially those rooted within the common law tradition. *Id*. (quoting Jared Ingersoll, *Report: Made by Jared Ingersoll. Esq. Attorney General of Pa.,*

in compliance with a resolution of the legislature, passed the 3d of Mar., 1812, relative to the penal code. Communicated to the legislature, Jan. 21, 1813, 1 J. of Juris: A New Series of The Am. L.J. 1, 325 (John E. Hall ed. 1821) (footnotes omitted) ("Ingersoll")). Thus, Pennsylvania's founding fathers repudiated the severity of English criminal laws and de-emphasized retribution as a justification, which had served as the basis of the Eighth Amendment, and instead looked to emerging Enlightenment theories as a foundation for criminal punishment in Pennsylvania. *Id*.

These Enlightenment principles, expressed by the French philosopher Baron de Montesquieu and Italian criminologist Cesare Beccaria, shaped penological thought in Pennsylvania both before and after the Revolution. These pioneers in punishment reform eschewed the importance of the severity of a punishment, which in Montesquieu's mind led to savagery and resulted in reluctant accusers and jury acquittals, and undercut the point of punishment: prevention. *Id*. at 215-16. Similarly, Beccaria's philosophy was based upon the social-contract theory, in which punishment was necessary to defend the public from "the usurpations of individuals," and, as criminal activities harmed society, and not individual citizens, the reason for punishment was to "deter these societally harmful usurpations." *Id*. at 217 (quoting Cesare Beccaria, On Crimes and Punishments (1764), *reprinted in* On Crimes and Punishments and Other Writings (Richard Bellamy ed., Richard Davies, Virginia Cox & Richard Bellamy trans., Cambridge Univ. Press, 1995)). Indeed, quoting "the great Montesquieu," Beccaria found that "[e]very punishment which is not derived from absolute necessity is tyrannous." *Id*. This foundational emphasis upon necessity informed the understanding of cruelty, and as the primary purpose of punishment was deterrence, in their view, permissible punishment was ideally the most lenient means that deterred. *Id*. at 218.

Thus, according to Bendesky, in contrast to the English common law, and based upon Enlightenment philosophy, the Pennsylvania framers advocated that only deterrence and reformation justified a punishment. As a result, the framers rejected a requirement that punishment also be unusual given their foundational belief that "anything *unnecessary* for achieving the limited purposes of punishment *was* the *superaddition* of cruelty." *Id*. at 212 (emphasis original).

This emphasis on deterrence and reformation, however, was tempered by other justifications for punishment. Although not direct evidence of the framer's intent, but nonetheless persuasive evidence of the distinct constitutional meaning of the Pennsylvania constitution compared with the federal Constitution,[14] following the ratification of the Constitution's "cruel punishments" clause, the nascent Pennsylvania legislature adopted a further reform in 1794: the first penal code passed after the new constitution limited the death penalty to first degree murder and divided murder into degrees ─ the first state to do so. The law's preamble confirms that Pennsylvanians strongly believed in notions of reform and providing for public safety as a basis for rejecting severe and excessive punishment, but also embraced additional justifications for punishment such as incapacitation and retribution:

> Whereas the design of punishment is to prevent the commission of crimes, and to repair the injury that hath been done thereby to society or the individual, and it hath been found by experience, that these objects are better obtained by moderate but certain penalties, than by severe and excessive punishments: And where as it is the duty of every government to endeavor to reform, rather than exterminate offenders, and the punishment of death ought never to be inflicted, where it is not absolutely necessary to the public safety.

[14] *Harmelin*, 501 U.S. at 980.

Id. at 214-15 (quoting Act of 22nd Apr. 1794, *reprinted in* John W. Purdon, Digest of the Laws of Pennsylvania 9 (M'Carty & Davis, 1831) at 646-47). Thus, there was a strong sentiment favoring Enlightenment principles,[15] and it is clear that the framers of the Pennsylvania Constitution offered significantly different notions of what constitutes cruelty in punishment, as compared to the federal Constitution.

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[15] As forcefully emphasized by Thomas Mifflin, the Commonwealth's first Governor and chairman of the 1790 Constitutional Convention, "every punishment, which is not absolutely necessary for [deterrence], is an act of tyranny and cruelty." *Id*. at 215 (quoting S. Journal, 17th Assemb. 14 (Pa. 1792)). This and related sentiments were echoed by other architects of Pennsylvania's embryonic government who believed that only deterrence and reformation justified the infliction of punishment and who accepted that notions of necessity, and, thus, cruelty, evolved over time with the development of "moral and empirical understanding." *Id*. at 219. These luminaries included, among others, William Bradford, Supreme Court Justice, Attorney General, 1790 Constitutional Convention attendee, and father of the reformation of the penal code of Pennsylvania, who believed in two "principles ... so important that they deserve a place among the *fundamental* laws of every free country:" one, that "*[t]he prevention of crimes is the soel end of punishments*;" and two, that "*every punishment which is not absolutely necessary for that purpose is a cruel and tyrannical act.*" *Id* at 221 (emphasis original) (citing Bradford, at 3, 4). Likewise, James Wilson, a signor of the Declaration of Independence and the United States Constitution, and regarded as the father of the Pennsylvania Constitution, believed that, "[i]n a free state, the law should impose no restraint upon the will of the citizen, but such as will be productive of advantage, publick or private, sufficient to overbalance the disadvantages of the restraint." *Id*. at 224 (quoting 3 James Wilson, Lectures on Law (1790), *reprinted in* The Works of the Honourable James Wilson 442-443 (Bird Wilson ed., 1804)). Similarly, both Thomas McKean – signatory to the Declaration of Independence, a member of the Pennsylvania Convention that ratified the federal Constitution, chair of the 1790 Pennsylvania Constitutional Convention, and the Commonwealth's first Chief Justice – as well as George Clymer – signor of both the Declaration of Independence and the United States Constitution – rejected retribution as a justification for punishment and were opposed to punishments of unnecessary severity. *Id*. at 227. Finally, Jared Ingersoll, esteemed lawyer and Attorney General from 1790 to 1799, who authored an influential and authoritative report consolidating the penal code which was relied upon by the Governor, the General Assembly, and the Pennsylvania Supreme Court, in discussing the purposes underlying punishment reasoned that "a less severe and awful penalty can effect the same purposes, or, in other words, if it be not *necessary* to punish murder with death, a milder medium of correction should be chosen." *Id*. at 229 (citing Ingersoll at 330) (emphasis original).

For these reasons, we find that the United States Supreme Court's historical analysis of the intent of the Eighth Amendment, emphasizing retribution as a justification for punishment and limiting its protections to punishments which have fallen out of use, is at variance with the historical origins of Article I, Section 13. Section 13 is founded to a large degree upon Enlightenment theories of deterrence and reformation, and on a rejection of punishments extending beyond the penological justifications for punishment as unnecessary, which constituted the *superaddition* of cruelty. Moreover, this notion of necessity – and, thus, cruelty – was understood to evolve over time with the development of moral and scientific advancements. We find that this history, for purposes of our *Edmunds* analysis, reveals a distinct background for the two constitutional provisions, supporting an interpretation of Section 13 which provides greater protections for Pennsylvania citizens against cruel punishment.

3. Pennsylvania Case Law

While the rich history underlying Pennsylvania's "cruel punishments" clause suggests a distinct meaning for the provision, our Court's case law, dating back to 1982, has suggested that the protections offered by the two constitutions are co-extensive. We find that this understanding of the two constitutional provisions was a result of an incomplete historical analysis, and one which has evolved as expressed in our Court's more recent decisions.

The first independent consideration of the cruel punishments provision was undertaken by our Court over 40 years ago in *Commonwealth v. Zettlemoyer*, wherein we held that the death penalty did not violate Article I, Section 13 of the Pennsylvania Constitution. *Zettlemoyer*, 454 A.2d 937 (Pa. 1982).

The *Zettlemoyer* Court rejected numerous claims under the federal Constitution, including that the imposition of the death penalty violated the Eighth Amendment to the

United States Constitution because the statutory provisions for appellate review were inadequate to ensure that the jury's discretion was channeled so as to avoid the arbitrary and capricious imposition of the death penalty. *Id*. at 960-64. The Court relied to a large degree upon the United States Supreme Court's decision in *Gregg v. Georgia,* 428 U.S. 153 (1976) (plurality), finding our sentencing scheme to more closely resemble Georgia's scheme, which had survived constitutional challenge. *Id*. at 966.

Our Court then rejected Zettlemoyer's claim that the imposition of the death penalty violated Article I, Section 13 of the Pennsylvania Constitution. In doing so, we looked to the framers' understanding of the propriety of the death penalty and concluded that the framers of the two Constitutions did not consider the death penalty to be a *per se* violation of either Constitution. More specifically, our Court reasoned that the intention of the framers was not dispositive, and the prohibitions against "cruel" or "cruel and unusual" punishments was not a "static concept;" rather, those constitutional provisions drew their meaning from "evolving standards of decency that mark the progress of a maturing society.'" *Id*. at 967-68. In discerning those "evolving standards of decency," the Court found that "the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards," and that "legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." *Id*. at 960 (quoting *Gregg,* 428 U.S. at 175-76, *quoting Furman,* 408 U.S. at 383).

That being the case, and again focusing on the propriety of the death penalty, our Court concluded that the General Assembly, since its origins, expressed its view that capital punishment, for at least some intentional killings, was an appropriate and necessary form of punishment, even in light of William Penn's "humane laws" of 1682 and 1683, which prescribed penalties less than death for all offenses *except* willful or

premeditated murder; indeed, we noted that, upon Penn's death in 1710, the Provincial Assembly repealed these laws and prescribed the death penalty for, *inter alia,* sodomy, buggery, rape, highway robbery, witchcraft and enchantment. *Id*. at 968. The Court explained that, thereafter, Pennsylvania has always operated with the penalty for at least some first degree murders. Finally, the *Zettlemoyer* Court pointed out that over a majority of the states reinstituted capital punishment for some crimes after the death penalty was declared unconstitutional in *Furman*. Thus, our Court concluded that, because the death penalty had been an accepted practice since the founding of the Commonwealth, it could not be considered to be "cruel punishment" for purposes of Section 13, and held that "the rights secured by the Pennsylvania prohibition against 'cruel punishments' are co-extensive with those secured by the Eighth and Fourteenth Amendments." *Id.* at 967.

Our decision in *Zettlemoyer*, however, had limitations. Our decision predated *Edmunds* by almost 10 years. Moreover, while the *Zettlemoyer* Court looked to the historical underpinnings of the cruel punishments clause, its focus was specifically on whether the death penalty existed at the time of the Pennsylvania Constitution's creation, rather than the framers' intent regarding the meaning of that provision vis-à-vis its federal counterpart.

Subsequent decisions construing Section 13 largely followed *Zettlemoyer*, either because the litigant did not raise an independent state constitutional analysis or did not develop such a claim. *See, e.g., Commonwealth v. Hairston*, 249 A.3d 1046, 1058 (Pa. 2021) (finding that defendant failed to present any compelling justification for altering the co-extensive holding of *Zettlemoyer*). However, our Court expressed the view that some claims could merit an approach under Article I, Section 13 distinct from the Eighth Amendment. Indeed, in *Means,* the question was whether a statute allowing victim impact evidence at the penalty phase of capital trials violated either the Eighth Amendment or

Article I, Section 13 of the Pennsylvania Constitution. The Opinion Announcing the Judgment of the Court did not accept that Article I, Section 13 claims required lockstep devotion to federal law interpreting the Eighth Amendment, as the Court could have refrained from further state constitutional analysis by citing *Payne v. Tennessee,* 501 U.S. 808 (1991), as dispositive of the Eighth Amendment claim. The Court nevertheless analyzed the question under Article I, Section 13, pursuant to *Edmunds,* ultimately concluding that the legislation was not constitutionally infirm. *Means,* 773 A.2d at 149-58.

Similarly, in *Batts I*, *supra*, notwithstanding the fact that the argument was developed primarily in terms of the Eighth Amendment and that Batts had not provided a fully developed *Edmunds* analysis, then-Justice Thomas Saylor, writing for a unanimous Court, explained that our Court's prior holdings that Section 13 was co-extensive with the Eighth Amendment arose only in discrete contexts, and, while rejecting a Section 13 claim in that appeal, offered that textual differences between the two Constitutions could provide a basis for greater protections under the Pennsylvania Constitution if our Court could derive new theoretical distinctions based upon the differences between the meaning of "cruel" and "unusual." 66 A.3d at 298.

The possibility of Section 13 providing greater protections than its federal counterpart was perhaps best explained by Chief Justice Ronald Castille in his concurring opinion in our subsequent decision in *Commonwealth v. Baker*, 78 A.3d 1044, 1053-54 (Pa. 2013) (Castille, C.J., concurring, joined by Saylor and Todd, JJ.). The majority in *Baker* analyzed the constitutional challenge only under the Eighth Amendment; however, Chief Justice Castille spoke to our Constitution. In his view, *Zettlemoyer* did not purport to establish that all claims arising under Article I, Section 13 should be treated as if they were subject to the same standards that would govern an equivalent Eighth Amendment

claim, in part because *Zettlemoyer* did not address a legislative enactment, but a judicial opinion deciding a specific issue, which was posed in *per se* fashion ─ specifically, whether capital punishment was unconstitutionally cruel under Article I, Section 13. As characterized by Chief Justice Castille, such a claim was doomed, as the death penalty had a long history, and the General Assembly had specifically and recently reapproved the punishment. Thus, he concluded that claims of cruel punishment could warrant a separate analysis under the two Constitutions, and could yield different results in the same factual scenario.

Moreover, the *Zettlemoyer* Court recognized that history is crucial to understanding Section 13, but it offered an incomplete account of the Commonwealth's constitutional past. It essentially reasoned that, because Pennsylvania law had originally tolerated the death penalty, the punishment could not become "cruel" now. But this approach to constitutional history ignored the original meaning of the provision and focused upon legislative actions in a vacuum, disregarding what the provision meant. Of course, *Zettlemoyer* predated *Edmunds* and, at that time, we did not emphasize the history of a constitutional provision. Furthermore, focusing on how our colonial forebearers viewed the death penalty overlooked the history of our prohibition on cruel punishments, and failed to allow for an independent meaning of Pennsylvania's prohibition on cruel punishment as explained in *Batts I* and *Baker*.

Based upon the above, we find that there is a unique Pennsylvania history to our "cruel" punishments provision that suggests that Section 13 provides greater protection to our citizens than its federal counterpart. Furthermore, as we find that our decision in *Zettlemoyer* was rendered prior to our seminal decision in *Edmunds*, and failed to engage in the rigorous assessment that we now believe necessary to determine rights under our Constitution, we conclude it serves as no impediment to the recognition of greater

protections under Section 13 when considered in light of our Court's recent case law, as set forth in *Batts I* and *Baker*.

4. Related Case Law From Other States

Consistent with *Edmunds*, we next consider related case law from other states. Virtually every state's constitution contains a provision analogous to the Eighth Amendment. Some states provisions are identical, barring "cruel and unusual punishments," others prohibit "cruel *or* unusual punishments," and five states in addition to Pennsylvania bar merely "cruel punishments." Case law from these five states ─ Delaware, Kentucky, Rhode Island, South Dakota, and Washington ─ offer varied interpretations.

Specifically, Delaware, Kentucky, and Rhode Island currently view their state constitutional protections as co-extensive with Eighth Amendment protections; however, it appears these states have not engaged in a rigorous *Edmunds*-like analysis in reaching their conclusions. Specifically, the Supreme Court of Delaware, in its 1963 decision in *State v. Cannon*, 190 A.2d 514, 515 (Del. 1963), explained that, even though Delaware's 1776 Declaration of Rights barred "cruel or unusual punishments" and the 1792 Constitution omitted the phrase "or unusual," nevertheless, "the omission of the phrase 'or unusual' has little or no significance." *Id*. This interpretation was recently reaffirmed by the Superior Court of Delaware in *State v. Desmond*, No. 91009844DI, 2024 WL 3456225, at *5-6 (Del. Super. Ct. July 16, 2024). Similarly, Kentucky has interpreted its constitution to be co-extensive with the Eighth Amendment. *See Riley v. Commonwealth*, 120 S.W.3d 622, 633 (Ky. 2003) (determining that Section 17 of the Kentucky Constitution was identical to the Eighth Amendment, "except that it proscribes 'cruel punishment' instead of 'cruel and unusual punishments,'" but regarding such "variation in phraseology as a distinction without a difference"); *Turpin v. Commonwealth*, 350 S.W.3d 444, 448

(Ky. 2011) (finding Section 17 provided protections parallel to those accorded by the Eighth Amendment). Rhode Island has likewise held that "the Eighth Amendment's prohibition against cruel and unusual punishment and the provisions of article 1, section 8, of the Rhode Island Constitution are identical." *State v. Monteiro*, 924 A.2d 784, 795 (R.I. 2007).

By contrast, the Supreme Court of South Dakota has explained that the South Dakota Constitution may provide greater protections against cruel punishments than the federal constitution. *State v. Moeller*, 548 N.W.2d 465, 487 (S.D. 1996) (in rejecting challenge to the death penalty as cruel punishment, court explained that its constitution could be interpreted to provide an individual with greater protection than the federal constitution).

The Washington Supreme Court, however, has set forth the most extensive analysis of its state's constitutional prohibition on cruel punishments. Specifically, in *State v. Bassett*, 428 P.3d 343 (Wash. 2018), the Washington Supreme Court held that sentencing a juvenile to life without parole, even after individualized sentencing, violated Article I, Section 14 of Washington's state constitution ─ the provision which bans cruel punishments. In doing so, the *Bassett* court reasoned that its constitutional provision provided greater protection than the Eighth Amendment "because it prohibits conduct that is merely cruel; it does not require that the conduct be both cruel and unusual." *Id*. at 349.

Similarly, addressing its constitution's "cruel *or* unusual" provision, in *State v. Kelliher*, 873 S.E.2d 366, 385 (N.C. 2022) (emphasis original), the Supreme Court of North Carolina held its clause offered protections that were distinct from, and broader than, the federal provision, and determined that sentencing a juvenile to more than 40 years in prison before becoming eligible for parole constituted a *de facto* sentence of life

without parole, and was unconstitutional, *id*. at 390-95. Likewise, in *People v. Bullock*, 485 N.W.2d 866 (Mich. 1992), the Michigan Supreme Court held that the imposition of a life sentence for possession of 650 or more grams of cocaine violated the Michigan Constitution's prohibition against "cruel or unusual" punishments, despite the United States Supreme Court having previously held that such a sentence did not violate the Eighth Amendment. As the court explained, "the Michigan provision prohibits 'cruel *or* unusual' punishments, while the Eighth Amendment bars only punishments that are both 'cruel *and* unusual.' This textual difference does not appear to be accidental or inadvertent." *Id*. at 872 (emphasis original); *see also People v. Taylor*, 2025 WL 1085247, *6 (Mich. Apr. 10, 2025) (holding that mandatorily condemning offenders who were 19 or 20 years old when they committed their crimes to die in prison, without first considering the attributes of youth that late adolescents and juveniles share, no longer comports with the "evolving standards of decency that mark the progress of a maturing society," and that the state constitution did not permit the imposition of such punishment against this class of late adolescents without individualized sentencing). Indeed, California, Florida, and Minnesota courts have also described the same textual difference between the Eighth Amendment and their own constitutional provisions (barring "cruel or unusual" punishments) as meaningful. In *People v. Carmony*, 26 Cal. Rptr. 3d 365, 378 (Cal. Ct. App. 2005), a California Court of Appeals referred to it as "purposeful and substantive rather than merely semantic." The Florida Supreme Court, in *Armstrong v. Harris*, 773 So. 2d 7, 17 (Fla. 2000), indicated that the difference demonstrated "that both alternatives (*i.e.*, 'cruel' and 'unusual') were to be embraced individually and disjunctively within the Clause's proscription." Lastly, the Minnesota Supreme Court, in *State v. Mitchell*, 577 N.W.2d 481, 488-89 (Minn. 1998), referred to this variation as "not trivial."

Finally, certain states whose constitutions have identical language to the Eighth Amendment have nevertheless interpreted their constitutions to be distinct from their federal counterpart. *See State v. Marshall*, 613 A.2d 1059, 1108 (N.J. 1992) (noting that, while its state guarantee against "cruel and unusual punishments" bears the same text as the Eighth Amendment, "New Jersey's history and traditions" give the clause its own meaning); *State v. Santiago*, 122 A.3d 1, 26-27 (Conn. 2015) (in abolishing the death penalty, the court relied upon the state's "particular sensitivity" to cruel and unusual punishments, stemming "from the earliest days of the colonies, and extending until the adoption of the state Constitution in 1818").

Thus, our sister states have come to differing conclusions regarding the meaning of the textual difference between "cruel punishments," "cruel or unusual punishments," and "cruel and unusual punishments." However, those states which have engaged in a robust analysis of the differences between their state constitution and the federal charter, have largely found greater protections for their citizens under their state charters. This lends support for interpreting Article I, Section 13 to provide greater protections than the Eighth Amendment.

5. Policy Considerations

The final factor of the *Edmunds* four-prong analysis considers policy matters, "including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence." *Edmunds*, 586 A.2d at 895. This factor is somewhat unique, and as Chief Justice Thomas Saylor offered, "[i]mplementation of a state constitutional value . . . necessarily entails a searching, evaluative inquiry" into genuinely "unique state sources, content, and context as bases for independent interpretation." Thomas G. Saylor, *Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged Prophylactic Rule,* 59 N.Y.U. Ann. Surv. Am. L. 283,

309-13 (2003). However, we have warned that the "policy" factor could "metamorphose into cover for a transient majority's implementation of its own personal value system as if it were an organic command." *Commonwealth v. Russo*, 934 A.2d 1199, 1212 (Pa. 2007). Thus, in an *Edmunds* analysis, we must take care not to place significant weight on policy matters, writ large, which are more appropriate considerations for the legislature.

In this regard, Appellant offers that Pennsylvania stands as a "national and international outlier" due to its extraordinary number of individuals serving life without parole sentences, which, in turn, is due in large part to being part of a minority of states that mandate life without parole sentences for felony murder. *Id.* at 32. Related thereto, Appellant asserts that the recent trend in state sentencing regimes is away from life without parole for felony murder convictions.[16] Appellant also points to racial bias as a policy reason to find a mandatory life without parole sentence for a felony murder conviction to be unconstitutional, proffering that, although black individuals constitute 12.2% of Pennsylvania's population, they constitute 70% of the more than 5,000 individuals serving a sentence of life without parole in the Commonwealth. Appellant's Brief at 37. Finally, he emphasizes the high cost of incarcerating elderly persons, including increasingly expensive medical care, and the low recidivism rate of these aging prisoners.

Matters such as Pennsylvania's minority status regarding its high number of individuals serving life without parole sentences for felony murder, racial disparities, and the practical ramifications of incarcerating these individuals, are significant, but are general public policy concerns; thus, we must use caution in considering them so as to

[16] *See*, *e.g.*, California, Cal. S.B. 1437 (2018); Colorado, Colo. Rev. State. § 18-3-102; Minnesota, MN SF2909.

not encroach upon our sister branch's domain. Ultimately, we find that the proffered policy considerations do not weigh heavily in favor of giving Section 13 independent meaning.

* * * * *

In conclusion, we believe that the *Edmunds* factors, as analyzed above, provide compelling reasons to interpret Article I, Section 13 broadly, and to provide greater protections to our citizens than those recognized under the Eighth Amendment to the United States Constitution. Our determination is based upon the textual differences between the two constitutions; the historic differences in penological justifications for punishment; and states with similar constitutions to ours which have found independent meaning in their organic charters.

C. Application

Finding that Section 13 provides greater protections than its federal counterpart, we address whether mandatory life imprisonment without parole for a conviction of second degree murder violates Section 13's safeguards against cruel punishment.

Generally speaking, we find that Section 13 embodies the principle that our citizens are protected from sanctions that are disproportionate to the circumstances of the offense for which they were convicted. This concept is firmly rooted in the Enlightenment philosophy which served as one of the driving forces behind Section 13, and, specifically, the notion of some framers that a sanction beyond that which was necessary for achieving the limited purposes of punishment was considered to be cruel. This right not to be subjected to disproportionate sanctions arises from the longstanding notion of justice that "punishment for [a] crime should be graduated and proportioned to both the offender and the offense" and prohibits punishments that are excessive in relation to the crime committed. *See Baker*, 78 A.3d at 1047; *Miller*, 567 U.S. at 469. Indeed, this principle

has for decades undergirded Eighth Amendment and other states' jurisprudence. *See Kennedy*, 554 U.S. at 419; *Roper*, 543 U.S. at 560; *see also*, *Taylor*, 2025 WL 1085247, at *3 (interpreting the Michigan Constitution's "cruel *or* unusual" language to require that "criminal sentences be proportional to the circumstances of the offense and of the offender such that excessive imprisonment is prohibited") (emphasis original).

Defining with exactness Section 13's notion of cruelty would be a difficult endeavor; however, this appeal does not call for an exhaustive delineation and we need not decide for all contexts the meaning of the constitutional language "cruel punishment." Rather, with respect to the unique constitutional challenge before us, we believe it sufficient to consider notions of culpability, severity, and penological justifications ─ akin to the factors identified by the United States Supreme Court in creating its framework in *Miller* and *Graham* to resolve its Eighth Amendment jurisprudence regarding juveniles ─ to assess whether the mandatory imposition of a sentence of life without parole for all offenders convicted of second degree murder is consistent with the protections found in Section 13.

Culpability is central to our analysis of whether punishment is proportional within a category of individuals, here, individuals convicted of second degree murder who are all subject to the same mandatory sentence of life without the possibility of parole. Indeed, at the core of the federal cases considering the constitutionality of the punishment of juveniles is the tenet that certain offenders are categorically less culpable than others. In those decisions, the ban on sentencing was based on "mismatches between the culpability of a class of offenders and the severity of a penalty." *See Miller*, 567 U.S. at 470.

Culpability has long been a cornerstone assessment in classifying crimes in this country. The United States Supreme Court has remarked that "[d]eeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more

serious is the offense, and, therefore, the more severely it ought to be punished." Prabhu, at 457-59 (footnote omitted). Generally, criminal offenses contain at least two mandatory elements: an *actus reus* and a *mens rea*. The former refers to the illegal act itself and the latter to the requisite mental state. For virtually all types of murder and manslaughter, the *mens rea* of the offender in relation to a killing is a determinative factor in homicide grading. *See id*. at 456.

With respect to sentencing, the United States Supreme Court has reasoned 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. As the high Court stated in *Enmund*, "American criminal law has long considered a defendant's intention ─ and therefore his moral guilt ─ to be critical to 'the degree of [his] criminal culpability.'" 458 U.S. at 800 (citing *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975)). Therefore, it follows that one who did not kill another or intend to kill another during the commission of a felony is less morally responsible and less deserving of one of the most severe punishments ─ mandatory life imprisonment without the possibility of parole ─ than the actual murderer. *See Graham*, 560 U.S. at 69; *Enmund*, 458 U.S. at 797-801.

As set forth above in greater detail, the United States Supreme Court has issued five decisions that imposed substantive constraints on the imposition of the sentences of death and life without parole. In each, the sentences were disproportionately severe because the offenders, as a category, by virtue of their status or offenses, were insufficiently culpable. *See Atkins* (forbidding the execution of those with "mental retardation"); *Roper* (forbidding the execution of juveniles); *Graham* (given their reduced culpability, barring life without parole for juveniles); *Miller* (banning mandatory sentence of life without parole for juveniles). While these federal decisions were limited to

intellectually disabled individuals or juveniles deemed categorically less culpable than adults, and, thus, less deserving of the sentence of death or life without parole, the principles announced therein are equally applicable to an analysis under Section 13.

Second degree murder covers a wide variety of criminal conduct and varying culpability for a killing. This degree of murder is somewhat of an anomaly, as the malice necessary to support deeming the act to be murder is inferred from the commission of the underlying felony. *Tarver*, *supra*. That is, it requires only an intent to commit the underlying felony, not the killing. Thus, unlike first degree murder, one may be convicted of second degree murder without malice (regarding the killing of the victim), without attempting to kill the victim, or without having any intent to kill the victim. Stated in more colloquial terms, second degree murder does not distinguish between the lookout, and the killer who pulls the trigger. Despite this wide-ranging conduct and differing degrees of culpability, both the killer and the lookout will be subjected to mandatory life imprisonment without the possibility of parole.

Additionally, second degree murder is an outlier, as it is one of the few crimes in Pennsylvania that has only one possible sentence: mandatory life without parole. Most other crimes allow the judge or jury some discretion in imposing a sentence, at least within a certain range. Such discretion allows for consideration of the offender's characteristics and culpability in fashioning an appropriate punishment.

Thus, by its terms, the mandatory penalty scheme of life without parole for all offenders convicted of second degree murder fails to assess individual culpability regarding the intent to kill, and mandates the same punishment regardless of that culpability.

Severity of punishment is an additional factor in determining whether a sanction is disproportionate to an offense. Initially, we note that, in Pennsylvania, first degree murder

constitutes the "most severe breach of the law of this Commonwealth and is therefore subject to our most severe penalty." *Commonwealth v. Fowler*, 304 A.2d 124, 129 (Pa. 1973). To convict an individual of first degree murder requires the Commonwealth to demonstrate that "a human being was unlawfully killed, the defendant was the killer, and the defendant acted with malice and a specific intent to kill." *Commonwealth v. Laird*, 988 A.2d 618, 624-25 (Pa. 2010). The sentence for first degree murder is death or life imprisonment. 18 Pa.C.S. § 1102(a)(1).

Felony murder, which is codified in Pennsylvania as second degree murder, is a criminal homicide that takes place while a defendant is "engaged as a principal or an accomplice in the perpetration of a felony." 18 Pa.C.S. § 2502(b). Pennsylvania limits those triggering felonies to "robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping." 18 Pa.C.S. § 2502(d). As noted, the malice necessary to find the act to be murder is inferred from the commission of the underlying felony, resulting in an offender who did not kill, attempt to kill, or intend to kill subject to conviction of second degree murder. Yet, despite these substantial differences between first degree murder and second degree murder, a conviction for second degree murder results in the same mandatory sentence as noncapital defendants convicted of first degree murder: life imprisonment without the possibility of parole. 18 Pa.C.S. § 1102(b); 61 Pa.C.S. § 6137(a)(1).

The gravity of a sentence of life without parole cannot be overstated. As the United States Supreme Court stressed in *Graham*, while a sentence of death is unique in its severity and irrevocability, life without parole is "the second most severe penalty permitted by law" and imprisoning an offender until he dies shares certain attributes with capital punishment that are dissimilar to any other sentence:

> The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a

> forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence. As one court observed in overturning a life without parole sentence for a juvenile defendant, this sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days."

Graham, 560 U.S. at 69-70 (citations omitted).

While it may be entirely appropriate to mandate a sentence of life imprisonment without parole for individuals convicted of first degree murder, the question before us is whether the same mandate for *all* individuals convicted of second degree murder constitutes cruel punishment. Life without parole imposes the harshest imprisonment sanction permitted under the law ─ imprisonment until death without the opportunity for consideration of release ─ regardless of culpability. Due to this scheme's mandatory nature and its unique severity, it poses a great risk of disproportionate punishment. *See Miller*, 567 U.S. at 479 (requiring individualized sentencing when imposing the harshest of prison sentences).

Finally, the reasons supporting a punishment ─ that is, the penological justifications for a sentencing practice ─ are relevant to our cruelty analysis. As noted above, the penological justifications for punishment played an important, albeit not exclusive, role in the adoption of Section 13. Punishment may have multiple and differing goals which lie within the discretion of the legislature. While an examination of penal philosophy can be an academic exercise, we conclude that, consideration of the purposes and effects of a penal sanction aids our Section 13 cruelty analysis. Indeed, as offered by the high Court as part of its Eighth Amendment jurisprudence, "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense."

Graham, 560 U.S. at 71; *see also Enmund*, 458 U.S. at 798 (explaining that a punishment which fails to serve any penological goal "'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

Thus, we turn to consider the traditional penological justifications for criminal punishment: rehabilitation, deterrence, retribution, and incapacitation. *See Commonwealth v. Colema*n, 285 A.3d 599, 613 (Pa. 2022) (offering that "sentencing serves many 'purposes, including "protection of society, general deterrence (example to others), individual deterrence, rehabilitation, and retribution (punishment, vengeance, desserts)'" (citation omitted)); *Graham*, 560 U.S. at 71 ("the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation"); 204 Pa. Code § 303.11(a) (The Pennsylvania's Sentencing Guidelines establish "a sentencing system with a primary focus on retribution, but one in which the recommendations allow for the fulfillment of other sentencing purposes including rehabilitation, deterrence, and incapacitation.").

Rehabilitation justifies punishment when purposed to cause self-reflection and improvement to lead a crime-free life after incarceration. While this purpose of punishment is to rehabilitate offenders so that they are no longer driven to commit crime, a life without parole sentence eschews it. *See Graham*, 560 U.S. at 74 (life without parole "forswears altogether the rehabilitative ideal"). Although some individuals convicted of second degree murder may reasonably be viewed as outside the realm of rehabilitation, such as someone directly responsible for the murder, this is not the case for everyone convicted of second degree murder. Thus, in the absence of an individualized assessment of the circumstances of a second degree murder, the imposition of mandatory life without parole is inconsistent with notions of rehabilitation.

Similarly, deterrence – structuring punishments so as to discourage a would-be offender from reoffending or to intimidate the public at large from engaging in criminal activity, and, thus, improving public safety – is undercut by imposing a mandatory sentence of life imprisonment without parole for second degree murder. First, if one convicted of second degree murder is sentenced to life without parole, there is no opportunity for the defendant to be released and resist reoffending. Furthermore, when a third party, such as a co-defendant, kills a person, the actions of that third party may be outside of the control of the defendant, and, thus, it makes little deterrent sense to punish the defendant for those actions. More significantly, deterrence goals generally require escalating consequences for escalating severity. Yet, second degree murder provides for a mandatory sentence regardless of the intent to kill, treating all such convictions the same, and, thus, there is no added consequence when a killing *is* intentional. That is, by punishing all felony murder convictions the same, regardless of an intent to kill, the sentencing scheme, counterintuitively, provides no added deterrence for such killings. Stated another way, a sentencing court or parole board is prohibited from taking into account the intent and culpability of someone convicted of felony murder. As such, a mandatory life without parole sentence for all felony murder convictions, without an assessment of intent or culpability, is in tension with a deterrent purpose.

Additionally, retribution is a traditional aim of punishment, representing society's condemnation of a crime. *See Commonwealth v. Torsilieri*, 232 A.3d 567, 589 (Pa. 2020). Retribution aims cannot support a life without parole sentence in all cases of second degree murder. While society may impose severe sanctions to express its condemnation of a crime and to seek restoration of a moral balance, even with retribution there is a proportionality principle, as "[t]he heart of the retribution rationale is that a criminal

sentence must be directly related to the personal culpability of the criminal offender." *See Graham*, 560 U.S. at 71 (citation omitted).

As we discussed, there is no assessment of individual culpability when one convicted of second degree murder is sentenced to a mandatory term of life imprisonment without parole. Therefore, a mandatory sentence of life imprisonment without parole is inconsistent with the retributive principle that punishment should be proportionate to culpability. *Id*. Conversely, providing parole eligibility for some second degree murder offenders would allow the severity of the offender's conduct to be taken into account. Viewed either as an expression of the community's moral outrage or as an attempt to vindicate the wrong to the victim, the retribution justification for mandatory life long imprisonment without the possibility of parole fades with respect to an individual who did not intend to commit or did not commit a homicide.

Finally, the incapacitation justification, the idea of decreasing crime through the removal of an individual from society, thereby eliminating the possibility of recidivism, is premised upon public safety benefits. Recidivism is a serious risk to public safety, and, thus, incapacitation is a significant and important policy. However, the permanent incarceration of an individual is premised upon the notion that he cannot be rehabilitated or deterred from committing a future crime ─ that is, he will forever be a danger to society, he is incorrigible. See *Graham*, 560 U.S. at 72-73. While incapacitation may be a legitimate penological goal sufficient to justify life without parole in other contexts, we find it cannot justify mandatory life imprisonment of all offenders who have been convicted of second degree murder, without an assessment of culpability.

In sum, we find that a mandatory sentence of life without parole for all individuals convicted of second degree murder cannot be reasonably justified by any of the traditional theories for punishment. While the justifications for punishment may support life-long

incarceration for some convicted of this crime, such justification cannot support life without parole for all offenders, as individuals who have lessened culpability are less deserving of the most severe punishments, necessitating individualized assessment of culpability.

Although the judgment of the General Assembly is entitled to a presumption of constitutionality, it is for our Court, ultimately, to determine whether Section 13 permits the mandatory imposition of a life of imprisonment without parole for second degree murder. We find that the sentencing framework imposing a *mandatory* sentence of life without parole for second degree murder convictions in *all* cases, regardless of the culpability and characteristics of the defendant — including such as the extent of an offender's participation in the conduct, and the details of his offense — without individualized assessment either at sentencing or through parole, prevents the sentencer from considering whether this harshest of sentences proportionately punishes the offender. Furthermore, this mandatory sentencing scheme runs afoul of notions of individualized sentencing for defendants facing the second most severe punishment after death, and the harshest type of incarceration. Finally, the mandatory nature of the sentencing scheme without individualized sentencing lacks adequate penological justification. Ultimately, we find that the mandatory sentencing scheme for second degree murder poses too great a risk of disproportionate punishment, and, thus, find it to be cruel.[17]

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[17] Our conclusion is broadly consistent with Eighth Amendment jurisprudence. Indeed, the United States Supreme Court has rejected a mandatory life with parole sentence for juveniles without individualized consideration of the details of the crime and character of the offender. *Miller*, *supra*. Just as the high Court has found with respect to juveniles, a life sentence of imprisonment without parole for second degree murder may be appropriate in certain circumstances, "but only so long as the sentence is not mandatory." *Jones*, 593 U.S. at 106. Indeed, our approach is also consistent with the individualized assessment of aggravating and mitigating circumstances required before the imposition (continued…)

Accordingly, we conclude Section 13's prohibition on cruel punishments proscribes a sentencing model which mandates the imposition of life imprisonment without parole for felony murder.[18] Therefore, we reverse the order of the Superior Court, vacate

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of the penalty of death. *See Gregg, supra* (upholding capital sentencing scheme that provided for the weighing of aggravating and mitigating circumstances).

[18] We emphasize the limited nature of our decision today, which addresses only the constitutionality of a sentence of mandatory imprisonment without the possibility of parole for all individuals convicted of second degree murder. We address a specific type of sentence (mandatory life imprisonment without the possibility of parole), for specific offenders (those convicted of second degree murder without an assessment of individual culpability). To be clear, under our decision today, the Commonwealth is not required to ensure parole or eventual release to someone convicted of second degree murder. Such a convict may remain incarcerated for the duration of his natural life. Rather, we hold that offenders convicted of second degree murder must receive a meaningful consideration of release, based upon their individual culpability and the circumstances surrounding their crime.

Furthermore, we do not pass judgment on the legality or wisdom of the felony murder doctrine itself. A challenge to the severity of a sentencing scheme is qualitatively different than a challenge to the validity of a substantive crime. Defining what acts constitute an offense is an authority vested in the legislature, subject to constitutional limitations. *See Commonwealth v. Church*, 522 A.2d 30, 35 (1987) ("It is recognized that the legislature has the exclusive power to pronounce which acts are crimes, to define crimes, and to fix the punishment for all crimes. The legislature also has the sole power to classify crimes and designate the procedure applicable at trial and after sentence."); *see also Johnson*, *supra*.

Similarly, our decision should not be read as casting doubt upon the constitutionality of existing sentences for first degree murder, whether punished by life imprisonment or death, which involves a complex legal scheme that takes full account of a defendant's individual culpability and circumstances. *See* 18 Pa.C.S. § 2502(a) ("A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing."); *Commonwealth v. Simpson*, 754 A.2d 1264, 1269 (Pa. 2000) ("To sustain a conviction for first-degree murder, the Commonwealth must prove that the defendant acted with the specific intent to kill, that a human being was unlawfully killed, that the accused did the killing and that the killing was done with deliberation."); 18 Pa.C.S. § 306(d) ("When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.").

Appellant's judgment of sentence, and remand the matter to the trial court for resentencing not inconsistent with our decision today.

On remand, the sentencing court must, after consideration of Appellant's individual culpability, determine whether he should be resentenced to life imprisonment without the possibility of parole; or to a maximum sentence of life imprisonment, as required by 18 Pa.C.S. § 1102(b), accompanied by a minimum sentence determined by the court. Our allowance for such a minimum and maximum sentence – despite the requirement in 42 Pa.C.S. § 9756(b)(1) that a minimum sentence may not exceed one half of a maximum sentence, and the prohibition in 61 Pa.C.S. § 6137(a) that the parole board has the power to parole all offenders except those serving life imprisonment – flows from our constitutional ruling. We came to the same conclusion in analogous circumstances in our post-*Miller* rulings addressing the resentencing of juveniles convicted of first degree murder who had been sentenced to life imprisonment without the possibility of parole. *See Batts I*, 66 A.3d at 297 (remanding for resentencing for possible maximum sentence of life imprisonment and minimum sentence to be set by sentencing court), and *Commonwealth v. Batts*, 163 A.3d 410, 442-44 (Pa. 2017) ("*Batts II*") (in appeal following *Batts I*, determining severance of 42 Pa.C.S. § 9756(b)(1) and 61 Pa.C.S. § 6137(a) necessary for constitutionally-mandated resentencing of juveniles).

Finally, as we have observed in prior cases where we deemed legislation to violate our Constitution, nothing in our decision today prevents the General Assembly from amending 18 Pa.C.S. § 1102(b) or 61 Pa.C.S. § 6137(a)(1) in a fashion in accord with Section 13's constitutional protections. *See*, *e.g.*, *Commonwealth v. Neiman*, 84 A.3d 603, 615-16 (Pa. 2013)*; City of Philadelphia v. Commonwealth*, 838 A.2d 566, 593-94 (Pa. 2003). Indeed, while we have a clear obligation to ensure that constitutional bounds are not crossed, we may not act as legislators, who are best positioned to effectuate penal

reform.[19] However, cognizant of the impact our decision today will have, we will stay our mandate for 120 days in order to provide a reasonable amount of time for the General Assembly to consider appropriate remedial measures. *See Neiman*, 84 A.3d at 616 (staying order to provide General Assembly time to consider appropriate remedial measures); *City of Philadelphia,* 838 A.2d at 594 (staying mandate to allow legislature time to act).[20]

Order reversed, judgment of sentence vacated, and case remanded. This mandate is stayed for 120 days.

Justices Donohue, Dougherty, Wecht and McCaffery join the opinion.

Justice Dougherty files a concurring opinion in which Justice McCaffery joins.

Justice Wecht files a concurring opinion.

Justice Mundy files a concurring opinion.

Justice Brobson files a concurring and dissenting opinion.

[19] Notably, in the wake of *Miller*, the Pennsylvania General Assembly established a new sentencing scheme for juveniles convicted of murder which included individual assessments and mandatory minimum sentences based upon the age of the offender. *See* 18 Pa.C.S. § 1102.1.

[20] As this matter comes to us on direct appeal, and the only question before us is the constitutionality of Appellant's sentence, we decline to address questions of retroactivity.

[J-60-2024] [MO: Todd, C.J.]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 3 WAP 2024
	:	
Appellee	:	Appeal from the Order of the
	:	Superior Court entered June 13,
	:	2023, at No. 1008 WDA 2021,
v.	:	Affirming the Order of the Court of
	:	Common Pleas of Allegheny County
	:	entered December 19, 2016, at No.
DEREK LEE,	:	CP-02-CR-0016878-2014.
	:	
Appellant	:	ARGUED: October 8, 2024

CONCURRING OPINION

JUSTICE DOUGHERTY **DECIDED: MARCH 26, 2026**

I join the majority opinion. As the majority persuasively explains, Pennsylvania's sentencing scheme mandating a life sentence without parole for felony murder does not violate the Eighth Amendment to the United States Constitution, but it does violate Article I, Section 13 of the Pennsylvania Constitution, which affords distinct protections in this context. I write separately to note an additional reason why mandating a life sentence for felony murder does not contravene the Eighth Amendment, and to amplify the majority's analysis of the state constitutional issue.

Beginning with Lee's claim under the Eighth Amendment, he alleges a life sentence for felony murder is "disproportionate" under the United States Supreme Court's decisions "[a]pplying the categorical approach[.]" Lee's Brief at 54, 57. As the majority describes, the High Court has developed "two lines of precedent" regarding claims of disproportionate sentencing under the Eighth Amendment. *Miller v. Alabama*, 567 U.S. 460, 470 (2012). Under one strand of decisions, "the Court considers all of the

circumstances of the case to determine whether the sentence is unconstitutionally excessive." *Graham v. Florida*, 560 U.S. 48, 59 (2010). In the second line of cases, the Court "has used categorical rules to define Eighth Amendment standards." *Id.* at 60. I agree with the majority that the latter line of cases employing a categorical approach "provides no relief to" Lee. Majority Opinion at 28. The Supreme Court's decisions applying the categorical approach have exclusively involved the death penalty or juvenile offenders sentenced to a mandatory term of life imprisonment. *See Hopkins v. Watson*, 108 F.4th 371, 390 (5th Cir. 2024) ("Critically, the categorical analysis so far has been applied only in cases that involve the death penalty or juvenile offenders sentenced to life in prison."); *United States v. Cobler*, 748 F.3d 570, 580-81 (4th Cir. 2014) ("We conclude that Cobler's categorical challenge likewise lacks merit. The present case involves neither a sentence of death nor a sentence of life imprisonment without parole for a juvenile offender, the only two contexts in which the Supreme Court categorically has deemed sentences unconstitutionally disproportionate."). Moreover, the Supreme Court has emphasized that cases involving the death penalty or juvenile offenders are categorically different for sentencing purposes. *See Solem v. Helm*, 463 U.S. 277, 294 (1983) ("[T]he death penalty is different from other punishments in kind rather than degree."); *Miller*, 567 U.S. at 471 ("[C]hildren are constitutionally different from adults for purposes of sentencing."). Here, the challenged sentencing scheme does not involve a death sentence or juvenile offenders. As such, the Supreme Court precedent applying a categorical analysis is inapposite.

There is also a second basis for rejecting Lee's Eighth Amendment claim, one rooted in the plain text of the amendment itself. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel **and** unusual punishments inflicted." U.S. CONST. AMEND. VIII (emphasis added). The conjunction "and"

between "cruel" and "unusual" connotes these are distinct, complementary standards, both of which must be met to fall within the constitutional prohibition; cruelty or unusualness alone does not violate the clause. *See Harmelin v. Michigan*, 501 U.S. 957, 994-95 (1991) ("Severe, 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."); *Gibson v. Collier*, 920 F.3d 212, 226 (5th Cir. 2019) ("As the text makes clear, these are separate elements."). A punishment is "cruel" under the Eighth Amendment if it is "calculated to 'superad[d]' 'terror, pain, or disgrace.'" *City of Grants Pass, Oregon v. Johnson*, 603 U.S. 520, 542 (2024), *quoting Bucklew v. Precythe*, 587 U.S. 119, 130 (2019). It is "unusual" if it has "'long fallen out of use.'" *Id.*, *quoting Bucklew*, 587 U.S. at 130.

Assuming a mandatory sentence of life imprisonment without the possibility of parole for felony murder is cruel for purposes of the Eighth Amendment, it is not unusual in a constitutional sense. According to a study published by *amici* The Sentencing Project and Fair and Just Prosecution, twelve jurisdictions mandate life without parole sentences for all adult felony murder convictions: Arizona, Florida, Iowa, Louisiana, Michigan, Mississippi, Nebraska, North Carolina, Pennsylvania, South Dakota, the Federal system, and Wyoming. *See* Nazgol Ghandnoosh, Emma Stammen & Connie Budaci, *Felony Murder: An On Ramp for Extreme Sentencing*, 2, 4, 24 (Published March 2022 and Updated May 2024), https://www.sentencingproject.org/reports/felony-murder-an-on-ramp-for-extreme-sentencing (last accessed Mar. 19, 2026); *see also Amici* Brief of The Sentencing Project *et al.* at 7-8 ("[T]en other States mandate life-without-parole sentences for all people convicted of felony murder.").[1] An additional eleven states mandate a life

[1] The majority notes "only four other states have a similar mandatory life without parole sentence, without exceptions, for **second degree murder**": Iowa, Louisiana, Mississippi, and North Carolina. Majority Opinion at 15 (emphasis added). While these may be the (…continued)

without parole sentence for certain felony murder convictions: Arkansas, California, Connecticut, Delaware, Illinois, Massachusetts, New Jersey, New Mexico, New York, Ohio, and South Carolina. *See id.* at 4, 24. And seventeen more jurisdictions permit life without parole for certain felony murders: the District of Columbia, Georgia, Idaho, Indiana, Maryland, Montana, Nevada, New Hampshire, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Vermont, Virginia, Washington, and West Virginia. *See id.* Clearly, a sentence of life imprisonment without parole for felony murder remains common in the United States and has not fallen into disuse. Hence, this punishment is not unusual for purposes of the Eighth Amendment. For this reason, too, Lee is due no relief under the federal charter.

Turning to Lee's claim under Article I, Section 13, I agree with the majority this provision affords "greater protections" than the Eighth Amendment in this context. Majority Opinion at 60.[2] I am particularly persuaded in this regard by the distinct language

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only other states besides Pennsylvania which mandate a life sentence for felony murder and which also happen to classify felony murder as "second-degree murder," the particular nomenclature used is irrelevant. As *amicus* The Office of Attorney General rightly observes, "the constitutional question . . . turns not on the label but on the actual crime and its punishment." *Amicus* Brief of The Office of Attorney General at 8 n.4. Again, as Lee's own *amici* have found in a published study and have also represented to this Court, there are twelve jurisdictions which require mandatory life sentences for all felony murder convictions, not just five.

[2] This Court has previously held Article I, Section 13 is coextensive with the Eighth Amendment. *See Commonwealth v. Real Property and Improvements Commonly Known as 5444 Spruce Street*, 832 A.2d 396, 399 (Pa. 2003); *Jackson v. Hendrick*, 503 A.2d 400, 404 n.10 (Pa. 1986); *Commonwealth v. Zettlemoyer*, 454 A.2d 937, 967 (Pa. 1982). However, this determination is context dependent. *See Commonwealth v. Batts*, 66 A.3d 286, 298 n.5 (Pa. 2013) ("We recognize that this Court has previously held Article I, Section 13 to be coextensive with the Eighth Amendment in several contexts. . . . However, none of those cases involved juvenile offenders, who the Supreme Court has indicated are to be treated differently with respect to criminal punishment."); *Commonwealth v. Means*, 773 A.2d 143, 151 (Pa. 2001) (opinion announcing judgment (…continued)

of the provision. Our state counterpart to the Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." PA. CONST. ART I, §13. Thus, Article I, Section 13 prohibits all "cruel punishments," full stop. The Eighth Amendment, however, requires punishments to be both "cruel and unusual" to violate the constitutional prohibition. A punishment which is cruel but not unusual (or vice versa) does not offend the Eighth Amendment. Our own charter, by contrast, omits the "and unusual" part. By its plain terms, Article I, Section 13 sweeps more broadly than the Eighth Amendment. The universe of punishments which are cruel is necessarily greater than those which are both cruel and unusual. *See State v. Kelliher*, 873 S.E.2d 366, 382 (N.C. 2022) (state constitutional clause barring cruel or unusual punishments "offers protections distinct from, and in this context broader than, those provided under the Eighth Amendment"); *State v. Bassett*, 428 P.3d 343, 349 (Wash. 2018) (state constitutional ban on cruel punishments "may offer greater protection than the Eighth Amendment because it prohibits conduct that is merely cruel; it does not require that the conduct be both cruel and unusual"); *State v. Moeller*, 548 N.W.2d 465, 487 (S.D. 1996) (state constitutional prohibition of cruel punishments "may be interpreted

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of court) (concluding in context of constitutional challenge to admission of victim impact testimony at penalty phase of capital trial that "*Zettlemoyer* is distinguishable" and analyzing whether Article I, Section 13 afforded greater protection than Eighth Amendment); *Commonwealth v. Baker*, 78 A.3d 1044, 1055 (Pa. 2015) (Castille, C.J., concurring) ("The *Batts* Court recognized that this Court's prior holdings that Article I, Section 13 was coextensive with the Eighth Amendment arose only in discrete contexts."); *see also* Bruce Ledewitz, *Bails, Fines and Punishments in The Pennsylvania Constitution: A Treatise on Rights and Liberties*, §16.2[a], 595 (Ken Gormley, *et al.* eds., 2d ed. 2020) ("The court tends to look on a case-by-case basis whether the state constitution follows federal law in each particular instance."). This Court has never held Article I, Section 13 is coextensive with the Eighth Amendment in the present context of evaluating the constitutionality of a mandatory life sentence for second-degree murder. There is no precedential bar to finding greater protection under our state charter in this discrete circumstance.

to provide an individual with greater protection than the federal constitution"); *People v. Bullock*, 485 N.W.2d 866, 872 & n.11 (Mich. 1992) ("[T]he Michigan provision prohibits 'cruel or unusual' punishments, while the Eighth Amendment bars only punishments that are both 'cruel and unusual.' . . . The set of punishments which are either 'cruel' or 'unusual' would seem necessarily broader than the set of punishments which are both 'cruel' and 'unusual.'") (emphasis omitted).

I also share the majority's view that the mandatory sentencing scheme for felony murder violates the greater protections afforded under Article I, Section 13. Unlike a defendant convicted of first-degree murder, a defendant convicted of second-degree murder has never been found by a judge or jury to have harbored the specific intent to kill. *See Commonwealth v. Fostar*, 317 A.2d 188, 192 (Pa. 1974) ("[A] finding of a specific intent to kill distinguishes first[-]degree from second[-]degree murder."). A second-degree murderer thus lacks the grave moral culpability of a first-degree murderer. Indeed, a defendant may be convicted of second-degree murder without any involvement whatsoever in the actual killing. He or she does not even have to expect or foresee that a life may be taken. What suffices to support a conviction is simply the defendant's participation, either as a principal or an accomplice, in the perpetration of an enumerated felony during which a criminal homicide was committed. *See* 18 Pa.C.S. §2502(b) ("A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony."); 18 Pa.C.S. §2502(d) (defining "perpetration of a felony" as "[t]he act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.").

To be sure, the underlying felonies justifying a second-degree murder conviction are serious crimes deserving of serious punishment. However, as the Supreme Court has noted, "[t]here is a line between homicide and other serious violent offenses against the individual[:]"

> Serious 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 life 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.

Graham v. Florida, 560 U.S. 48, 69 (2010) (cleaned up).

Notwithstanding that second-degree murderers lack the severe blameworthiness of first-degree murderers and can be, and often are, non-slayers, under Pennsylvania's existing sentencing framework they are all uniformly subject to a mandatory term of life in prison with no possibility of parole. Without any individualized assessment of their specific conduct, their specific characteristics, or the particular circumstances of their crimes, all those convicted of second-degree murder are uniformly and perfunctorily sentenced to prison for the remainder of their natural lives. With the exception of the death penalty, a life sentence without parole is the most severe penalty known to our law. And like a death sentence, a life without parole sentence has characteristics that "are shared by no other sentences." *Id.* Life without parole "alters the offender's life by a forfeiture that is irrevocable[,]" and "deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by" commutation, which is rare. *Id.* at 69-70.[3] This sentence means the "denial of hope[,] . . . that good behavior and character

[3] Since 1995, there have been 76 commutations of life sentences in Pennsylvania. *See* https://www.pa.gov/agencies/bop/about-the-board/about-statistics/commutation-of-life-sentences (last visited Mar. 19, 2026).

improvement are immaterial[, and] that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." *Id.* at 70 (quotation marks and citation omitted). The gross mismatch between culpability and the severity of the sentence persuades me this specific case presents an instance, likely to be quite rare, in which the penal sanction is so unduly harsh and devoid of humanity as to constitute an unconstitutionally cruel punishment under the state charter.

Our departure from federal law in this case represents a significant development in Pennsylvania law which will inevitably engender state constitutional claims of cruel punishment in other contexts. In anticipation of these cases on the horizon, I offer some observations regarding the meaning and reach of today's decision.

The majority opinion is confined to "the unique constitutional challenge before us" of "whether the mandatory imposition of a sentence of life without parole for all offenders convicted of second[-]degree murder is consistent with the protections found in Section 13." Majority Opinion at 61; *see id.* at 70 n.18 ("We emphasize the limited nature of our decision today, which addresses only the constitutionality of a sentence of mandatory imprisonment without the possibility of parole for all individuals convicted of second[-] degree murder."). It does not purport to address the constitutionality of any other sentence or sentencing scheme and should not be construed to dictate a finding of unconstitutionality in any other circumstance. In particular, "our decision should not be read as casting doubt upon the constitutionality of existing sentences for first[-]degree murder, whether punished by life imprisonment or death, which involves a complex legal scheme that takes full account of a defendant's individual culpability and circumstances." *Id.*

The majority opinion observes as a historical matter that "Section 13 is founded to a large degree upon Enlightenment theories of deterrence and reformation[.]" Majority

Opinion at 50. The majority duly recognizes, however, in accordance with well-settled Pennsylvania law, that "the traditional penological justifications for criminal punishment" include not only deterrence and rehabilitation, but also "retribution . . . and incapacitation." *Id.* at 66; *see Commonwealth v. Coleman*, 285 A.3d 599, 613 (Pa. 2022) ("[S]entencing serves many purposes, including protection of society, general deterrence (example to others), individual deterrence, rehabilitation, and retribution (punishment, vengeance, desserts).") (quotation marks and citation omitted); *Commonwealth v. Torsilieri*, 232 A.3d 567, 593 (Pa. 2020) ("[T]he traditional aims of punishment . . . includ[e] deterrence and retribution[.]"); *Commonwealth v. Williams*, 652 A.2d 283, 285 n.1 (Pa. 1994) ("There are other purposes of sentencing in addition to individual deterrence and rehabilitation. . . . The 'recidivist philosophy' urged by appellant is particularly relevant to the concepts of individual deterrence and rehabilitation. The 'recidivist philosophy,' however, is totally meaningless insofar as other valid purposes of sentencing are concerned, such as protection of society and general deterrence. The legislature is perfectly free to enact a sentencing scheme which rejects the 'recidivist philosophy' and focuses on other goals of the penal system."); 42 Pa.C.S. §9721(b) ("[T]he court shall follow the general principle that the sentence imposed should call for total confinement that is consistent with . . . the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant."); 204 Pa. Code §303a.5(b)(2) (Pennsylvania's Sentencing Guidelines "provide a system with a primary focus on retribution, but one which allows for the fulfillment of other utilitarian sentencing purposes, including person rehabilitation, general deterrence, incapacitation to protect the public, and victim restoration.").[4] Thus, today's decision reaffirms that

[4] Under the rehabilitation theory of punishment, "we 'punish' the convicted criminal by giving him appropriate treatment, in order to rehabilitate him and return him to society so reformed that he will not desire or need to commit further crimes." Wayne R. LaFave, 1 (…continued)

retribution and incapacitation are properly weighed in the sentencing calculus. A court's consideration of these long-accepted penological aims in fashioning a sentence does not render the punishment cruel under Article I, Section 13.

The majority opinion does not "[d]efin[e] with exactness" the meaning of "cruel" under Article I, Section 13. Majority Opinion at 61. Nonetheless, certain conclusions are clear regarding what "cruel" does **not** mean. "Cruel" does not mean causing pain or suffering. The maxim of *noscitur a sociis* "requires that the meaning of a word be interpreted in the context of its surrounding words[.]" *Mezzacappa v. Northampton County*, 334 A.3d 268, 275 (Pa. 2025). "Cruel" immediately precedes and modifies the word "punishments." "All punishment involves the infliction of physical or psychological pain." John F. Stinneford, *The Original Meaning of "Cruel"*, 105 Geo. L.J. 441, 459 (2017). Hence, the word "cruel" in Article I, Section 13 cannot simply mean causing pain or suffering. If it did, the "cruel punishments" clause would outlaw all punishments without exception. This would be an absurd result, and constitutional language, like statutory language, must be construed to avoid absurdity. *See* 1 Pa.C.S. §1922(1). Instead, "cruel" must mean causing an extraordinary amount of pain beyond the normal suffering which attends all punishment.

Subst. Crim. L. §1.5(a)(3) (3d ed.). "[T]he concept of deterrence involves the notion of 'individual deterrence' — that punishment will dissuade the offender from repeating his criminal acts [and] the principle of 'general deterrence' — that punishment can discourage similar wrongdoing by others through a reminder that the law's warnings are real and that the grim consequence of imprisonment is likely to follow from certain crimes." *State in Interest of C.A.H.*, 446 A.2d 93, 97 (N.J. 1982) (cleaned up). "The goal of retribution . . . reflects society's and the victim's interests in seeing that the offender is repaid for the hurt he caused[.]" *Kennedy v. Louisiana*, 554 U.S. 407, 442 (2008). Incapacitation reflects the principle that "society may protect itself from persons deemed dangerous because of their past criminal conduct . . . by isolating these persons from society." LaFave, 1 Subst. Crim. L. §1.5(a)(2).

Moreover, the prohibition on cruel punishments does not bar lengthy or severe sentences. A sentence can be long or severe, even spanning the entirety of the defendant's remaining life, but nevertheless proportionate to the gravity of the wrongdoing and the circumstances of the defendant and case, such that it does not cross the line into unconstitutional cruelty.

Also, "cruel" is not synonymous with "excessive," *i.e.*, exceeding what is necessary to serve the permissible goals of sentencing. *See* Concurring Opinion at 12 (Wecht, J.) ("Nor is [today's decision] an invitation to appellate jurists to invalidate any sentence that might strike them as beyond what is strictly 'necessary' to serve some legitimate interest."). Article I, Section 13 is a single sentence consisting of three clauses. The first two clauses bar "excessive bail" and "excessive fines." They explicitly employ the adjective "excessive." The "cruel punishments" clause, however, does not. The choice of the distinct word "cruel" to describe the prohibition signals that mere excessiveness is insufficient to render a punishment unconstitutional. *See Shirley v. Pennsylvania Legislative Reference Bureau*, 318 A.3d 832, 849 (Pa. 2024) (noting "the basic rule of construction that when a [text] uses different words, it is presumed the words have different meanings"). It would appear that a sentence is unconstitutionally cruel only when it goes beyond mere excessiveness and involves undue harshness to the point of inhumanity.

With these points of elaboration, I join the majority's cogent and important decision.

Justice McCaffery joins this concurring opinion.

[J-60-2024] [MO: Todd, C.J.]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 3 WAP 2024
	:	
Appellee	:	Appeal from the Order of the
	:	Superior Court entered June 13,
	:	2023, at No. 1008 WDA 2021,
v.	:	Affirming the Order of the Court of
	:	Common Pleas of Allegheny County
	:	entered December 19, 2016, at No.
DEREK LEE,	:	CP-02-CR-0016878-2014.
	:	
Appellant	:	ARGUED: October 8, 2024

CONCURRING OPINION

JUSTICE WECHT **DECIDED: MARCH 26, 2026**

I join today's Opinion. The Majority's scholarly analysis amply justifies the conclusion that the "cruel punishments" clause of the Pennsylvania Constitution provides broader protection than its later-adopted and textually distinct federal counterpart.[1] The Majority compellingly demonstrates that the sentencing scheme for felony murder (*i.e.*, second-degree murder[2]) in this Commonwealth crosses the line into constitutional cruelty,

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[1] *See* PA. CONST. art. I, § 13 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted."); U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel *and unusual* punishments inflicted.") (emphasis added). The Eighth Amendment's Cruel and Unusual Punishments Clause is applicable to the states via the Fourteenth Amendment to the United States Constitution. *See Robinson v. California*, 370 U.S. 660, 666-67 (1962).

[2] 18 Pa.C.S. § 2502(b) ("A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony."); *see also id.* § 2502(d) (defining "perpetration of a felony" as "[t]he act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping").

in that it categorically mandates life imprisonment without the possibility of parole—the second-most severe penalty that the law can impose—without any allowance for consideration of individual culpability for the killing.

A departure from federal law necessarily means that we enter uncharted constitutional terrain. In this regard, a few points are worthy of emphasis.

I.

As the Majority notes, "our decision should not be read as casting doubt upon the constitutionality of existing sentences for first degree murder, whether punished by life imprisonment or death."[3] It is important to underscore the narrow grounds for the operative distinction here, *i.e.*, the range of varying culpability for killing that falls within the felony-murder rule. This is best illustrated through contrast with the crime of first-degree murder. A conviction for first-degree murder necessitates proof beyond a reasonable doubt that the defendant acted with the specific intent to kill.[4] "It is the specific intent to kill which distinguishes murder in the first degree from lesser grades of murder."[5] The personal culpability of the perpetrator of a first-degree murder cannot be doubted.[6]

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[3] Maj. Op. at 70 n.18.

[4] 18 Pa.C.S. § 2502(a) ("A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing."); *Commonwealth v. Simpson*, 754 A.2d 1264, 1269 (Pa. 2000) (citing *Commonwealth v. Hall*, 701 A.2d 190, 196 (Pa. 1997)) ("To sustain a conviction for first-degree murder, the Commonwealth must prove that the defendant acted with the specific intent to kill, that a human being was unlawfully killed, that the accused did the killing and that the killing was done with deliberation.").

[5] *Simpson*, 754 A.2d at 1269.

[6] This is true even of a person convicted of first-degree murder under an accomplice liability theory, who may not have taken a life personally, but necessarily must have possessed the specific intent to kill. *See* 18 Pa.C.S. § 306(d) ("When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense."); *Commonwealth v. Huffman*, 638 A.2d 961, 962-64 (Pa. 1994) (finding reversible error (continued…)

By contrast, a person who participates in a qualifying felony, but who does "not kill or intend to kill," may be guilty of felony murder if someone dies during the crime, but "his culpability is plainly different" from the person who actually commits the act of intentional killing.[7]

This is the doctrinal basis for the constitutional line that Appellant Derek Lee draws around a "non-slayer" who, although convicted of second-degree murder, did not personally kill or intend to kill anyone. By way of example, consider that a person may be convicted of second-degree murder for, *e.g.*, serving as the getaway driver for a robbery, even if he did not intend (and had no reason to expect) that another robber would kill someone during the commission of the crime. Under the current sentencing scheme for second-degree murder, the getaway driver who intended only to make off with some ill-gotten gains must always be punished identically to a person who methodically plans and executes a cold-blooded murder. Despite their differing degrees of culpability for killing, both offenders spend the remainder of their natural lives in prison without ever having a chance of consideration for parole. It is this anomaly or discrepancy that serves as the cornerstone of the constitutional challenge in this case.

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where jury instruction suggested that accomplice could be found guilty of first-degree murder absent proof of specific intent to kill) (*partially overruled on other grounds as recognized in Commonwealth v. Maisonet*, 31 A.3d 689, 694 n.2 (Pa. 2011)); *see also Commonwealth v. Koehler*, 36 A.3d 121, 154 (Pa. 2012) ("We clarified in *Huffman* that the Commonwealth must prove beyond a reasonable doubt that the defendant independently possessed the requisite specific intent to kill, and that the same could not be proven by evidence of the intent to kill possessed by the defendant's accomplice or co-conspirator.").

[7] *Enmund v. Florida*, 458 U.S. 782, 798 (1982); *see also id.* at 800 (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975)) ("American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to 'the degree of [his] criminal culpability,' and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing.").

No one denies that one who commits a serious felony may deserve a lengthy prison sentence. But, as the Supreme Court of the United States long has recognized, "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."[8] Where, however, a person *does* specifically intend to kill another, nothing in today's decision implicates the constitutionality of life imprisonment without the possibility of parole as a mandatory sentence for a resulting conviction of first-degree murder.[9]

First-degree murder is likewise the only offense eligible for the death penalty in Pennsylvania. Death is the most serious penalty that any government may impose. Because "the penalty of death is different in kind from any other punishment," the Supreme Court of the United States for many years has given the death penalty a unique treatment under the Eighth Amendment.[10] This distinction led to "two general classifications" in Eighth Amendment jurisprudence: cases involving "challenges to the length of term-of-years sentences given all of the circumstances of a particular case," and "cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty."[11] In recent years, however, the United States Supreme Court has extended the "categorical" approach previously reserved for capital cases to

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[8] *Graham v. Florida*, 560 U.S. 48, 69 (2010) (citing *Enmund*, 458 U.S. 782; *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Tison v. Arizona*, 481 U.S. 137 (1987); *Coker v. Georgia*, 433 U.S. 584 (1977)).

[9] *See* Maj. Op. at 65 ("While it may be entirely appropriate to mandate a sentence of life imprisonment without parole for individuals convicted of first degree murder, the question before us is whether the same mandate for *all* individuals convicted of second degree murder constitutes cruel punishment.") (emphasis in original).

[10] *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality).

[11] *Graham*, 560 U.S. at 59.

challenges of life-without-parole sentences, specifically for juvenile offenders.[12] This jurisprudential innovation was premised in large part upon the idea that the severity of life-without-parole renders the sentence similar to the death penalty in some respects.[13] Given these federal developments, it is understandable that Lee seeks a further extension of the Supreme Court of the United States' "categorical" approach beyond the capital context, *a la Graham* and *Miller*.

As the Majority rightly concludes, however, we need not take that step here as a matter of federal law.[14] And we do not do so. The Majority provides more than adequate grounds to distinguish between the Eighth Amendment and Article I, Section 13 for purposes of an *Edmunds* analysis, and thus to correct this Court's previous decision to read our own Constitution in lockstep with federal law.[15, 16]

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[12] *See Graham*, 560 U.S. 48 (holding that sentence of life-without-parole is unconstitutional for juvenile offenders in non-homicide cases); *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that mandatory sentence of life-without-parole is unconstitutional for juvenile offenders).

[13] *See Graham*, 560 U.S. at 69 (reasoning that "life without parole sentences share some characteristics with death sentences that are shared by no other sentences"); *see also id.* at 103 (Thomas, J., dissenting) ("'Death is different' no longer.").

[14] *See* Maj. Op. at 27-28.

[15] *Commonwealth v. Zettlemoyer*, 454 A.2d 937, 967 (Pa. 1982) (holding that the "rights secured by the Pennsylvania prohibition against 'cruel punishments' are co-extensive with those secured by the Eighth and Fourteenth Amendments"); *see* Maj Op. at 54 (critiquing *Zettlemoyer*'s "incomplete account of the Commonwealth's constitutional past").

[16] I am increasingly skeptical of decisions, like *Zettlemoyer*, that tether the meaning of the Pennsylvania Constitution to the interpretation of the United States Constitution, particularly with regard to provisions, such as Article I, Section 13, that predate their federal analogues. When we decide that our own Constitution is "co-extensive" with federal law, we make a bold commitment. We necessarily adopt even future decisions of the Supreme Court of the United States, sight-unseen, no matter how poorly reasoned, and notwithstanding that they concern a different document with a distinct text and history. And, given the *stare decisis* effect of our decisions, when we hitch our jurisprudential wagon to the decisions of another, we unjustly bind our successors. Thus, we find (continued…)

II.

For purposes of Article I, Section 13 of the Pennsylvania Constitution, nothing in the Majority's discussion implicates the constitutionality of the death penalty as a sentence for first-degree murder.[17] As the Majority reasons, *mandatory* sentences of life-without-parole for all convictions of second-degree murder, "regardless of culpability," fail to allow an "individualized assessment either at sentencing or through parole," and, by making culpability irrelevant to the imposition of one of the harshest sentences, the sentencing scheme "poses too great a risk of disproportionate punishment," and is thus "cruel."[18] As noted above, the death penalty in this Commonwealth is reserved for the most egregious first-degree murder cases, where the culpability of the offender is at its zenith. Moreover, capital punishment is anything but mandatory. Rather, the penalty is governed by a statutory scheme that requires careful, circumstance-specific consideration of aggravating and mitigating circumstances, which are designed to take particular account of the defendant's individual culpability and characteristics, and to reduce the possibility of arbitrary death sentences.[19] With its focus upon the varying culpability of offenders in cases of second-degree murder, the Majority suggests nothing

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ourselves now, nearly a half-century after *Zettlemoyer*, correcting a mistake that this Court should not have made in the first place. The Pennsylvania Constitution is a rich document with its own unique legacy—an ancestor of the United States Constitution rather than a descendant—which protects a bundle of fundamental rights wholly independent of any federal document. That should be the starting point for analysis of any provision of the Pennsylvania Constitution. *See Edmunds*, 586 A.2d at 894-95 ("Here in Pennsylvania, we have stated with increasing frequency that it is both important and necessary that we undertake an independent analysis of the Pennsylvania Constitution, each time a provision of that fundamental document is implicated.").

17 *See* Maj. Op. at 70 n.18.

18 *Id.* at 65, 69.

19 *See* 42 Pa.C.S. § 9711.

that implicates this established procedure. If there is a viable challenge to the death penalty under the Pennsylvania Constitution, it is beyond the scope of the instant case.

The issue here is solely the constitutionality of the mandatory sentence of life-without-parole for all persons convicted of second-degree murder. This also defeats the suggestion of the Commonwealth and its *amicus curiae* that the constitutional analysis here is actually a surreptitious attack on the doctrinal foundation of the felony murder rule.[20] The Commonwealth's claim in this regard is a strawman. A constitutional challenge to the severity of a sentence has nothing to do with the validity of the substantive offense. As a substantive offense, the felony murder rule has deep roots in the common law, premised upon a theory of imputed malice pursuant to which "the malice necessary to make a killing, even an accidental one, murder, is constructively inferred from the malice incident to the perpetration of the initial felony."[21] There is nothing constitutionally infirm in the theory of imputed malice that underlies the crime of second-degree murder. This is a choice that the General Assembly was and is entitled to make pursuant to its prerogative to codify common law crimes and to define by statute Pennsylvania's criminal offenses and the elements thereof. There is no question that the legislature similarly is entitled to prescribe the penalty for the crime that it has defined as

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[20] *See* Commonwealth's Br. at 13 (suggesting that Lee's "argument is really a challenge to the felony murder rule which rests culpability on each participant in the underlying felony equally"; "What [Lee] is really doing is trying to escape the consequences attendant to being an accomplice."); *Amicus Curiae* Br. of Pennsylvania District Attorneys Association at 7 ("One must then wonder if [Lee's] real challenge is not to his sentence, but to the doctrine of vicarious criminal liability, without which he could not have been convicted of second-degree murder.").

[21] *Commonwealth ex rel. Smith v. Myers*, 261 A.2d 550, 553 (Pa. 1970); *see also Commonwealth v. Yuknavich*, 295 A.2d 290, 292 (Pa. 1972) (quoting *Myers*, 261 A.2d at 553); *Commonwealth v. Tarver*, 426 A.2d 569, 573 (Pa. 1981) (same).

second-degree murder. The severity of that penalty, however, is necessarily subject to the constitutional prohibition of "cruel" punishments.[22]

III.

The legislative prerogative to define crimes and punishments further informs another feature worthy of note in the Majority's analysis: its discussion of the penological justifications for criminal punishment. Appropriately, the Majority acknowledges "retribution" as one theory of punishment among several that operate in Pennsylvania law. The legislature is not constitutionally prohibited from considering an interest in retribution when drafting the Crimes Code or the Sentencing Code. As the *Graham* Court remarked, "[c]riminal punishment can have different goals, and choosing among them is within a legislature's discretion."[23] With this in mind, it is fit and proper that the Majority rebuffs the invitation of Lee and his *amici* to overhaul the foundation of criminal sentencing in this Commonwealth.

In any discussion of penal philosophy, it is helpful to define some terms. The precise framing and terminology may vary, but there traditionally have been four "goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation."[24] "Deterrence" concerns the disincentive to commit similar crimes in the future, both on the part of the offender and others who may learn

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22 PA. CONST. art. I, § 13.

23 *Graham*, 560 U.S. at 71 (citing *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring)).

24 *Id.* (citing *Ewing v. California*, 538 U.S. 11, 25 (2003) (plurality)); *see also Commonwealth v. Coleman*, 285 A.3d 599, 613 (Pa. 2022) (quoting *Commonwealth v. Williams*, 652 A.2d 283, 285 n.1 (Pa. 1994)) ("[S]entencing serves many purposes, including 'protection of society, general deterrence (example to others), individual deterrence, rehabilitation, and retribution (punishment, vengeance, des[]erts).'"); *Amicus Curiae* Br. of Criminologists and Law Professors at 5-6 (collecting scholarship) ("Criminologists widely recognize—and analyze—four purposes of sentencing: retribution, rehabilitation, deterrence, and incapacitation.").

from the offender's example; "incapacitation" refers to the need to protect society from offenders likely to pose a threat if not incarcerated; and "rehabilitation" focuses upon the ability of the criminal justice system to reform the offender, so that he might avoid future criminality.[25] "Retribution"—often defined as "the interest in seeing that the offender gets his 'just deserts'"[26]—is a goal that "reflects society's and the victim's interests in seeing that the offender is repaid for the hurt he caused."[27] Retribution is perhaps the most natural and intuitive reason to punish crime, an impulse and justification familiar now as in the past.[28] Writ large on the canvas of American law, it is impossible to discern a world in which criminal sentencing is purged of a retributive element. Before law, no doubt, there was retribution. And every system of law that has evolved since the dawn of time has carried that retributive impulse forward. To pretend or posture otherwise, as some commentators of past and present do, is fantasy and delusion.

Wisely, the Majority does not accept the invitation of Lee and his *amici* to declare that "retribution" is a categorically impermissible aspect of criminal punishment in this Commonwealth going forward, and no portion of the Majority's discussion may fairly be read to suggest as much.[29] The bulk of the Majority's discussion of penal philosophy lies

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[25] *See generally* 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.5(a) (Theories of punishment) (3d ed. 2017).

[26] *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

[27] *Kennedy*, 554 U.S. at 442 (citing *Atkins*, 536 U.S. at 319; *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring)).

[28] *See Furman*, 408 U.S. at 308 (Stewart, J., concurring) ("The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.").

[29] *See, e.g.*, Maj. Op. 67-68.

within its *Edmunds* analysis,[30] in which the Majority discusses the history of the "cruel punishments" provision of Article I, Section 13 of the Pennsylvania Constitution—an account that recent scholarship has suggested as support for a departure from federal interpretation of the Eighth Amendment.[31] The conclusion to be drawn from this history is that some framers of Pennsylvania's Constitution appeared to regard rehabilitation and deterrence to be the only legitimate reasons to punish a criminal, and that any penalty that exceeded what was necessary to achieve those aims was "cruel" in the constitutional sense.[32]

Such discussion of history is all well and good. As a practical matter, however, it is less than clear how a rejection of retribution as a penological aim would function in practice, even if it was possible in theory. This is likewise true of incapacitation—another traditional justification for punishment; it too would seem to be excluded by reference to some framers' exclusive focus upon deterrence and rehabilitation.

The justifications for punishment are a philosophical explanation for *why* we, as a society, punish crime. They are far more descriptive than prescriptive. By and large, criminal sentencing serves *all* of the aims of punishment. These concepts can provide a framework for explaining why a particularly severe penalty—death or life-without-parole—is grossly disproportionate to a given offense or class of offender, as the Supreme Court

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30 *See Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991) (articulating factors bearing upon the analysis of provisions of the Pennsylvania Constitution, including "1) text of the Pennsylvania constitutional provision; 2) history of the provision, including Pennsylvania case-law; 3) related case-law from other states; [and] 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence").

31 *See* Maj. Op. at 46-49 (discussing Kevin Bendesky, *"The Key-Stone to the Arch": Unlocking Section 13's Original Meaning*, 26 U. PA. J. CONST. L. 201 (2023) ("Bendesky")).

32 *Id.* at 48-49 & n.15.

of the United States has done in its "categorical restriction" line of cases,[33] and as the Majority does today.[34] This rationale is of some utility in articulating, for instance, that sentencing a juvenile to life-without-parole fails to serve an interest in rehabilitating that juvenile.[35] However, the vast majority of scenarios fall into a far grayer area, where a focus upon discrete penological justifications is not a helpful yardstick for measuring the suitability of a particular sentence in a particular case.

I know of no standard by which we might declare with respect to a given offender or a given crime that a five-to-ten year prison sentence is necessary to serve the interests in deterrence and rehabilitation (and *only* those interests), but that a sentence of six-to-twelve years would exceed those interests and thus cross the constitutional line into "cruelty." One can foresee all manner of novel constitutional challenges to quite ordinary sentences, premised upon the notion that they exceed what is necessary for rehabilitation or deterrence, are impermissibly concerned with retribution, etc. We are not equipped to pick apart such sentences in search of the nebulous boundaries between penological justifications. Nothing in today's decision can be read to undermine the constitutionality of such sentences.

Today's decision presages the development of a new body of jurisprudence based upon the independent protections of Article I, Section 13 of the Pennsylvania Constitution, cut free from federal precedent. I fully support this endeavor. This is an endeavor that maintains our proper role and that remains respectful of legislative prerogatives. The

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[33] *See, e.g.*, *Graham*, 560 U.S. at 71-74; *Kennedy*, 554 U.S. at 441-46; *Atkins*, 536 U.S. at 318-20; *Roper v. Simmons*, 543 U.S. 551, 571-72 (2005).

[34] *See* Maj. Op. at 65-68 (reasoning that mandatory sentence of life-without-parole for all convictions of second-degree murder fails to serve interests in rehabilitation, deterrence, retribution, and incapacitation).

[35] *See Graham*, 560 U.S. at 74.

General Assembly has articulated statutory standards for sentencing that mandate consideration of "the gravity of the offense as it relates to the impact on the life of the victim and on the community"[36]—a factor steeped in the interest of retribution. And Pennsylvania's sentencing guidelines expressly declare that they establish a "system with a primary focus on retribution."[37] The Majority's Opinion does not call the foundation of this system into doubt, nor otherwise suggest that our General Assembly's entire approach to criminal sentencing is in constitutional jeopardy.

The Majority's discussion of penological interests is best understood as an historical inquiry into the foundational distinctions between Article I, Section 13 and the federal Eighth Amendment. The Majority's *Edmunds* analysis underscores the need to give independent meaning to our own constitutional provision. Today's decision offers no indication that Article I, Section 13 prohibits consideration of "retribution" in a criminal sentence or sentencing statute. Nor is it an invitation to appellate jurists to invalidate any sentence that might strike them as beyond what is strictly "necessary" to serve some legitimate interest.

IV.

A final matter requires comment. The arguments of Lee and his *amici curiae* in this case rely to some extent upon reference to international law and the practices of various foreign nations. The Majority wisely does not engage with this suggestion. While the Majority's silence on the matter is suggestive, I would go a step further. I would

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[36] 42 Pa.C.S. § 9721(b).

[37] 204 PA. CODE § 303a.5(b)(2) ("Purposes of sentencing") ("The sentencing guidelines provide a system with a primary focus on retribution, but one which allows for the fulfillment of other utilitarian sentencing purposes, including person rehabilitation, general deterrence, incapacitation to protect the public, and victim restoration.").

expressly declare that foreign law, norms, and practice are irrelevant to the interpretation and application of the Pennsylvania Constitution.

In numerous cases concerning the Eighth Amendment, the Supreme Court of the United States has utilized international and foreign law as a component of its rationale for concluding that a punishment is "cruel and unusual."[38] This practice has engendered significant (and, in my view, well-warranted) criticism from jurists and scholars.[39] As a historical matter, the laws of Pennsylvania and the United States were designed expressly to differ in many respects from those of other nations.[40] As our law was intended to be distinct at its inception, it makes little sense to attempt a harmonization with foreign norms today. Just as importantly, every legal principle articulated in another country rests upon the backdrop of the culture, legal traditions, and mores of that nation and people, a backdrop that is often quite different from our own.[41] It is likely impossible, and probably hubristic, for American jurists to take adequate account of these variations among nations and cultures. Reliance upon the legal rules of other countries creates a substantial risk

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[38] *See, e.g.*, *Graham*, 560 U.S. at 80-82; *Roper*, 543 U.S. at 575-78; *Atkins*, 536 U.S. at 316 n.21; *Enmund*, 458 U.S. at 796 n.22; *Coker*, 433 U.S. at 596 n.10.

[39] *See, e.g.*, John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303 (2006); Ken I. Kersch, *The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law*, 4 WASH. U. GLOB. STUD. L. REV. 345 (2005); Michael Wells, *International Norms in Constitutional Law*, 32 GA. J. INT'L & COMPAR. L. 429 (2004).

[40] *See* Maj. Op. at 46 (quoting Bendesky at 213) (referring to comment of Justice William Bradford that the severity of English law was "an exotic plant and not a native growth of Pennsylvania").

[41] *See Roper*, 543 U.S. at 626-27 (Scalia, J., dissenting) ("It is beyond comprehension why we should look . . . to a country that has developed, in the centuries since the Revolutionary War—and with increasing speed since the United Kingdom's recent submission to the jurisprudence of European courts dominated by continental jurists—a legal, political, and social culture quite different from our own."); Wells, *supra* n.38, at 436 ("[I]t seems at best pointless, and at worst destructive, to give weight to decisions reached by international tribunals that, by their very nature, cannot give due regard to differences among cultures.").

that important context is lost in translation. Even setting aside the practical challenges of making coherent use of these materials, a more fundamental objection remains: we are Pennsylvanians, and we are interpreting the Pennsylvania Constitution. The very suggestion that Pennsylvania law "should conform to the laws of the rest of the world . . . ought to be rejected out of hand."[42]

Even proponents of the use of international law in American constitutional interpretation must grapple with another obvious criticism of the practice: cherry-picking. If the laws of all the nations of the world are fair game, then one should consider *all* of their merits. This is nearly impossible to do. One tends to emphasize the materials that support a preferred view while downplaying or wholly disregarding those that weigh against it. Justices Antonin Scalia and Stephen Breyer agreed that the enterprise was akin to Judge Harold Leventhal's legendary comment on the use of legislative history as "looking out over the crowd at a cocktail party to try to identify your friends."[43] As Justice Scalia elsewhere put it: "To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry."[44] Judge Richard Posner once articulated the criticism in the following terms:

> The citation of foreign decisions is opportunistic; in fact, it is a "rhetorical" move in the pejorative sense of the word. Our Justices cite foreign decisions for the same reason that they prefer to quote from a previous

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42 *Roper*, 543 U.S. at 624 (Scalia, J., dissenting).

43 Norman Dorsen, *The relevance of foreign legal materials in U.S. constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519, 530 (2005) (Justice Breyer: "Foreign decisions in this respect are a little like legislative history. And criticism of their uses is the same." Justice Scalia: "It sure is."); *see also Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends.").

44 *Roper*, 543 U.S. at 627 (Scalia, J., dissenting).

> decision rather than state a position anew: they are timid about speaking in their own voices lest the mask slip and legal justice be revealed as personal or political justice.[45]

Litigation in the Supreme Court of Pennsylvania is not litigation in the International Court of Justice. Foreign laws, practices, or customs have no place in the analysis of the Pennsylvania Constitution. Fortunately, the Majority does not suggest to the contrary. Future litigants should take note.

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[45] Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 88 (2005).

[J-60-2024] [MO: Todd, C.J.]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 3 WAP 2024
	:	
Appellee	:	Appeal from the Order of the
	:	Superior Court entered June 13,
	:	2023, at No. 1008 WDA 2021,
v.	:	Affirming the Order of the Court of
	:	Common Pleas of Allegheny County
	:	entered December 19, 2016, at No.
DEREK LEE,	:	CP-02-CR-0016878-2014.
	:	
Appellant	:	ARGUED: October 8, 2024

CONCURRING OPINION

JUSTICE MUNDY **DECIDED: MARCH 26, 2026**

I agree with the majority that under the Supreme Court's cases there is no basis to conclude that life without parole as a penalty for an adult convicted of felony murder violates the Eighth Amendment. I also agree that Article I, Section 13 of the Pennsylvania Constitution prohibits a mandatory sentence of life without parole for felony murder in relation, specifically, to defendants who did not kill, attempt to kill, or intend that anyone be killed. As that is all this case decides, I believe some of the language used by the majority in describing its holding may be imprecise, at least to the extent it can be construed to encompass second-degree murderers who either killed or intended to kill. *See, e.g.*, Majority Op. at 70 ("Accordingly, we conclude Section 13's prohibition on cruel punishments proscribes a sentencing model which mandates the imposition of life imprisonment without parole for felony murder."). The limited scope of the present decision is discussed below.

First, though, the seriousness of the offense of felony murder should not be understated. Felonies are dangerous crimes, and the General Assembly has broad latitude to set the penalty when a defendant willingly participates in a predicate felony and someone is killed during its commission. *See* 18 Pa.C.S. § 2502(d) (listing the predicate felonies as robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary, and kidnapping); *cf. Commonwealth ex rel. Corbett v. Griffin*, 946 A.2d 668, 675 (Pa. 2008) ("[T]he Legislature's determination as to whether a particular offense is serious enough at a given time to warrant the status of felony reflects the public will as expressed through the ballot box."). The *result* of dangerous conduct often determines its criminality, and anyone who voluntarily embarks upon a predicate felony as principal or accomplice is assumed to be aware the crime could lead to violence, up to and including death. *See Commonwealth v. Legg*, 417 A.2d 1152, 1154 (Pa. 1980) (under a reasonable-person standard, the actor knew or should have known death might result from the felony and proceeded with it anyway). Thus, we have explained that, with felony murder, the defendant acted with "malice incident to the perpetration of the initial felony," which is then extended by law to the homicide, making it murder. *Commonwealth v. Yuknavich*, 295 A.2d 290, 292 (Pa. 1972). Some predicate crimes are so inherently dangerous that the legislature may impose the severest penalty short of execution when they end in someone's death. Courts should not lose sight that an unjustified killing is the ultimate act of evil, one that completely erases another person's entire existence and potential. *See Graham v. Florida*, 560 U.S. 48, 69 (2010).

The instant case is illustrative. Appellant willingly participated in an armed home invasion and robbery, and purposefully engaged in assaultive behavior in the form of tasing and pistol-whipping the victim. Anyone who invades someone else's home should expect a high probability that violence will occur, which obviously could lead to death.

The added factor that the invasion was armed and the perpetrators arguably kidnapped the victims by forcing them into the basement only drives that point home.[1] In such instances, the theoretical foundations of the felony-murder doctrine stand on solid ground, including transferred malice and strict liability.

In other instances, the felony-murder defendant may play a relatively minor role, such as the getaway driver for an unarmed confederate. *See* Majority Op. at 63 (distinguishing the "lookout" from the triggerman). Through youth or naiveté, he may expect the incident to involve the stealing of a few items from a convenience store and little else. *Cf*. Concurring Op. at 3 (Wecht, J.) (describing that the driver may only intend to "make off with some ill-gotten gains"). In such circumstances, the driver is still guilty of a serious crime. He will have waited in a nearby vehicle to help the actual robber escape with stolen goods. And the robbery itself must, to constitute a robbery, be undertaken with at least the threat of immediate serious bodily injury, *see* 18 Pa.C.S. § 3701(a)(1) – a threat even an unarmed person is capable of making through deception or physicality. Even if the store clerk is not physically harmed in the course of the robbery, moreover, the event may be terrorizing, and either he or someone else will have been unjustly deprived of property for which they are presumed to have labored. But as for the getaway driver who had no intention that physical harm would come to anyone, and who did not attempt to harm anyone – as to that person, even if one might suggest a lengthy prison sentence is appropriate, incarcerating him for life without parole based on such conduct does appear to fit the description of "cruel" in the *constitutional* sense. *See* Concurring Op. at 10-11 (Dougherty, J.).

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[1] *See* 18 Pa.C.S. § 2901(a) (defining kidnapping to include unlawfully removing another person "a substantial distance under the circumstances from the place where he is found," or confining another person for a substantial period in a place of isolation with the intent to commit any felony or terrorize the victim).

Turning to the present case, this is, in effect, a facial challenge that involves only a subset of defendants convicted of felony murder. Appellant framed the issue subject to the assumption that he "did not kill or intend to kill," and that is the constitutional issue we accepted for review:

> Is [Appellant's] mandatory sentence of life imprisonment with no possibility of parole unconstitutional under Article I, § 13 of the Constitution of Pennsylvania where he was convicted of second-degree murder *in which he did not kill or intend to kill and therefore had categorically-diminished culpability*, and where Article I, § 13 should provide better protections in those circumstances than the Eighth Amendment to the U.S. Constitution?

Commonwealth v. Lee, 313 A.3d 452 (Pa. 2024) (*per curiam*) (emphasis added). Consistent with the issue as articulated, Appellant argues his challenge should be sustained precisely because defendants who "did not kill or intend to kill" are less culpable. Brief for Appellant at 54. He continues by reference to *Graham* and *Enmund v. Florida*, 458 U.S. 782 (1982). *Enmund* affirmed that in a felony-murder prosecution the reviewing court's proportionality analysis should focus on the defendant's culpability and not that of the person who killed the victim, *see Enmund*, 548 at 798, and it barred the death penalty for a robbery accomplice who did not kill, attempt to kill, or intend or contemplate that a life would be taken during the robbery. *See id*. at 801. For its part, *Graham* explained that a juvenile offender who did not kill or intend to kill has diminished moral liability both because of his youth *and* because of the absence of homicidal conduct or intent. *See Graham*, 569 U.S. at 69 (expressing that the offender's blameworthiness is "twice diminished"). Based on these decisions, Appellant argues:

> Defendants who do not kill, attempt to kill, or intend to kill are therefore less morally culpable than those who do, and are therefore less deserving of the most severe punishments. . . . Under the [United States Supreme] Court's long-standing proportionality framework, a punishment is categorically disproportionate to the offense if there are "mismatches between the culpability of a class of offenders and the severity of the penalty."

Brief for Appellant at 55-56 (quoting *Miller v. Alabama*, 567 U.S. 460, 470 (2012)).

All of this demonstrates we are not presently asked to decide whether a mandatory sentence of life without parole violates Section 13 for a second-degree murderer who killed, attempted to kill, or intended to kill. We are "limited to the issue as it was framed in the petition for allowance of appeal," *Briggs v. Sw. Energy Prod. Co.*, 224 A.3d 334, 350 (Pa. 2020), and our mandate is to "decide the discrete legal issue presented to us." *Rendell v. Pa. State Ethics Comm'n*, 983 A.2d 708, 718 (Pa. 2009). It is worth noting that someone who did not kill the homicide victim might have intended to do so. *See, e.g.*, *Sellers v. People*, 560 P.3d 954 (Colo. 2024) (upholding mandatory life without parole for a defendant convicted of felony murder, who fired a weapon at the victim but missed).[2] Alternatively, a person might kill another individual during the course of a felony, albeit without the specific intent required for first-degree murder. *See, e.g.*, *Commonwealth v. Wellman*, 344 A.3d 13 (Pa. Super. 2025). *See generally Commonwealth v. Mickell*, 729 A.2d 566, 569 (Pa. 1999) (explaining the difference between the requisite malice for first- and second-degree murder). But we must presume for purposes of today's decision that Appellant neither killed nor intended or contemplated that a life would be lost during the robbery in which he participated.

The inevitable consequence is that our present ruling does not encompass a determination that mandatory life without parole violates Section 13 vis-à-vis a different class of second-degree murderers: those who killed, attempted to kill, or intended to kill. Such defendants lie outside the scope of the issue presented to this Court and resolved by it. To the extent this case may be viewed as presenting a facial challenge based on a

[2] A similar circumstance would arise if the defendant shot at a store clerk, intending to kill him, and the clerk returned fire, killing the defendant's coconspirator or a bystander (or the confederate killed the bystander). *But cf. Commonwealth v. Redline*, 137 A.2d 472 (Pa. 1958) (where police used justifiable force to kill the defendant's confederate in a shootout, the defendant was not guilty of murder at common law).

categorical prohibition, *see* Majority Op. at 8 ("Appellant raises a facial challenge."), that category is limited by the framing of the issue. The Commonwealth points out, correctly, that the General Assembly is authorized to "define grades of murder and assign sentences to each." Brief for Appellee at 16. That body's enactments enjoy a strong presumption of validity and will only be invalidated if they violate the Constitution "clearly, palpably, and plainly." *Ferguson v. PennDOT*, 340 A.3d 278, 285 (Pa. 2025). Deference to the legislative judgment applies with special force where contemporary standards for criminal punishment are concerned, as those standards are "peculiarly questions of legislative policy." *Commonwealth v. Hairston*, 249 A.3d 1046, 1056 (Pa. 2021) (quoting *Gregg v. Georgia*, 428 U.S. 153, 176 (1976)). These observations, in turn, counsel against interpreting our present ruling as broadly invalidating Pennsylvania's felony-murder sentencing scheme. The General Assembly has determined, *inter alia*, that all second-degree murderers who *did* kill, attempt to kill, or intend to kill, are to be sentenced to life without parole. That legislative determination is not before us, and nothing in this decision indicates it is inconsistent with the Pennsylvania Constitution.

Although Appellant framed his issue in terms of his "categorically-diminished culpability," his utilization of the word *categorical* should not be interpreted in the technical sense in which the United States Supreme Court uses that term in its Eighth Amendment jurisprudence. The Supreme Court has drawn a distinction under the Eighth Amendment between case-by-case review for gross disproportionality, and a broader consideration of societal standards that identify a national consensus and independent judgments about the penalty. *See Graham*, 560 U.S. at 60-61. This categorical approach has been applied mainly to defendants convicted of non-homicide offenses, juvenile offenders, and offenders with certain intellectual disabilities. *See id*. at 61 (citing *Kennedy v. Louisiana*, 554 U.S. 407 (2008), *Roper v. Simmons*, 543 U.S. 551 (2005), and *Atkins v. Virginia*, 536

U.S. 304 (2002)). Appellant does not fall into any of those categories, and there is nothing in today's decision suggesting it is grounded on a national consensus. Rather than try to shoehorn the Supreme Court's "categorical" language into Pennsylvania constitutional law, I believe it appropriate to describe the instant case as raising a *limited facial challenge*. *Cf. United State v. Blount*, 764 F. Supp. 3d 281, 296-97 (W.D. Pa. 2025) (addressing a limited facial challenge to a federal statute). As mentioned above, Appellant is not seeking to invalidate life-without-parole sentences for all felony murderers, only for a clearly-defined subset of them (those who did not kill or intend to kill). In that sense the challenge is limited. But as to that subset of felony murderers, the challenge is facial. This is because of the way the issue is presented and argued. Appellant does not rely on any facet of his specific conduct that would differentiate him from any other defendant convicted of second-degree murder who did not kill, attempt to kill, or intend to kill. Nor does the majority. Consequently, by deeming Appellant's challenge meritorious, the majority necessarily invalidates the statute as to a class of parties who are not before the court, namely, all second-degree murderers who did not kill, attempt to kill, or intend to kill. *See Citizens United v. FEC*, 558 U.S. 310, 331 (2010) (discounting any "as-applied" label where the claims forwarded by the corporate party would, if meritorious, invalidate the challenged statute as to all corporations).

I am also hesitant to the extent my colleagues may be interpreted to suggest a sentence of life without parole for Appellant is unconstitutional. *See, e.g.*, Concurring Op. at 6-7 (Dougherty, J.). That is not the issue before us. The issue is whether Pennsylvania statutory law may, in Appellant's circumstances, make that sentence mandatory rather than discretionary – *i.e.*, imposed without the sentencing court's ability to consider the defendant's character and record, or the circumstances of his offense. The issue is thus similar to the one raised in *Miller v. Alabama*, 567 U.S. 460 (2012), where the Supreme

Court invalidated mandatory life without parole for juvenile offenders because it precluded the sentencing court from accounting for the juvenile's age, the attendant characteristics of youth, and the circumstances of the offense. *See id*. at 477-78; *see also Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (striking down a statute mandating the death penalty for first-degree murder, which gave "no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense"). In *Commonwealth v. Felder*, 269 A.3d 1232 (Pa. 2022), we explained that "*Miller*'s bar on mandatory life-without-parole sentencing regimes 'is a prophylactic that entitles a juvenile homicide offender to a certain sentencing process, but not a particular sentencing outcome.'" *Id*. at 1245 (quoting *United States v. Grant*, 9 F.4th 186, 193 (3d Cir. 2021)). The same is true here. It will be for the sentencing court on remand to determine Appellant's sentence, and nothing in this Court's present decision precludes life without parole imposed as a discretionary exercise of that court.

Separately, in reaching its holding the majority asks whether mandatory life imprisonment without parole advances the traditional penological goal of deterrence. It is self-evident that the harsher the penalty, the greater its deterrent effect. In any event, a greater penalty will not have a lesser deterrent effect. *Cf. Gregg v. Georgia*, 428 U.S. 153, 186 (1976) (stating that, while some people will not be deterred from committing a capital offense by the death penalty, for many others the penalty is a "significant deterrent"). The majority expresses, however, that in the present context, a harsher penalty has *reduced* deterrence. *See* Majority Op. at 67. The majority reasons from the premise that deterrence requires "escalating consequences for escalating [criminal] severity," *id*. at 67, but I view that as a faulty premise. Deterring people from committing second-degree murder does not require that its prescribed punishment be less severe than the penalty attached to first-degree murder. All that matters is the punishment for

second-degree murder. The harsher it is, the more people will be deterred from committing it. While the majority notes the actual killer's conduct *in killing the victim* "may be outside the control of the defendant," it overlooks that the defendant's decision to embark upon a predicate felony lies within the defendant's power. It seems straightforward that, if a person knows he will be sentenced to life without parole if the felony he elects to participate in leads to someone's death, he will be less likely to participate in the felony.

In closing, we are not moral philosophers; we decide issues of law. I am circumspect about some of the wording used in our prior cases that can be read to suggest we are more advanced, morally speaking, than our forebears. In a case involving the murder of a police officer during an armed robbery, we stated that retribution as a penological justification is "incongruous in an era of enlightenment." *Commonwealth v. Elliot*, 89 A.2d 782, 784 (Pa. 1952); *cf*. Majority Op. at 50 (positing that the concept of penological necessity has been "understood to evolve over time with the development of moral and scientific advancements"). Later, the Supreme Court held that the Eighth Amendment's text "must draw 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) – a phrase we adopted as a litmus for Article I, Section 13.[3] This type of portrayal marshals to its aid an unsubstantiated assumption that our own modern society is more "enlightened," more "evolved," more "decent," more "mature" than past civilizations and societies. To my mind, the accuracy of this allusion to inevitable moral progress and suggestion of inherent superiority is neither empirically established nor sufficiently evident to constitute a premise that can validly support legal doctrine. It strikes me, rather, as an

[3] *See Commonwealth v. Zettlemoyer*, 454 A.2d 937, 968 (Pa. 1982); *Commonwealth v. Hairston*, 249 A.3d 1046, 1056 (Pa. 2021).

example of the fallacy of chronological snobbery.[4] As a matter of constitutional reasoning, I find it more persuasive to analyze whether a challenged penalty is "cruel" for Section 13 purposes on its own terms, without an unearned assist from the presumption of inevitable moral progress and human improvement through evolution.[5]

[4] *See generally* A. J. Hoover, DON'T YOU BELIEVE IT, Ch. 10 (Moody Press 1982).

[5] I am not saying the majority does this. My remarks are directed at some of the language used in our prior cases that are referenced by the majority.

[J-60-2024] [MO:Todd, C.J.]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 3 WAP 2024
	:	
Appellee	:	Appeal from the Order of the
	:	Superior Court entered June 13,
	:	2023, at No. 1008 WDA 2021,
v.	:	Affirming the Order of the Court of
	:	Common Pleas of Allegheny County
	:	entered December 19, 2016, at No.
DEREK LEE,	:	CP-02-CR-0016878-2014.
	:	
Appellant	:	ARGUED: October 8, 2024

CONCURRING AND DISSENTING OPINION

JUSTICE BROBSON **DECIDED: MARCH 26, 2026**

Appellant Derek Lee (Lee) and another man, armed with guns and a taser, entered uninvited into the home of Leonard Butler (Victim) on October 14, 2014. Both men forced Victim into the basement of the home, which Victim shared with his 9-year-old son and his son's mother, and demanded that Victim give them his money. While in the basement, Lee pistol whipped Victim in the face and stole Victim's watch. Lee then returned upstairs, while the other man remained in the basement with Victim. Following a struggle between the other man and Victim over the gun, the gun discharged, killing Victim. For this, a jury convicted Lee of murder in the second degree—*i.e.*, felony murder, defined in Section 2502(b) of the Crimes Code as criminal homicide when "committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony." 18 Pa. C.S. § 2502(b).

Section 1102(b) of the Crimes Code compelled the sentencing judge, in this case the late-Honorable David Cashman of the Allegheny County Court of Common Pleas, to

sentence Lee to life imprisonment for the second-degree murder conviction. 18 Pa. C.S. § 1102(b). The Crimes Code does not include a minimum, alternative sentence for felony murder. Accordingly, under Section 1102(b), life imprisonment is both the minimum and maximum sentence for felony murder in the Commonwealth. *See Castle v. Pa. Bd. of Prob. and Parole*, 554 A.2d 625, 628 (Pa. Cmwlth. 1989) (concluding that Section 1102(b)'s omission of "words 'not less than' or 'at least' does not render [an inmate's] sentence something other than a mandatory minimum").

As a result of his life sentence for the felony murder of Victim, Lee is not eligible for parole consideration by the Pennsylvania Parole Board (Board) because of two provisions in the Prisons and Parole Code (Parole Code),[1] which limit the Board's authority. The first is Section 6137(a)(1), which provides the Board generally with the authority to release offenders on parole, "except an offender . . . serving life imprisonment." 61 Pa. C.S. § 6137(a)(1). The second is Section 6137(a)(3), which prohibits the Board from exercising its pardon power before the expiration of the offender's "minimum term." *Id*. § 6137(a)(3). Section 1102(b) of the Crimes Code operates in tandem with Section 6137(a)(1), (3) of the Parole Code to create an overarching sentencing scheme amounting to a mandatory life without parole (LWOP) sentence for every offender convicted of felony murder in the Commonwealth. *See Scott v. Pa. Bd. of Prob. and Parole*, 284 A.3d 178, 192 (Pa. 2022) ("[T]he legislative intent to forever bar parole eligibility for all individuals convicted of second-degree murder is best described as part of the judgment of sentence.").[2]

[1] 61 Pa. C.S. §§ 101-6309.

[2] *But see Scott*, 284 A.3d at 199-207 (Wecht, J., dissenting) (disagreeing with majority's conclusion that Parole Code limits on parole eligibility for those serving sentences of life imprisonment are part of sentence).

We accepted discretionary review of this matter to consider Lee's facial constitutional challenge to this mandatory LWOP sentencing scheme for felony murder. In essence, Lee's argument is that not all felony murder offenders are created equal and, therefore, a sentencing scheme that imposes a mandatory LWOP sentence for felony murder regardless of the culpability level of the offender violates, *inter alia*, the Pennsylvania Constitution's prohibition against "cruel punishments."[3] Pa. Const. art. I, § 13. In furtherance of this argument, Lee advances a departure claim under *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), urging this Court to interpret our state charter's prohibition against "cruel punishments" as providing greater protection to offenders than that afforded under the Eighth Amendment to the United States Constitution, which prohibits "cruel and unusual punishments." U.S. Const. amend. VIII.

Generally, I agree with the Majority's *Edmunds* analysis and its conclusion that Article I, Section 13 of the Pennsylvania Constitution provides broader protection against "cruel punishments" than that afforded under the Eighth Amendment to the United States Constitution. I further agree, generally, with the Majority's conclusion that a mandatory, or *per se*, LWOP sentence for *all* offenders convicted of felony murder, regardless of criminal intent or level of culpability, runs afoul of the protections afforded under our state charter. I reach these conclusions, however, with some critical reservations.

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[3] Lee also argues that a sentencing scheme that imposes a mandatory LWOP sentence for felony murder under circumstances where the offender did not kill or intend to kill—*i.e.*, the offender had a categorically diminished culpability—violates the Eighth Amendment to the United States Constitution. The Majority concludes that "the United States Supreme Court's decisions employing a categorical approach, whether involving the death penalty with diminished culpability, or regarding the sentencing of the distinct class of juveniles to mandatory life without parole[,] are, under the Eighth Amendment, distinguishable from an analysis of the mandatory sentencing of adults to life without parole and, at least at this juncture, without additional guidance from the high Court, provide[] no relief" to Lee. (Majority Op. at 28.) I agree with the Majority on this point.

First, the Majority *does not* conclude that Section 1102(b) of the Crimes Code, which imposes a mandatory sentence of life imprisonment for felony murder, is unconstitutional. To the contrary, the Majority concludes that a sentencing scheme that mandates the imposition of LWOP for felony murder, without an assessment of culpability, constitutes "cruel punishment" under Article I, Section 13 of the Pennsylvania Constitution. Indeed, the Majority's mandate preserves life imprisonment as the only legislatively authorized sentence for felony murder. (Majority Op. at 71 (directing that, on remand, sentencing court may sentence to LWOP or life imprisonment accompanied by minimum sentence for purposes of determining parole eligibility).) Why is this important? It is important because, regardless of what the sentencing court decides on remand in this matter, Lee could still spend the rest of his life in prison. Either the sentencing court sentences him again to LWOP, or the sentencing court sentences him to life imprisonment with a minimum term of imprisonment that, once expired, will make him eligible to seek parole from the Board.[4] *See Rogers v. Pa. Bd. of Prob. and Parole*, 724 A.2d 319, 321 n.2 (Pa. 1999) ("Under Pennsylvania law, the minimum term imposed on a prison sentence merely sets the date prior to which a prisoner may *not* be paroled." (emphasis in original)). There is, however, no right to favorable parole consideration by the Board. Indeed, a Board decision to deny parole is not subject to judicial review. *See Pittman v. Pa. Bd. of Prob. and Parole*, 159 A.3d 466, 470 n.7 (Pa. 2017); *Rogers*, 724 A.2d at 323 (rejecting claim of statutory and constitutional right to appeal decision denying parole).

[4] I note that this is all Lee has requested. He seeks only "a sentence that will allow him a *meaningful opportunity* to obtain release from incarceration *through the parole system*." (Appellant's Br. at 60 (emphasis added).) In other words, Lee does not challenge his specific sentence of life imprisonment; rather, he challenges only the portion of the sentencing scheme that creates a *per se* prohibition against anyone serving a sentence of life imprisonment for felony murder from access to parole consideration by the Board.

Second, to the extent the Majority's mandate is followed, the proceedings on remand should not turn into a *de facto* parole hearing. *See* 61 Pa. C.S. § 6135(a) (setting forth factors Board is to consider in parole decision). The sentencing court should, based solely on a review of the record of the criminal proceedings, assess Lee's *criminal intent and culpability* with respect to his felony murder conviction and determine whether Lee should, at some point, be eligible for parole. What remains unclear, however, is how to elucidate a judicially manageable standard by which the sentencing court must assess Lee's criminal intent and culpability and translate that assessment into a lawful sentence. A direction on remand to consider Lee's "individual culpability," (Majority Op. at 71), without more, invites widely disparate outcomes between sentencing courts and, in my respectful view, will not fully address the cruel punishment proportionality challenge that the Court sustains in this case.

While the Majority's remand for resentencing is consistent with the Court's mandate in *Commonwealth v. Batts*, 66 A.3d 286 (Pa. 2013), the Court in *Batts* provided more robust remand guidance to the sentencing court than the Majority does here. In *Batts*, this Court ruled that Pennsylvania's mandatory LWOP sentencing scheme for juveniles convicted of first-degree murder was unconstitutional under the Eighth Amendment to the United States Constitution in light of the United States Supreme Court's deeply divided decision in *Miller v. Alabama*, 567 U.S. 460 (2012). As this Court noted in *Batts*, the *Miller* Court sustained an Eighth Amendment proportionality challenge in that matter because the mandatory nature of the LWOP sentence

> precluded the sentencing court from considering important factors, such as chronological age, level of maturity, family and home environment, the circumstances of the offense, the extent of the juvenile's participation in the unlawful conduct, the impact of familial and peer pressures, the juvenile's ability to negotiate with police or prosecutors, and the possibility of rehabilitation.

Batts, 66 A.3d at 291. A juvenile LWOP sentencing scheme that does not afford the opportunity to reflect on these concerns risks disproportionate punishment and, therefore, violates the Eighth Amendment under *Miller. Id*.

With *Miller* decided and controlling, the Court in *Batts* readily concluded that imposition of the Commonwealth's mandatory LWOP sentence imposed on the juvenile appellant in *Batts* violated the juvenile appellant's Eighth Amendment to the United States Constitution right against cruel and unusual punishment and turned its focus to the narrower issue of how to remedy the violation. *Id.* at 293. Ultimately, the Court determined that a remand for resentencing was appropriate with an instruction to the sentencing court to consider "appropriate age-related factors," including:

> a juvenile's age at the time of the offense, his diminished culpability and capacity for change, the circumstances of the crime, the extent of his participation in the crime, his family, home and neighborhood environment, his emotional maturity and development, the extent that familial and/or peer pressure may have affected him, his past exposure to violence, his drug and alcohol history, his ability to deal with the police, his capacity to assist his attorney, his mental health history, and his potential for rehabilitation.

Id. at 297 (quoting *Commonwealth v. Knox*, 50 A.3d 732, 745 (Pa. Super. 2012)).

An instruction that the sentencing court on remand consider Lee's "individual culpability" at resentencing is as amorphous and inadequate as directing a resentencing court in a juvenile matter to consider, post-*Miller*, an offender's "age." We gave far greater remand guidance to the sentencing court in *Batts*. Moreover, as we noted in *Batts*, Section 1102.1(d) of the Sentencing Code, added by the General Assembly in 2012 in response to *Miller*, expressly requires a sentencing court to consider certain factors and make findings on the record relative to those factors when determining whether to impose an LWOP sentence on a juvenile:

> (1) The impact of the offense on each victim, including oral and written victim impact statements made or submitted by family members of the victim detailing the physical, psychological and economic effects of the

crime on the victim and the victim's family. A victim impact statement may include comment on the sentence of the defendant.

(2) The impact of the offense on the community.

(3) The threat to the safety of the public or any individual posed by the defendant.

(4) The nature and circumstances of the offense committed by the defendant.

(5) The degree of the defendant's culpability.

(6) Guidelines for sentencing and resentencing adopted by the Pennsylvania Commission on Sentencing.

(7) Age-related characteristics of the defendant, including:

(i) Age.

(ii) Mental capacity.

(iii) Maturity.

(iv) The degree of criminal sophistication exhibited by the defendant.

(v) The nature and extent of any prior delinquent or criminal history, including the success or failure of any previous attempts by the court to rehabilitate the defendant.

(vi) Probation or institutional reports.

(vii) Other relevant factors.

18 Pa. C.S. § 1102.1(d). Clearly, this post-*Miller* legislative response proves our policymaking branch's willingness, ability, and interest in establishing robust and clear criteria for sentencing courts to apply when assessing whether to impose an LWOP sentence.

We cannot here draw upon guidance from the United States Supreme Court, as we did in *Batts* with respect to age-related factors, for a list of "individual culpability" factors that a sentencing court should apply when deciding whether to impose an LWOP sentence for felony murder *or*, if not, how to set a minimum sentence for purposes of parole eligibility. The parties also do not offer any such guidance in their arguments to the Court. Of course, we could make up our own list. Factors that come to mind in

assessing an offender's individual culpability for the felony murder could include, for example, whether the offender was armed at the time of the murder, whether the offender committed any act of physical violence against the victim during the felony, whether the offender had the opportunity to prevent the murder but chose not to act, whether the offender threatened the victim or anyone else with physical harm, and whether the offender was even present at the time of the murder. To me, any list of factors to guide a sentencing court on remand is preferable to the Majority's nonspecific instruction to consider Lee's "individual culpability."

For all of these reasons, left to my own devices, I would not provide a remedy to Lee for the constitutional violation at this juncture, nor would I telegraph to Lee, the General Assembly, the Governor, or the public at-large how the Court intends to proceed if the General Assembly fails to enact remedial legislation within the time set by the Majority. Indeed, there appear to be multiple legislative options to address the constitutional problem with mandatory LWOP sentences for felony murder as applied to Lee and others serving the same sentence under the same problematic sentencing scheme, and not all would require resentencing. Whether and, if so, how the General Assembly chooses to address this matter will require debate and compromise, and this Court's telegraphing how it will rule in the absence of action within a court-imposed deadline could impede that collaborative process. I would prefer, then, to stay this matter without direction on how the Court plans to proceed thereafter.