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IN THE SUPREME COURT OF PENNSYLVANIA

No. 3 WAP 2024

COMMONWEALTH OF PENNSYLVANIA, Appellee

v.

DEREK LEE, Appellant

BRIEF OF AMICI CURIAE THE PENNSYLVANIA PRISON SOCIETY, THE AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, THE AMERICAN CIVIL LIBERTIES UNION, THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER, AND PROFESSOR MICHAEL MERANZE IN SUPPORT OF APPELLANT

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

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INTEREST OF AMICI

Amici are the Pennsylvania Prison Society, The American Civil Liberties Union of Pennsylvania, The American Civil Liberties Union, The Roderick and Solange MacArthur Justice Center, and Professor Michael Meranze, a scholar of early American legal histories. Amici's interest in this case is to assist the Court in grounding its analysis of Section 13 on a thorough and accurate understanding of its history and meaning when it was adopted in 1790.

The Pennsylvania Prison Society, the oldest prison reform society in the world, was founded in Philadelphia in 1787 to reform the Commonwealth's penal system in accord with Enlightenment principles. For 237 years, the Society has worked to advance the health, safety, and dignity of the people who live and work in every jail and prison in the Commonwealth. Cruel punishments, in every form, are anathema to the Society's mission.

The American Civil Liberties Union of Pennsylvania (ACLU of Pennsylvania) and the national American Civil Liberties Union (ACLU) are non-profit, nonpartisan organizations dedicated to defending and expanding individual rights and personal freedoms throughout, respectively, Pennsylvania and the country. Through advocacy, public education, and litigation, the ACLU of Pennsylvania works to preserve and enhance liberties grounded in the United States and Pennsylvania constitutions and civil rights laws. In recent years,

the ACLU of Pennsylvania has focused resources on promoting respect for people's constitutional rights in Pennsylvania's criminal legal systems. *See, e.g., League of Women Voters of Pennsylvania v. DeGraffenreid*, 265 A.3d 207 (Pa. 2021) (challenging proposed constitutional amendments that undermine criminal defendants' rights); *Kuren v. Luzerne Cnty.*, 146 A.3d 715 (Pa. 2016) (challenging constitutionality of indigent defense system); *J.H. v. Dallas*, 15-cv-02057-SHR (M.D. Pa., Jan. 27, 2016) (challenging prolonged wait times for incompetent criminal defendants to access treatment); *Doe v. McVey*, 513 F.3d 95 (3d Cir. 2008) (challenge to unfair application of Megan's Law supervision to out-of-state offenders). The ACLU has focused resources on similar issues, including the issue of life without parole sentences imposed on defendants convicted of felony murder. *See Sellers v. Colorado*, No. 22SC73 (S. Ct, St. of Colo. September 10, 2023) (amicus brief addressing the racially disparate impact of life without parole sentencing for strict-liability felony murder).

The Roderick and Solange MacArthur Justice Center (RSMJC) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur. Through its litigation efforts, RSMJC seeks to vindicate individual rights, hold people with power accountable, and demand real reform. RSMJC attorneys have led civil rights battles in areas including police misconduct, the rights of the indigent in the criminal legal system, compensation for the wrongfully convicted,

and the treatment of incarcerated people. RSMJC has served as merits counsel, amicus counsel, or amicus curiae in numerous cases around the country challenging excessive or unfair sentences, including *Sellers v. Colorado*, No. 22SC738 (S. Ct, St. of Colo. September 11, 2023) (arguing that life without parole for strict-liability felony murder violates the state constitution); *Commonwealth v. Mattis*, No. SJC-11693 (S. Judicial Ct. Mass. Nov. 11, 2022) (contending that life without parole sentences for late adolescents over age 18 violate the Massachusetts Declaration of Rights); *Scott v. Pennsylvania Board of Probation and Parole*, 256 A.3d 483 (Pa. Cmmw. Ct. 2021) (contending that life without parole sentences for felony-murder convictions violate the state constitution); and *Jones v. Mississippi*, 593 U.S. 98 (2021) (arguing that a sentencer must make a finding that a juvenile is permanently incorrigible for imposing a LWOP sentence).

Michael Meranze is a Professor of History at the University of California, Los Angeles who specializes in United States intellectual and legal history with an emphasis on early America, including the history of the American death penalty. He is the author of *Laboratories of Virtue: Punishment, Revolution, and Authority in Philadelphia, 1760-1835*, an examination of the birth of the penitentiary in the context of the contradictions of the American Revolution and early Liberalism.

ARGUMENT

Article 1, Section 13 of the of the Pennsylvania Constitution reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." Pa. Const., art. 1, § 13. When Section 13 was adopted in 1790, Pennsylvania led the country in applying Enlightenment principles to its penal system. These principles—reducing excessive punishments, reforming individuals convicted of crimes, and deterring crimes through proportionate sentences—spurred the Commonwealth to adopt a series of revolutionary reforms in the years immediately before and after Section 13's adoption. The Commonwealth's new system, animated by "the duty of every government to endeavor to reform, rather than exterminate offenders," 15 Statutes at Large of Pennsylvania 174 (1794), was subsequently embraced by every other state, the federal government, and most countries around the world.

Section 13's prohibition on "cruel punishments"– which predates and is textually broader than the Eighth Amendment—embodied these Enlightenment principles, as Pennsylvania's framers explicitly recognized. Cruelty was then understood to mark any punishment that was disproportionately or unnecessarily severe to serve the purposes of reformation and deterrence. It should be understood the same way today.

This Court has recognized that it is "important and necessary that we undertake an independent analysis of the Pennsylvania Constitution," *Commonwealth v. Edmunds*, 586 A.2d 887, 896 (Pa. 1991), and this duty is paramount here. Guided by that principle, and considering the founders' historical understanding that sentencing should focus on reformation and deterrence, a sentence of life imprisonment without parole for one convicted of felony-murder is manifestly cruel. Mr. Lee, like more than a thousand other Pennsylvanians, was sentenced to die in prison for a killing that someone else committed—a homicide that Mr. Lee neither caused nor intended. His sentence turns Section 13's Enlightenment principles of restoration and proportionate deterrence on their head. This Court should independently analyze these punishments under Section 13 and hold that they are cruel.

A. Section 13's Prohibition On "Cruel Punishments" Is Independent From The Eighth Amendment's Prohibition On "Cruel and Unusual Punishments."

The framers of Pennsylvania's 1790 Constitution saw the penal system as a distinct and core concern of state government. Their analysis of the cruelty and propriety of criminal punishments focused on history, traditions, and practices unique to this Commonwealth. *See* William Bradford, *An Enquiry: How Far the Punishment of Death Is Necessary in Pennsylvania* (1793), published in 12 Am. J. Legal Hist. 122 (1968). This Court's scrutiny of contemporary punishments

imposed in the Commonwealth should use the same touchstone. Section 13 should have independent force and meaning.

This accords with a foundational principle of our Commonwealth and our nation: state constitutions enable "rights and liberties to be effectuated to the fullest," whereas the U.S. Constitution encompasses a "negative restriction on the states' power to act in certain ways." Alan B. Handler, *Expounding the State Constitution*, 35 Rutgers L. Rev. 202, 205 (1983). Thus, "state courts, as the ultimate arbiters of state law, have the prerogative and duty to interpret their state constitutions *independently*." Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. Rev. 1307, 1315 (2017) (emphasis in original). This Court has accordingly "'on numerous occasions recognized the Pennsylvania Constitution to be an alternative and independent source of individual rights.'" *Commonwealth v. Sell*, 470 A.2d 457, 467 (Pa. 1983) (quoting *Commonwealth v. Tate*, 432 A.2d 1382, 1387-88 (Pa. 1981)).

This distinction between the protections of federal and state constitutions—and corresponding division of responsibility between the U.S. Supreme Court and this Court—makes logical sense. This Court is best situated to interpret the Pennsylvania Constitution, and Section 13 specifically, in accordance with "local conditions and traditions." Jeffrey Sutton, *51 Imperfect Solutions: States & The Making of American Constitutional Law* 17 (2018). And it is free to afford

individual guarantees that align both with Pennsylvania's deeply rooted history and its contemporary standards of decency, without the need to impose the kind of "federal discount" that arises from the U.S. Supreme Court's sweeping, nationwide jurisdiction. *Id.* at 175.

Indeed, "[t]he United States Supreme Court has repeatedly affirmed that the states are not only free to, but also encouraged to engage in independent analysis in drawing meaning from their own state constitutions." *Edmunds*, 586 A.2d at 894 (citing *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 80-82 (1980)); *see also California v. Greenwood*, 486 U.S. 35, 43 (1988) ("Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."). But this Court can only fully effectuate the individual rights embedded in the Pennsylvania Constitution by treating it as a stand-alone document and not presuming that federal law dictates its meaning. *See* Liu, *supra* at 1315.

Criminal law in particular warrants independent state constitutional analysis. Criminal law falls squarely within the expertise of the states, as most criminal prosecutions take place in state courts rather than the federal system. Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 Tex. L. Rev. 1141, 1150 (1985). And since most criminal prosecutions occur in state courts, proportionality within the state judicial system is

more vital than conformity with federal law. *Id.* As this Court has recognized, the Eighth Amendment is subject to "a federalism-based constraint," whereas Section 13 implies "that comparative and proportional justice is an imperative within Pennsylvania's own borders." *Commonwealth v. Eisenberg*, 98 A.3d 1268, 1283 (Pa. 2014) (internal quotation omitted).

Ultimately, "[t]here is no reason to think, as an interpretive matter, that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed the same." Sutton, *supra* at 174. This Court has expressly recognized as much. *See, e.g., Edmunds*, 586 A.2d at 895-96. Of course, here, Section 13 and the Eighth Amendment are textually distinct. And just as their text and foundational purposes are distinct, Section 13 has a unique history that guarantees protections at criminal sentencing that are independent of and broader than those of the Eighth Amendment.

B. Section 13, Which Pre-Dates The Eighth Amendment, Was Intended To Preclude Excessive Criminal Punishments.

This Court has accorded special force to rights that stem from "a deep history of unwritten legal and moral codes which had guided the colonists from the beginning of William Penn's charter in 1681." *Edmunds*, 586 A.2d at 896. The Court has further recognized that rights "first adopted as a part of our organic law in 1776" are of "paramount" importance. *Sell*, 470 A.2d at 467. And the Court has ruled that state constitutional guarantees predating the federal Bill of Rights

warrant independent and more robust interpretations than their federal counterparts. *Pap's A.M. v. City of Erie*, 812 A.2d 591, 605 (Pa. 2002); *Edmunds*, 586 A.2d at 896. Section 13 checks all these boxes.

Section 13's history shows that it merits distinct and greater force than the Eighth Amendment. In 1681, Pennsylvania was founded on Quaker ideals that rejected cruel and excessive punishments and embraced deterrence and reformation as the proper goals of punishment. Although British authorities later forced the colony to enact numerous brutal punishments, in practice the colonists resisted imposing harsh penalties. Then immediately after independence, the Commonwealth mandated "less sanguinary" and "more proportionate" punishments in its 1776 Constitution. These Enlightenment principles were implicitly incorporated into Section 13 when it was adopted in 1790. Not until a year later, in 1791, was the Eighth Amendment enacted. Thus, like the right to free expression, Section 13's Cruel Punishments Clause is "distinct and firmly rooted in Pennsylvania history and experience. The provision is an ancestor, not a stepchild" of the Eighth Amendment. *Pap's A.M.*, 812 A.2d at 603-05 & n.6 (addressing the right to free speech).

Specifically, Section 38 of Pennsylvania's 1776 Constitution required that punishments be made "less sanguinary, and in general more proportionate to the crimes." Pa. Const. of 1776, sec. 38. At the time, "sanguinary" meant "cruel." 1

Samuel Johnson, *A Dictionary of the English Language* (London, W. Strahan 1755). Thus, the 1776 Constitution endorsed the principle that excessive or disproportionate punishments were cruel.

The Commonwealth's firmly rooted history of relatively mild criminal penalties dates to its founding in 1681, when Pennsylvania adopted the most modern criminal code in Western society. It was "the mildest criminal code of any continental English colony, and one much milder than England's." Jack D. Marietta & G.S. Rowe, *Troubled Experiment: Crime and Justice in Pennsylvania, 1682-1800* 12 (2006). "The punishments prescribed in it were calculated to" achieve two ends: "to reform" and "to check a people," i.e., to deter crimes. Bradford, 12 Am. J. Legal Hist. at 134. These mild criminal laws "were often re-enacted: which is a decisive proof that they were found adequate to their object." *Id.* at 135. Pennsylvanians favored mild punishments because "[c]ruel and sanguinary punishments which had been multiplied under an ancient [British] system . . . were little adapted to people who had fled from persecution." Jared Ingersoll, *Report: Made by Jared Ingersoll. Esq. Attorney General of Pa., Jan. 21, 1813*, 1 J. of Juris: A New Series of the Am. L.J. 1, 325 (John E. Hall ed. 1821).

British authorities later forced the colony to adopt what Pennsylvanians saw as a "shocking catalogue of unjust and cruel penalties." Roberts Vaux, *Notices of the Original, and Successive Efforts, to Improve the Discipline of the Prison at*

Philadelphia and to Reform the Criminal Code of Pennsylvania 8 (1826). As Bradford explained, "the severity of our criminal law" under the British system "is an exotic plant and not the native growth of Pennsylvania." Bradford, 12 Am. J. Legal Hist. at 137. Nonetheless, "to enhance further its reputation for mildness," colonial Pennsylvanians "made provisions for softening the draconian sentences of the courts" such as the broad use of clemency and jury acquittals. Negley K. Teeters, *Public Executions in Pennsylvania, 1682-1834*, 64(2) J. Lanc. Cty. Hist. Soc. 89 (1960). And, "as soon as we separated from [Britain], the public sentiment disclosed itself, and this benevolent undertaking [of reforming criminal punishments] was enjoined by the constitution." Bradford, 12 Am. J. Legal Hist. at 137.

This was both a longstanding Quaker ideal and an emerging Enlightenment principle. All of the leading voices among Pennsylvania's framers—including Attorney General and later Pennsylvania Supreme Court Justice William Bradford, Governor Thomas Mifflin, Attorney General Jared Ingersoll, United States Supreme Court Justice James Wilson, and Thomas Paine—embraced the view that cruel punishments are those unnecessary for reformation and deterrence. *See* Kevin Bendesky, *'The Key-Stone to the Arch': Unlocking Section 13's Original Meaning*, 26 Univ. Pa. J. Const'l L. 208-12 (2023). These views endorsed the Enlightenment theories of criminal punishment espoused by Montesquieu and Beccaria. *Id.*

Indeed, the 1776 Constitution paraphrased Montesquieu, and the Legislature's 1786 penal reforms quoted him. *See* Pa. Const. of 1776, § 38; 12 Statutes at Large of Pennsylvania 280 (1786). Of Beccaria, Bradford wrote that his "humanitarian system, long admired in secret, was publicly adopted and incorporated by the Constitution of the State" upon independence. Bendesky, 26 Univ. Pa. J. Const'l L. at 237.

Montesquieu's and Beccaria's views were compatible with Pennsylvania's Quaker roots but not with the British system. Pennsylvania's commitment to making criminal laws "less sanguinary" went hand in hand with making them less British. *See* Bradford, 12 Am. J. Legal Hist. at 127-28, 133-34. Thus, unlike the Eighth Amendment—which the United States Supreme Court has interpreted as an importation of the seventeenth century British prohibition on "cruel and unusual punishments," *see Bucklew v. Precythe*, 587 U.S. 119, 130-31 (2019); *Solem v. Helm,* 463 U.S. 277, 285 (1983)—Section 13 derives from Enlightenment philosophy that Pennsylvanians saw as distinct from, and indeed irreconcilable with, British heritage.

Enlightenment era theory, Section 38 of the 1776 Constitution, and Pennsylvania's colonial history illuminate the philosophic underpinnings of Section 13's Cruel Punishments Clause. *See* Bradford, 12 Am. J. Legal Hist. at 126-27. "Pennsylvania led the country, and indeed the world, in turning

Enlightenment theories of punishment into legal guarantees, passing a series of early reform efforts that included Section 13 of the 1790 constitution." Bendesky, 26 Univ. Pa. J. Const'l L. at 213. Grounded on Pennsylvania's history and incorporating Enlightenment principles, Section 13 prohibits punishments that exceed what is necessary to deter crime and reform the offender.

C. The Framers Of The Pennsylvania Constitution Considered A Penalty To Be Cruel If It Exceeded What Was Necessary To Deter And Reform.

The Commonwealth ratified Section 13 on September 2, 1790. The plain language of the provision, as understood by every branch of Commonwealth government at the time, outlaws punishments that are not necessary to deter crime and reform offenders.

"The touchstone of interpretation of a constitutional provision is the actual language of the Constitution itself." *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 802 (Pa. 2018). In 1790, the definition of "cruel" connoted normative and moral judgment: "1. . . . hard-hearted; without pity; without compassion; savage; barbarous; unrelenting . . . 2. [Of things] . . . destructive; causing pain." Johnson, *A Dictionary of the English Language*; *see also* 1 Noah Webster, *An American Dictionary of the English Language* (New York, S. Converse 1828) (similar). In applying Section 13, this Court must therefore weigh whether a criminal punishment is "barbarous" or "destructive."

Pennsylvania's framers provide clear guidance on how to evaluate such cruelty. In 1793, William Bradford reasoned that state constitutional provisions directing that "cruel punishments ought not to be inflicted . . . implicitly prohibit every punishment which is not evidently necessary." Bradford, 12 Am. J. Legal Hist. at 127. Such necessity, in turn, arises only from the purposes of reformation and deterrence. *Id.* at 126-27. And the goal of deterrence is itself limited by the principle that "every penalty should be proportioned to the offense." *Id.* at 126. Bradford's views were authoritative—he was then a Justice on this Court, had served as Pennsylvania's Attorney General from 1780 to 1791, and was later appointed by George Washington as the country's second Attorney General. *See* Bendesky, 26 Univ. Pa. J. Const'l L. at 220.

Executive, legislative, and judicial pronouncements in the years immediately before and after Section 13's adoption confirm Bradford's understanding that cruel punishments are those unnecessary to deter crimes and reform offenders. In a speech to the Senate, Governor Mifflin declared that, "we consider the prevention of crimes to be the sole end of punishment," and "every punishment, which is not absolutely necessary for that purpose, is an act of tyranny and cruelty." Gov. Thomas Mifflin, *Journal of the Senate of Pennsylvania* (Dec. 8, 1792). Governor Mifflin, incidentally, had requested Bradford's analysis quoted above, and later endorsed it by signing into law the penal code revisions that Bradford proposed.

The Legislature likewise endorsed Bradford's—and hence Montesquieu's and Beccaria's—views on the purpose of punishments. In adopting Bradford's proposed reforms four years after Section's 13 adoption, the Legislature explained that "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 . . . these objects are better obtained by moderate but certain penalties, than by severe and excessive punishments." 15 Statutes at Large of Pennsylvania 174 (1794). This echoed the Legislature's earlier declaration, four years before Section 13's adoption, that "it is the wish of every good government to reclaim rather than to destroy," and "the principal ends of society in inflicting [criminal punishments are] to correct and reform the offenders, and to produce such strong impression upon the minds of others as to deter them from committing the like offences." 12 Statutes at Large of Pennsylvania 280 (1786).

Subsequent events further confirmed Bradford's view. In 1812, for example, the Legislature commissioned the Attorney General to report on the Commonwealth's penal code. *See* Bendesky, 26 Univ. Pa. J. Const'l L. at 228-29. The Legislature and this Court subsequently recognized Attorney General Ingersoll's report as an authoritative overview of Pennsylvania's founding era criminal jurisprudence. *See id.* The report concluded that "'the principle upon which all criminal law rests . . . is necessity," and "[w]hen punishments are

unnecessarily severe, 'the laws themselves . . . appear to be exercised in cruelty.'" *Id.* (quoting Ingersoll, 1 J. of Juris: A New Series of the Am. L.J. 1 at 325.)

In 1825, this Court outlawed the common law punishment of tying a convict to a "ducking-stool" and submerging her underwater. In so ruling, the Court referenced Section 13 and opined that "the reformation of the culprit, and prevention of the crime, be the just foundation and object of all punishments." *James v. Commonwealth*, 12 Serg. & Rawle 220, 235-36 (Pa. 1825). The evidence is therefore overwhelming that in the years surrounding Section 13's adoption, a cruel punishment was understood to include any sentence more severe than necessary to accomplish the "just" goals of reformation and deterrence.

Conspicuously absent from Section 13 is the conjunctive pairing of "unusual" with "cruel" that is found in the Eighth Amendment. "[P]rohibition of cruel punishments that need not be unusual opens the door to a broader analysis under state constitutions." William W. Berry III, *Cruel State Punishments*, 98 N.C. L. Rev. 1201, 1245 (2020). The omission of the conjunctive "and unusual" was not accidental—Pennsylvania's ban on "cruel punishments" has remained unchanged through numerous constitutional revisions since 1790. *See* Bendesky, 26 Univ. Pa. J. Const'l L. at 205. Section 13 was rooted in a uniquely Pennsylvanian concept of punishment; indeed, Bradford's analysis focused squarely on state constitutional provisions mandating that "cruel punishments ought not to be inflicted," without

reference to "cruel and unusual" punishments or the Eighth Amendment. Bradford, 12 Am. J. Legal Hist. at 127. Under Section 13, "the analysis of cruelty does not require the kind of two-track approach to constitutional limits that the Supreme Court has utilized in applying the Eighth Amendment." Berry III, *supra* at 1246. The historical understanding of "cruelty" in the Commonwealth—and not federal jurisprudence governing "cruel and unusual punishments"—is the correct framework for determining the contours of Section 13. Bendesky, 26 Univ. Pa. J. Const'l L. at 203-04. Put simply, the Eighth Amendment added a federal tolerance for cruel punishments—not shared by Pennsylvania and other states with similar Cruel Punishments Clauses—so long as those punishments were not unusual.

Finally, it bears emphasis that in 1790 the connection between social necessity and cruelty was understood to evolve with experience. Bradford explained that the social necessity of punishments is illuminated by "the further diffusion of knowledge and melioration of manners," and that "[a] few years experience is often of more real use than all the theory and rhetoric in the world." Bradford, 12 Am. J. Legal Hist. at 148. Bradford, like Pennsylvania's framers in general, thus embraced Montesquieu's view that, "'as freedom advances, the severity of the penal law decreases.'" *Id.* at 138. Attorney General Ingersoll's report echoed this understanding. *See* Bendesky, 26 Univ. Pa. J. Const'l L. at 229-30. Likewise in *James*, this Court reasoned that "time" is the "great innovator"

through which we achieve "the general improvement of society, and the reformation of criminal punishment." 12 Serg. & Rawle at 235. Whereas the United States Supreme Court did not recognize until 1958 that cruelty under the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958), in Pennsylvania, this insight coincided with Section 13's adoption.

D. Mandatory Life Without Parole Sentences For Felony Murder Defendants Who Neither Kill Nor Intend to Kill Are Cruel Punishments That Undermine The Goals Of Reformation And Deterrence.

Applying the original understanding of Section 13, Mr. Lee's mandatory sentence of life imprisonment without parole is excessive. His sentence—in effect, to die in prison—is not proportional to his crime in which he neither intended to kill nor killed. His sentence does not serve, but in truth undermines, the proper purposes of deterrence and reformation. His sentence is starkly contrary to the evolving standards of decency in this Commonwealth and beyond. His sentence is, in a word, cruel. "Pennsylvanians understood cruelty as meaning anything exceeding the severity necessary for reformation and deterrence-according to contemporary, not eighteenth century, science. By the very logic of those who originally espoused it, sanctions such as mandatory life imprisonment . . . must withstand today's science, not last century's." Bendesky, 26 Univ. Pa. J. Const'l L. at 245.

Mr. Lee's sentence, like those of more than a thousand similarly situated prisoners in Pennsylvania, undermines the core purpose of reformation. By contrast, the possibility of release, including through the parole system, faithfully effectuates the goal of reformation. The Board of Probation and Parole's authority and expertise enable it to make individualized determinations as to a person's rehabilitative needs and potential for supervision in the community. The mandatory imposition of life imprisonment without the possibility of parole, by contrast, "eliminates the possibility that an individual ever rejoins society." Berry III, 98 N.C. L. Rev. at 1250. And without that possibility, a prisoner's impetus to reform and his hope to re-enter the community are extinguished from the start. Pennsylvania's second-degree murder statute thus precludes both the reformation of the prisoner and the individualized determination of proportional punishment by either the judicial branch (at the time of sentencing) or the executive branch (in the parole process). In doing so, it offends Section 13's prohibition on cruel punishments.

Experience shows that eliminating mandatory life without parole sentences does not decrease public safety. Only 2 of 174 juvenile lifers released in Philadelphia were later convicted of crimes (one for contempt and the other for robbery). Daftary-Kapur & Zottoli, *Resentencing of Juvenile Lifers: The Philadelphia Experience*, Department of Justice Studies Faculty Scholarship and

Creative Works, Spring 2020, https://www.msudecisionmakinglab.com/philadelphia-juvenile-lifers. Similarly, in Maryland, 97% of prisoners released from mostly LWOP sentences have not been reincarcerated. *The Ungers, 5 Years and Counting: A Case Study in Safely Reducing Long Prison Terms and Saving Taxpayer Dollars*, Justice Policy Institute, Nov. 2018, https://static.prisonpolicy.org/scans/The_Ungers_5_Years_and_Counting.pdf. Of 125 people released from LWOP sentences in California between 2011 and 2019, only four were subsequently convicted of a crime: one for a felony, and the other three for misdemeanors. *The Reintegration of People Sentenced to Life Without Parole*, Human Rights Watch, June 2023, https://www.hrw.org/report/2023/06/28/i-just-want-to-give-back/reintegration-of-people-sentenced-to-life-without-parole?gad_source=1&gclid=CjwKCAjw26KxBhBDEiwAu6KXtxhxxjQ7ocFhXPPm7FwIRNDJDXIRHQhCIpxmsVhiqp_Wm-79Lwmp6hoCJQ4QAvD_BwE. People in Mr. Lee's position can and do become law-abiding and valuable members of the community.

Mr. Lee's sentence likewise subverts the goal of proportional deterrence. He, his family, loved ones, and society through his absence, are paying the ultimate price for what someone else did. The punishments imposable for Mr. Lee's own conduct, considered alone, do not extend to life imprisonment. The message sent

by these mandatory sentences of life imprisonment is therefore not one of deterrence but of profound unfairness. This unfairness is especially abhorrent when considering that most of the defendants subjected to these sentences are persons of color. Lindsay & Rawlings, *Life Without Parole for Second-Degree Murder in Pennsylvania: An Objective Assessment of Race*, Philadelphia Lawyers for Social Equity, April 2021, https://www.plsephilly.org/wp-content/uploads/2021/04/PLSE_SecondDegreeMurder_and_Race_Apr2021.pdf(finding that Black Pennsylvanians are sentenced to life without parole for second-degree murder at a rate *21.2 times* higher than their White counterparts).

The mandatory sentence of life imprisonment without the possibility of parole for second-degree murder is excessive when compared to other sentences for similar and/or more morally reprehensible crimes. The draconic nature and disproportionality of mandatory life imprisonment without the possibility of parole is especially clear when compared to the penalty for third-degree murder: a *maximum* of twenty to forty years of imprisonment, imposed only after a sentencing hearing at which aggravating and mitigating evidence is considered. *See* 18 Pa.C.S. § 1102(d).

The elements of second-degree murder and the elements of third-degree murder are not dissimilar. The required malice for second-degree murder is derived from the act of committing the predicate felony, not the killing. "The malice or

intent to commit the underlying crime is imputed to the killing to make it second-degree murder, regardless of whether the defendant actually intended to physically harm the victim." *Commonwealth v. Rivera*, 238 A.3d 482, 500 (Pa. Super. Ct. 2020). The malice required for third-degree murder is derived from the intent to harm the victim. *Commonwealth v. Fisher*, 80 A.3d 1186, 1195 (Pa. 2013) ("Third degree murder is not by definition an unintentional killing; it is a malicious killing without proof that the specific result intended from the actions of the killer was the death of the victim."). The criminality of third-degree murder is thus arguably worse than Mr. Lee's crime, and yet his sentence is far more severe.

Likewise, the crimes of attempted murder, solicitation to commit murder, and conspiracy to commit first-degree murder[1]—*crimes which all contain the element of a specific intent to kill*[2] —carry far lesser sentences than second-degree murder, and allow for sentencing hearings. *See* 42 Pa.C.S. § 1102 (c) ("a person who has been convicted of attempt, solicitation or conspiracy to commit murder, murder of an unborn child or murder of a law enforcement officer where serious

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[1] *See Commonwealth v. Thomas*, 2019 WL 1125552 (Pa. Super. Ct. Mar. 11, 2019) ("[T]he sentence of life imprisonment imposed for conspiracy to commit first-degree murder illegal.")

[2] *Commonwealth v. Geathers*, 847 A.3d 730, 734 (Pa. Super. Ct. 2004) ("For a defendant to be found guilty of attempted murder, the Commonwealth must establish specific intent to kill."); *Commonwealth v. Stokes*, 38 A.3d 846 (Pa. Super. Ct. 2011) ("To establish conspiracy to commit murder, the Commonwealth must show that the defendant, with the specific intent to kill, agreed with one or more persons to commit murder, or agreed to attempt to commit murder, or solicited someone to commit such crime or agreed to aid in the commission, attempt, or solicitation of such crime, and committed an overt act towards the commission of the murder.")

bodily injury results may be sentenced to a term of imprisonment which shall be fixed by the court at not more than 40 years."). In the instant case, the underlying crime of robbery, which was imputed to the killing to make it second-degree murder, alone could not result in a sentence of any more than 20 years of imprisonment. *See* 18 Pa.C.S. § 3701(a)(1)(i), (b)(1) (robbery charge in question is a first-degree felony); 18 Pa.C.S. § 1103(1) (maximum sentence for first-degree felony is 20 years). Mandatory life imprisonment without the possibility to even request leniency at the time of sentencing, is cruel, disproportionate, and does not meet the goals of deterrence and reformation when considered within the statutory sentencing scheme of arguably morally worse crimes.

Today, only ten states—including Pennsylvania—mandate life imprisonment without parole for felony murder.[3] This dwindling minority of states provides a much stronger indicator of society's evolving views against this penalty than the Supreme Court has relied on to invalidate comparable punishments. The evolving societal trend aligns with Pennsylvania's historical tradition of imposing proportionate criminal penalties. In Mr. Lee's case and so many others,

[3] *See* Arizona Rev. Stat. Ann. § 13-1105; Fla. Stat. Ann. § 775.082; Iowa Code Ann. § 902.1; La. Stat. Ann. § 14:30(C); Miss. Code. Ann. § 97-3-21; Neb. Rev. Stat. Ann. § 28-105; N.C. Gen. Stat. Ann. § 14-17; 18 Pa. Stat. and Cons. Stat. Ann. § 1102; SDCL § 22-6-1; Wyo. Stat. Ann. § 6-2-101.

Pennsylvania has departed from both society's evolving standards and its own foundational principals, imposing disproportionate and excessive punishments.

CONCLUSION

In analyzing Mr. Lee's claim, this Court should consider the unique history and text of Section 13, in which cruel punishments were those deemed in excess of that necessary to reform offenders and deter crime. Guided by this historical understanding, the Court should hold that Mr. Lee's mandatory sentence of life imprisonment without parole violates Section 13's Cruel Punishments Clause.

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COMBINED CERTIFICATES OF COMPLIANCE

1. Pursuant to Pa. R.A.P 127, I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

2. Pursuant to Pa. R.A.P. 1115, I certify that the word count complies with the word limitation and contains 5,265 words, excluding those parts exempted by the rules.

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APPENDIX E: Roberts Vaux, *Notices of the Original, and Successive Efforts, to Improve the Discipline of the Prison at Philadelphia and to Reform the Criminal Code of Pennsylvania* 8 (Phila. 1826).

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