

Oral Argument PA Supreme Court

SUBJECT: Derek Lee Oral Argument

DATE: 10/08/2024

Judge: Good morning, everyone. Welcome to the 1st day of our oral argument session for the fall here in our magnificent courtroom in Pittsburgh. As many of you know, the Pennsylvania Supreme Court is the oldest Supreme Court in North America. Our roots date back to William Penn's Provincial Court of 16/84, and the Supreme Court was formally established pursuant to the Pennsylvania Judiciary Act of 17/22. In 2022, we celebrated the Court's historic 300th anniversary in Philadelphia, and we are all very proud of our rich history. We sit today in Pittsburgh City County Building, a 1917 granite art deco building, which was designed by renowned local architect, Henry Hornbostel. The city county building houses executive, legislative, and judicial offices for both the city of Pittsburgh and Allegheny County. Before we begin, I would like to recognize some of our law students who are here with us today. They are 3rd year students from Duquesne's Thomas R. Klein School of Law, whose professor, Lauren Gailey, arranged for them to attend our oral argument session today. Students, would you stand if you're not already standing so you can be recognized? We're happy to have you here. We hope that you will find today's arguments interesting and educational. And, I hope that none of the attorneys dissuade you from pursuing careers in law. Thanks for being here. Before we hear the first case, I'd like to remind counsel of a few things. Appellant's counsel, please approach the podium when your case is called. I will then give a short summary of your case. You may then begin by stating your name and the party you represent and introducing your co counsel to the court. The justices are familiar with your cases, so I ask that you avoid any unnecessary recitation of the facts or procedural history, and instead focus on the main issues on which we granted review. Counsel is welcome to rely on their briefs for any particular issues. Please remember that we do not permit rebuttal. In cases where there are multiple parties represented by separate counsel, you should avoid repeating the same arguments as prior counsel. Please try not to interrupt the judges when they are asking you a question, although they may be interrupting you. A justice's question is not meant to trip you up, rather it indicates there are particular issues we wish to explore further. While there's no set time for oral argument, I will advise counsel when the court is satisfied that all of its questions have been answered. And at that time, I will ask that you conclude your argument. Mister Minner, would you call the first case? Good morning. Good morning, your honor. In this case, appellant Derek Lee was convicted of second degree felony murder, robbery, and conspiracy in connection with an attempted robbery which resulted in his co conspirator shooting a man to death. Appellant was sentenced to a mandatory term of life imprisonment without the possibility of parole for his second degree murder conviction. We granted allowance of appeal to determine whether appellant's mandatory sentence of life imprisonment without the possibility of parole is unconstitutional under article 1, section 13 of the Pennsylvania Constitution which prohibits cruel punishment. Or the 8th Amendment to the US Constitution which prohibits cruel and unusual punishment. Please proceed.

Bret Grote: Thank you, your honor. And first, I'd like to introduce my co counsel, Quinn Cousins and Samadhi Sisse. And in the gallery, Pardiss Kabrei, Nia Holston, Rupali Rashatoire, and Nikki Grant. Welcome. Good morning, and may it please the court.

Bret Grote: name is Bret Grote, and I represent appellant Derek Lee who has been sentenced to die in prison for a felony murder conviction based on his role in a robbery in which he did not take a life or intend to take a life. If mister Lee lives to be 76 years old, at which point it will be the year 2064 and he will have been incarcerated for 50 years, even then he will not be able to go in front of the parole board even if the department of corrections considers him long since completely rehabilitated. He must die in prison for the unintended consequences of criminal conduct and a killing committed by another person. This must no longer be permitted under the Pennsylvania Constitution. It speaks volumes that the Commonwealth and its Amici do not defend life without parole for felony murder on the basis that it

is necessary to deter crime or that it has any greater deterrent effect than life with parole for felony murder would have.

Bret Grote: The only real dispute they raise is that the Pennsylvania Constitution's provision outline cruel punishments must be interpreted identically to the United States Supreme Court's interpretation of the 8th Amendment's cruel and unusual punishment clause, unusual punishment clause, which they argue would deny mister Lee relief.

Judge: What what do you cite to persuade us that our Pennsylvania Constitution provides broader protection against punishment than the US Constitution?

Bret Grote: Thank you for that question. I would cite to the distinct text and the history informing the meaning of the Pennsylvania Constitution as well as the meaning of the federal Constitution. Pennsylvania constitution's cruel punishments, federal constitution cruel and unusual punishments.

Bret Grote: Starting with the federal constitution, the term unusual has a distinct substantive meaning within the US Supreme Court's jurisprudence. This was recognized in *Harmelin v Michigan* where it was mentioned that, discussed that unusual meant contrary to long usage, contrary to the common law. This was reiterated in *Bucklew versus Preciseath* in 2019. And just this past summer in the grants pass case, unusual meant punishments that had fallen out of usage and that were not recognized as common within the jurisdiction.

Judge: Hasn't our court hold held that, those 2 constitutional provisions are coextensive?

Bret Grote: This court has held that in *Commonwealth v Zettle Moyer*, *Commonwealth v Baker*, *Commonwealth v Batts*, but it is made clear, especially in the post *Edmunds* holdings, that an *Edmunds* analysis must be engaged in every time a specific claim is raised under the state constitution. This is the first time that life without parole for felony murder has been in front of this court under an article 1 section 13 claim. Which counsel brings me to my particular concern. For us to tread on the constitution is a significant act. The concern that you're addressing is not so much a constitutional issue, but a statutory issue for which life without parole is applicable under statute 6137 for felony murder.

Judge: Why should we not restrain from addressing the constitutional issue and require the general assembly to amend that statute?

Bret Grote: This court cannot require the general assembly to amend the statute without I got that. Without, striking down an unconstitutional statute, which then could incentivize them to make that particular change. But there is a legal question in front of this court as to whether mister Lee's sentence violates article 1 section 13. And the assessment for whether it violates article 1 section 13 must flow from the *Edmunds* analysis and the standard that is applied to assess this sentence.

Bret Grote: Under the *Edmunds* analysis, we have to go back to the history of the founding, the very framing of article 1 section 13's cruel punishment clause and to, refer to the *Zettle Moyer*, *Baker*, *Batts* line of cases, none of those cases addressed this history. And we have thoroughly briefed and cited ample historical evidence that the founders of the Commonwealth of Pennsylvania viewed cruel punishments as those punishments which were excessive to the need to deter others from committing crime and to reform the person

Judge: who Do I understand your question on that? I'm sorry. I'll be done done in just a moment. As I understand your argument, you are not saying that there aren't some cases of, felony murder that would be appropriate for a life without parole sentence, but that yours is not and that, the court should have the discretion.

Bret Grote: Therefore, we should strike the mandatory part of the statute. So thank you for that question. We believe there's multiple different ways you can strike mister Lee's sentence down, and the way that we think categorically is the disproportionality for second degree murder focuses on the lack of a specific intent to take a life. That lack of a specific intent to take a life is present as a matter of law in all second degree cases, but we also recognize that this court may issue a ruling that is taking into account the lack of a specific intent to take a life, plus the fact in this case that mister Lee did not take a life. That's a narrower subset of second degree cases.

Judge: Are you asking us to parse out the requirement? But we're asking to focus on the mens re requirement as the most salient factor that leads to a disproportionality analysis from our perspective. Counsel, my question. Excuse me. The argument you're making doesn't discount that there are some felony murder cases that you would acknowledge are appropriate for, life without parole, but you don't want the mandatory life without parole to apply to every case.

Judge: Is that correct?

Bret Grote: We're not acknowledging that life without parole is constitutional for any second degree murder case. We're most specifically But you're not arguing that it's not. We're arguing that in this case, it is not. As to other cases in front of the court, the court may not reach those cases and the court may leave for another day whether article 1 section 13 is unconstitutional with a fact pattern not in front of this case.

Judge: But I thought the the gist of your argument was that based on our ruling in the future, the trial courts would be able to sift through the the facts and decide based on the mens' or lack of mens' way of whether or not it's a case suitable for life without parole or just life. So that's not our argument, but that's a way that the court could resolve this case. It's a good argument, though. The I don't dis I don't disagree with that. We have a number of arguments that we like.

Bret Grote: Some are we like more than others. Maybe if I can sketch out I think there's 4 ways. We could probably imagine more, but I think there's 4 ways that mister Lee's sentence could be struck down. The mandatory nature of the sentence could be struck down, and that would allow the resentencing court after a proceeding considering facts and circumstances of the case, mister Lee's role in the offense, any mitigating evidence, prosecutorial victim input, etcetera, whether to impose life with parole or life without parole

.Judge: How is that a how is that a sentence under, the Pennsylvania sentencing code?

Bret Grote: Life with parole.

Judge: How would that happen?

Bret Grote: We believe that would happen the same way that after Commonwealth v after Miller v Alabama, Commonwealth v. Bats engaged in a severability analysis that allowed a sentencing court to impose a life with parole sentence at its discretion when there was no statute, commanding when the minimum sentence would be imposed or whether or not there would be some statutorily based minimum. I thought the sentencing code was designed in such a way that any life sentence resulted in, without parole.

Bret Grote: It is designed in such a way as it was And and so then, how do we eradicate that aspect of the code? So I would direct the court to this decision this court's decision in Commonwealth v. That's the 2017 version in which the

Commonwealth severed the section 6137 of the parole code that prohibited parole eligibility for those sentenced to life imprisonment if they were younger than 18. It also severed the requirement that a sentencing court peg its minimum to half of the maximum since there was no, half of a life sentence. And then at the discretion of the resentencing court, taking into account relevant legislative statutes that did not directly apply specifically the 1102.1, which was for cases of 1st and second degree murder committed by somebody who's younger than 18 that occurred after Miller v Alabama.

Bret Grote: The court imposed a minimum sentence after that severability analysis. The court also recognized in those bats decisions that the legislature could have intervened and created a sentencing scheme. And they did. They did. Yes.

Bret Grote: And it was for the cases that, where the crime was committed on or after the date of Miller v Alabama.

Judge: Can I can I stop you just a moment? Justice Wecht got cut off a little bit ago, and I wanna give him an opportunity to finish it. Justice Donahue, you finish her line, chief. I actually I actually have a different line, so you may you may you may pick up my line.

Judge: So, be my guest. Well, thank you both for the lines. Counsel, a moment ago, you had mentioned something, consistent with your briefing about the, penological aims of deterrence and rehabilitation. Is the general assembly not entitled to other objectives in their lawmaking capacity? For example, retribution.

Judge: And, to the extent that that is a, that is a um a impulse that legislators are allowed to pursue, how are we to how are we to construe that in terms of this argument?

Bret Grote: So we think the historical evidence of the legitimate punishments or purposes of punishment, embedded within article 1 section 13 were deterrents and, rehabilitation. However, if this court were to include what the US Supreme Court has recognized as 2 other major legitimate interest, retribution, and incapacitation, we think it's the same results. Retributive theory, also sometimes called just dessert theory in, the jurisprudence in the criminology literature, is focused on a proportional punishment for the offense that is at issue. And punishing people for the unintended consequences of their actions, punishing people for felony murder convictions in Pennsylvania with the same punishment as those who have specific intent violates retributive principles as well.

Bret Grote: We briefed this in the 8th amendment section of our brief, and we also touched on by the criminologist, amicus, URI brief as well. As for incapacitation, I think that's fairly subsumed or could be under the rehabilitative analysis. If somebody is rehabilitated, by definition, they do not need to be incapacitated in order to protect the public.

Judge Counsel, can I a comment you made. Am I to understand your position is that there should be no minimum with for felony murder?

Judge: And if so, many of the amicus briefs shared with us the the overwhelming disproportionate contact for those incarcerated based upon the statute as written. Are we not treading again into difficult territory by having disproportionate allowing the judges to determine what the maximum or the minimum? What if the minimum were were 99 years to life?

Bret Grote: So I'm not going to pretend that there's not complicating factors with the remedy. We proposed the severability analysis that this court engaged in his bats as a way to resolve this case because it's something familiar to the court in its jurisprudence.

Bret Grote: It is the case that the court would have options if you strike down mister Lee's sentence, including retaining jurisdiction in order to seek supplemental briefing on the appropriate remedy consistent with a rule that this court would announce, including putting a ruling on hold to give the general assembly a time to act, which has been done in other instances. There would be a minimum, and I don't believe there would be a risk that courts of common pleas would not discharge their duty to impose a minimum that matches somebody's individualized culpability. And in fact, in the remedy that we propose, individual culpability would still be relevant in 3 critical phases of the sentencing process. The first would be imposing a minimum for the 2nd degree murder offense itself if the legislature were to act in response to a ruling of this court to guide how that minimum would be set, that then would also be taken into account. But the second critical juncture where individual culpability would be assessed would be in imposing an aggregate sentence.

Bret Grote: Oftentimes, maybe all of the times, we'll say most all of the time, when there's a more severe course of criminal conduct, there's multiple charges, multiple convictions. Nothing in the rule that we are seeking would limit or hinder a sentencing court's ability to impose aggregate consecutive stacked sentences.

Judge: Why don't you share with us the rule you believe we should make?

Bret Grote: We believe the rule should be that life without parole for felony murder where there's no intent to take a life, is disproportionate to the legitimate purposes of punishment and unconstitutional under article 1 section 13.

Judge: Well, that's a little that's that's different than the juvenile cases, for example.

Judge: That was a categorical juvenile cases were a categorical categorical situation. You're basically taking anybody who is guilty of felony murder, should be should not get life without parole. That that's is that a facial challenge? Is that an as applied challenge? What what are you what are you advocating here?

Bret Grote: So it's a categorical challenge focusing on the sentencing statutes. Well, it's a it's a category challenge focusing on the same focusing on the entirety of the universe as the category. Judge: That's that's what you're focusing on

.Bret Grote: That's that's, let's say, our maximal position, but we also recognize the court may decide there's a narrower subset that's currently being made. Your client voluntarily engaged in a a in a violent felony.

Judge: This isn't the getaway driver situation. Your client voluntarily get with with guns, entered a home he shouldn't have entered into, pistol whipped somebody, happened to leave the room, and surprise, you enter a room with a felony you enter a house with a felony to commit a burglary, and somebody dies and gets killed and shot. Is is your client, the client that you're saying falls into this category that we should say, oh, for all of these people, these people that commit that engage in violent felonies with guns, where you're obviously thinking if you're going to somebody's home with a loaded gun, somebody might die. You're this is the situation we should say he falls into that category and and life without parole is unconstitutional for him.

Bret Grote: Yes. We believe that him not having an intent to take a life and not taking a life would allow such a ruling. A lot of the conduct you just described if somebody did not lose their life is subject to severe penalties under the law.

Judge: But somebody did lose their life.

Bret Grote: Without life, without parole. And that's why I agree with governor Shapiro that somebody lost their life.

Bret Grote: Felony murder should permit more serious consequences than simply punishing somebody for the underlying felony. As governor Shapiro also said, mandating life without parole where there wasn't a specific intent to take a life doesn't further deterrent ends. The US Supreme Court and the Pennsylvania Supreme Court have spoken to the mismatch between deterrents and a crime where there's not premeditation. In 1970, this court stated, in Commonwealth, X rail Myers v Smith. If added deterrent is the goal, the felony murder rule is not the right approach.

Bret Grote: In 1980 2, in Edmond v Florida for the US Supreme Court, they recognized for capital punishment to be an effective deterrent, premeditation has to be involved in the murder. So we are not arguing there should not be severe consequences for second degree murder. Life with parole is a very serious penalty. Judge: You're not agreeing, you're not agreeing with the governor's amicus brief, it seems. You're not you wouldn't, you wouldn't view it as a win, so to speak, here if you got a ruling that said mandatory life without parole is unconstitutional.

Judge: You you you're more ambitious than that in this in this context. Right?

Bret Grote: We would definitely consider it a win if mister Lee sentence was struck down and mandatory life without parole is unconstitutional. Absolutely. We agree with much in the governor's brief, not everything in the governor's brief.

Judge: But, I mean, the the you don't want the the Miller bats type approach. In other words, you don't want the the individualized inquiry empowering trial judges to decide whether this person gets life without parole and this one doesn't. And I'm not I'm not sure, why you think, you've you've made a compelling case to go beyond that.

Bret Grote: So we think that felony murder consistent with, say, the US Supreme Court's decisions in Edmund, also, Graham v Florida about non homicide offenses, which relied on Edmund, their capital penalty jurisprudence, dealing with crimes that don't involve a specific intent to take a life, those were cases that took the penalty off the table altogether. But it is certainly the case that if the standard this court were to find an article 1 section 13 permitted that life without parole may be constitutional in some instances for felony murder, then the mandatory nature would have to fall in sentencing courts would have to make a decision as to whether a particular offense warranted life without parole based on the standard this court would announce to apply article on section 13.

Judge: But frankly, I thought that was going to be the gist of this argument. But it's not. But it's not. Counsel, you keep referring to Batts and I understand the argument that you're making, but this court had, a cushion in Batts, because the legislature had already adopted, a sentencing code that dealt with, the juveniles, in these situations. And if you'll recall, Batts, we said to the trial courts, And why don't you follow in your sentencing scheme that which the legislature had set up? So BATS is really a stopgap. That's not what you're talking about here at all. I mean, you know, if this court struck down, this sentence, the legislature would have to do something. I mean, that do do you not agree?

Bret Grote: I agree, and I think the procedural analog to where this case would be would actually be Miller v Alabama. When Miller v Alabama, was issued, the Pennsylvania legislature had not acted. Obviously, that was a US Supreme Court decision. But if there is a decision in the first instance on the constitutionality of the mandatory life without parole sentencing scheme, then that would basically put us back prebounced. Judge: So don't let me lose my my place in line here to get to my line of questioning. What is the mens rea for this crime?

Bret Grote: The mens rea for this crime is having the intent to engage in the underlying felony. Judge: Okay. And how does that translate into being punished for the death? Because there so there's 3 elements. The mens rea I just said,

the criminal act is participating in the underlying felony, and a death has to occur in the course of that felony.

Judge: Does, does a, individual have to have, a recklessness mens rea? Does you see my problem. And, I think the District Attorney's Association and others have suggested that what your problem is really with is the crime. I mean, because you're asking us to parse situations in which, an individual dies in the midst of the commission of a felony. Your client, did not was not in the getaway car. But this rule applies to the individual who is in the getaway car. This rule would apply to someone who did not know that the other perpetrator had a gun or a weapon. Am I correct?

Bret Grote: Correct.

Judge: And isn't that what is the gist of your problem?

Judge: The latter individuals that I described, somebody sitting in a car not knowing that, his accomplice had a a, a gun and that someone there was even a possibility that someone would die, in the context of this commission is is gonna go to prison for life without parole. Correct? And isn't that what you're asking, trial judges to have the ability to do to parse that type of conduct?

Bret Grote: Yes. We would like trial judges to be able to separate between levels of culpability.

Judge: But then that's not but then that's not the statutory crime.

Bret Grote: It's yes. And we recognize that problem, which is one of the reasons we focused on the element of this lack of specific intent because that flows from the statute itself. There are other felony murders

Judge: But that's the problem. It the the statute presumes that. The the statute presumes that there is some mens rea in the commission of the murder. Correct? The mens rea is imputed from the mens rea. What what what is imputed?

It's the Bret Grote: The malice. Judge From the underlying felony. Bret Grote: Correct. Judge: Not the murder. Bret Grote: Correct. Judge: And and therein lies the problem, correct?

Bret Grote: One of the problems.

Judge: Well, so so for us to say to trial judges, take a look at what really happened here. Your client, in the examples that I just gave, had a greater culpability than the individual who's sitting in the getaway car without any knowledge of, you know, a gun being present in the perpetration of the felony or anything like that. But then we aren't talking about the felony murder rule. We're talking about something else. We're talking about, a judge determining what the mens rea is for the actual commission of the murder. And that's not the actual commission of the murder, and that's not the felony murder rule.

Bret Grote: So I'd follow you in what you're describing if there would be a mens rea attached to the homicide would essentially be one of the what I refer to as an aggravated felony murder statute that other states do have

. Judge: But isn't that what you're talking about? Isn't that what you're asking us to, direct trial judges to do, assuming we could do that without the legislature stepping in and fixing that problem?

Bret Grote: We're there's different ways we can come to relief. We're asking this court to make a clear recognition as governor Shapiro and others have, in the briefing in this case between specific intent murder Judge And no intent Bret Grote: Correct. Judge: To commit murder. Bret Grote: Correct. Now when you you've mentioned, you know, is it

recklessness for those perhaps who have, committed the act that led to a death. It could have been. It also could have been a voluntary manslaughter and involuntary manslaughter situation. I know hypothetical. I know real cases, and we can talk about that all day. We also know cases where it's just not going it's gonna be difficult to determine because the jury is not required to prove in some case or to make a finding as to who even committed the murder.

If this court were to say there's too greater risk of punishment because mandatory life without parole, too greater risk of excessive punishment, sweeps in so many people who's role in the offense, and their criminal intent was such that life without parole would not be justified, I think the court could allow a man a discretionary sentencing scheme that, like so many other sentencing schemes in Pennsylvania, allows trial courts to impose this based on, an assessment of one's culpability and the presentations at a sentencing proceeding without that turning into a type of formal fact finding which triggers which would make it an element to the offense. Judge: Well, interestingly, your client doesn't meet that definition of someone who was not plausibly, did not have an intent. He he had a gun. Right? Bret Grote: So that I don't think means he had any intent to take a life as went into the burglary with a gun or the robbery, whichever it is.

The US Supreme Court considered that argument Edmund v Florida as whether robberies and certain violent felonies are so inherently dangerous that it should justify, in that case, capital punishment, and it would have a deterrent effect. And they rejected it. Judge: And I think that That was capital that was that was capital punishment. That's not and and I thought you didn't want us to look to the United States Supreme Court. I thought you wanted to look us to look to the Pennsylvania constitution.

Bret Grote: I want you to look at both, and the US Supreme Court can certainly provide guidance and a floor for interpreting the Pennsylvania constitution. When it comes to this being capital punishment, the analysis of deterrence and one's culpability, I think, still holds for that without parole. United States Supreme Court, to my knowledge, has not yet ruled life without life without parole for felony murder is unconstitutional under the United States constitution except for juveniles category. Correct. But there are other holdings from their playing the capital.

Bret Grote: Capital punishment. From their categorical jurisprudence, which includes capital punishment as well as Graham and Miller that I think have a lot of Miller was a juvenile case. That can be very illuminating for this purpose. Judge: I wanna I wanna just follow-up on justice Donahue's point here. Are are you are she gave you some facts that, you know, let the let's talk let's talk for a second about the the the getaway driver, whichever which seems to be coming up in every brief that I've read about this.

Judge: What about the getaway driver? Are you are you telling me that in Pennsylvania, the district attorneys and juries are convicting mere getaway drivers who had no idea that a a violent felony was about to be committed and did not participate, that DAs are charging them with felony murders, juries are convicting them of felony murder, and sending this pure innocent getaway driver to life without parole? There's cases where getaway drivers and lookouts have been sentenced to life without parole, certainly. And this is a facial challenge, isn't it? Is your challenge a facial challenge?

Our challenge is to mister Lee's sentence. They could be sentenced, to life without parole under the current scheme, the getaway driver. They certainly can be sentenced to life without parole. Yes. Our challenge is to mister Lee's sentence.

So you're you're but you're raise so you're raising an as applied challenge. You're not raising a facial constitutional challenge. We're making a categorical analysis, and we understand You you already Judge:counsel, I'm gonna just interrupt for a second. It's a it's in Pennsylvania, we have 2 types of constitutionality challenges in statutes. They're either facial or they're as applied.

Are you raising a facial? Because the law is different on both. Are you raising a facial challenge or an as applied challenge? We analyze the question differently depending on whether it's facial or as applied. Which are you challenging?

Bret Grote:We're asking for a distinct analysis this court's never engaged in before under the state constitution, and we figured that has to happen. Judge You can't tell me whether you're raising a facial or an as applied challenge. Bret Grote:I think both challenges are fairly encompassed within the questions and the arguments presented

. Judge:You're making a categorical challenge. I don't know how that is not a facial challenge.

Okay. So we're making I mean, we're making a categorical challenge, but we also understand that if this court believes that life without parole may be constitutionally permissible in certain instances, there for striking down mister Lee's sentence, namely the mandatory nature in which it would be facial. Judge: That would still be facial. Yeah. Because we'd be striking the mandatory.

Judge: Okay. Your category your category is everybody who could be charged with Right. With with with felony murder. You're even asking us to to consider retroactive, applications, so it seems clearly facial. Bret Grote:We we recognize you do not have to consider retroactive on direct appeal. We think there's reasons to address that sooner than later. The attorney general's brief said if it is struck down, it should be addressed sooner than later. We also recognize that that raises challenging issues, issues that have not been briefed, supplemental briefing, if this sentence is struck down.

Judge: But after Montgomery, how how can it not be retroactive if we go there? If if we strike down if if we strike down life without parole as unconstitutional, there literally has to be a resentencing for all 1100 people that are currently serving life without parole sentences in Pennsylvania. Does it not?

Bret Grote:Not necessarily. As Montgomery v Louisiana itself said, the remedy for Miller v Alabama did not have to be resentencing. It could be making, defendant's parole eligible. So the legislature could act.

It would be a watershed moment. Correct? If we Correct. Question I have. Excuse me.

Following your theory and your request of this court, share with us how that jives with felony 3, where you have a 40 year up to. Are you at least that's what I'm. Gathering from you. I I want you to clean that up. At at least that's what I'm What do you say?. Bret Grote:When you say felony 3, are you referring to 3rd degree murder? I I apologize. Murder 3.

Quite alright. No. I think second degree murder would have a more severe penalty. Instead of a 40 year max, it would be a life max. And I think courts are Where do we start at the minimum?

40 to life? Since 40 is the top for murder 3? I'm just trying to find out 40 is the max for murder. Right? So 20 would be the minimum under the state law.

Right? Bret Grote: It couldn't be any higher than that. For those who are 17 or 16 and are guilty of second degree murder, the legislature set the minimum at 30. So I don't think I can tell you that courts thereby should, you know, deviate from that as a categorical nature in setting the minimum. That's what the statutory law is for second degree murder for those who are younger than 18.

The minimum's 30. So we're still talking about very severe penalties. There is a question about what the sentencing court could impose if the legislature has not acted to give it guidance at this point?

Judge: That's it it's a big question because is there a way we can give your client relief here without rewriting the sentencing and parole code? There's a difference between striking things. We can strike things, then we engage in a severability analysis. But what you're asking for to me commands us to write something, and that is something that belongs to the general assembly. How can we grant relief to your client without rewriting the sentencing and parole codes?

Bret Grote: The same way that relief was granted in Commonwealth V Batt which was a severability analysis. And courts did have discretion to impose minimums.

They were guided by 1102.1, but I know many, many people who were sentenced to less than the 35 year maximum for first degree murder when they were resentenced because courts were your client's minimum? What do we think it is or what it should be Yeah. Upon remand? Yeah. Because well, I mean, because we're the legislature hasn't set one up.

Right? So if we were to strike this, in your view, your client gets resentenced. Right? What's the minimum? I mean, we'd be making it up just as much as you'd be making it up here.

So why don't you tell us what you think the minimum should be? Bret Grote: Correct. We would advocate for 25 years and the court would probably not impose less than 30 would be my guess. Judge: But you're really arguing for the back end, not the front end. I mean, we have a minimum maximum statute here.

Judge: You're just basically saying life without parole without a possibility of parole is unconstitutional. Therefore, every single person that's sentenced to life without parole in Pennsylvania gets a hearing to determine whether or not they've served enough time. What what are you asking us to fashion is really the question I think you're hearing that's being weaved throughout this particular The the the the problem is life without parole you can't under the parole code, you can't you aren't considered for parole until you've done your minimum. Well, and I thought And that's the there is no minimum. I thought you were arguing at least in part for us to just declare it unconstitutional and then we could give the legislature 90 days or whatever to to redraft it.

Bret Grote: I think that would be prudent, especially given the conversation today and all the challenges that there

would be how how could they redraft the sentencing code without redrafting the crime? I I understand my problem. I mean, you know, every time we get down to this question about, well, what should your client sentence be? The answer is, it would depend on his mens rea. Would it not? I mean, you know, to suggest that something apply that our ruling would apply retroactively would somehow imply a one size fits all sentence. And is that really true given what we're dealing with, with the felony murder rule as it currently exists? The first question you raised, how could the legislature, engage in a remedy here? They can amend the parole code. And they can amend the parole code in different ways.

They have authority to do that. But how would a judge decide what the appropriate sentence is if there is no context in which to determine what the defendant's mens rea is vis a vis the actual crime for which he or she is being punished, I e, the murder. So I think the court could still take into account a number of factors even without an additional element of the mens rea. In other sentencing proceedings, people are convicted of 1 or more proceedings, people are convicted of 1 or more offenses that have their mens rea and act as rea, and the court has a range of punishments that are within its discretion to impose. We're simply arguing that life without parole, the without parole must be struck down.

Life with parole That's why I that's why I made the suggestion earlier. What what you're essentially asking us to do is strike down as a facial facial challenge, life without parole, which would require a resentencing for every single inmate right now in Pennsylvania that's serving life without parole. Because what you're really asking us to do is not engage in the factual analysis. It's to give it to the sentencing judge some discretion to hear mitigation, to hear the facts and circumstance of the case, to see what participation, if any, that this particular individual who's serving, like, without parole participated in the actual case itself. In other words, the getaway driver as justice Brobson just mentioned, the person who goes in with a gun, but it's not necessarily the person that fires the the fatal bullet.

Correct? Bret Grote:That could be one way to respond. The legislature could amend the parole code and say anybody that has been in x number of years is parole eligible. They could also say somebody who has been convicted of second degree murder, and it was this underlying felony. They set this particular year, number for a minimum different underlying felony.

They set a different year for minimum eligibility. They would have options in that regard. Judge:The legislature been lobbied to rewrite this statute? They have. And then they have not taken that up.

Judge: The, I also Well, to in in fairness, they have had hearings. There is a bill. I think it's in the house. It's it's not like it's that's not like they've rejected it. It's under consideration.

Bret Grote:I meant they there's been a hearing in the House Judiciary Committee, but for years years years, they have not had any full votes. They have not passed. And this court has to roll, of course, on the constitutional questions in front of it without speculating if there's a violation here the legislature may solve in the future. But as to the concerns, though, about if any rule is issued, if it would necessarily be retroactive, would that unleash the need for a thousand resentencing proceedings in Pennsylvania? I do wanna make clear that if that is the consequence, if those sorts of, to use the words of this court from Commonwealth v Wolff in discussing what happened after the US Supreme Court's alien rolling.

If these sorts of unavoidable and wide scale consequences are required, then that is necessary to enforce constitutional rights. Bret Grote: The Pennsylvania has had a recent resounding unequivocal success with resentencing over 500 former juvenile lifers. One study, it's been cited in many of the briefs, found 1% recidivism rate. That's just unheard of when it comes to other criminal offenses. Counsel, you're again, you keep going back to the juvenile lifers.

Judge: This is not these are not juveniles we're talking about. Let's let's again, I wanna go back to this. Let's assume you're right. Let's assume let's assume we believe that facially facially, it's unconstitutional. The remedy you concede is not that all these people get out of of prison.

Right? You you would suggest there has to be some form of resentencing. Unless the legislature amends the parole code. Yes. Okay.

Judge: So but in the resentencing, I'm trying to understand let's assume there's no action by the general assembly because usually when we ask them to, they take their time. What can we do as a court to give relief? Because I asked you about are are we to say, as a matter of constitutional law, the because in order to be eligible for for parole, you need to meet your minimum. Right? Correct.

Judge: Okay. So as a matter of constitutional law, does this court have the power to say from here on out until the General Assembly amends the statute, felony murder is a has a mandatory minimum of 25 years to life. Do we have authority to do that? Bret Grote: Under your power to create rules to enforce constitutional rights, I believe you would have the authority, but I'm not familiar with it being exercised in that particular way within Pennsylvania. But I'm also not aware of any case where this court has used article 1, section 13 at all, let alone to strike down a sentence and to create a a remedy for that.

Bret Grote: But I think you have the power to create constitutional rules. To to to specify a minimum number of years for us to sit here and I hate to use the l word, but to basically legislate a minimum term. If it's a no. Bret Grote: You're just asking me what the court has the power to do. Well, I'm trying to figure out what we can do to give your client relief if your client wins.

Bret Grote: Right. I think you could do that. Judge: You think we could also say we could also strike keep keep life because it's 2 statutes, it's life, and we could also amend the parole code to basically say because right now the parole code says you're eligible at your minimum and life does not have a minimum. Judge: We could blue line and add language there that says, unless you're serving a life sentence for felony murder, in which case you're immediately eligible for a parole hearing. We could we could add that language to the parole code too.

Bret Grote: I don't think you could add that language for a different reason because that sort of immediate eligibility for everybody would not be preserving as much of the legislative statute's intent, in order to remedy the constitutional violation. That would be going way beyond. Judge: So then unless there's a third option, our only option is for this court to set a mandatory minimum for felony murder? That is an option. Well okay.

Judge: So that's an option that you said was good. Amending the parole code is not an option. What's the third option?

Bret Grote: Wait. Judge I gave you 2 options.

1 was for this court to legislate a mandatory minimum. You said we could do that. You could create a rule to enforce a constitutional right. I would not use the l word. That we could create I would not use the r word.

I I don't think we can do a rule. We could create a mandatory minimum. I would legislate rule, whatever. But you think we can? Some other word.

Bret Grote: I don't think you ever have, but I think it's possible. We can't, however, according to you, rewrite the parole code to say people serving life life for felony murder are eligible for parole. We can't do that. I think that you would have to attach a number of years in order to preserve as much of the legislature's intent as is constitutional. But that's more jiggering with the statute.

Judge: Right? It's no different from the first example as to what a minimum would be before somebody's parole eligible in order to comply with what would be a rule under constitutional ruling under article 1 section 13. Other than those 2, is there a third option for us to get relief give you relief?

Bret Grote: Resentencing consistent with the court's decision in batts for mister Lee.

Judge: But where do we get the number arguing for us to find it unconstitutional unconstitutional and let the chips fall where they may.

Judge: el don't see any options for us to rewrite something the legislature has written. We don't do that.

Bret Grote: I agree that you don't do that. That's why we do not advocate for that as a question of the court's constitutional powers when engaging in, the establishment of constitutional rights. That's it.

Judge: That's the problem, counsel, because magic doesn't like, if we strike it down and send it back, if your argument isn't that they're all instantly eligible for parole, the trial courts need to know what to do. There's no minimum in the parole I mean, that's where do we where do we make up a number? That's, I thought, what justice Brobson was getting at it. Right. No.

Bret Grote: So I I follow. So I think that what chief justice Todd just said about our position that it can be struck down. You can maintain jurisdiction, even request supplemental briefing, and give the legislature time to act, and the legislature could then provide that guidance in that minimum.

Judge: And if they don't? And if they don't?

Bret Grote: And if they don't, then I believe we're back to batts severability unless this court were to use a power under article 1, section 13 that has not been used to state that life without parole for felony murder is unconstitutional. And

in order to remedy that, individual sentenced to life without parole for felony murder must become parole eligible after 25, 30%. That come from? That's the question. Because we had something at bats.

Judge: We had we had something. What that's that's what I'm getting at. Where do we get that number? Where do we draw the line? Right.

Bret Grote: The most, I think, proximate sentencing statute is statute is the sentence for life without parole for felony murder for those who were younger than 18. That's the most proximate to this case. There's also different underlying felonies that are involved that often people are concerned. Is we should take the legislature's intent to, extend grace to juveniles and then comply it to everybody. Bret Grote That was not what we said. This was that asking where to find a minimum, it makes sense to look at the only other instance where second degree murder has a punishment attached to it in the statutory code. Judge: Alright. Are there other questions for mister? Are there other questions for mister Groot? I think we understand your position.

Judge: Thank you, sir. Thank you. We'll hear from, mister McCarthy for the Commonwealth.

ADA McCarthy Chief Justice Todd, members of the court, may it please the court, Kevin McCarthy, assistant district attorney, Allegheny County on behalf of the Commonwealth. Just Chief Justice Todd, Justice Donahue, you have demonstrated my own problem in addressing the arguments of counsel. I can't seem to find exactly where appellant is going and what he wants. As I said in my brief, this argument is really a challenge to the felony murder doctrine, period. They don't like the sentence which is unique to felony murder. And instead, they wanna say that the sentence is unconstitutional as opposed to the crime is unconstitutional or rather the definition.

Judge: That's the point. Punishments can't be cruel, so that's what we're asked to decide. I mean, they're saying mandatory life without parole violates the cruel punishments. Why isn't that justiciable?

ADA McCarthy: Well, I do believe it is. I'm just saying my consternation and struggles with to respond to arguments. It seems as though I'm I'm, grabbing in a phantom because Judge: Well, but but the arguments are incongruent. I mean, if if there's a problem with the manner in which someone is punished, which has nothing to do with that individual's actual culpability for the act for which you're being punished. That would make the sentence for that unconstitutional. I mean, where where is the I'm congruent. But of course, as this members of the court have pointed out this morning, is it a facial challenge or is it a a, as applied challenge?

Judge: I think we've determined it's a facial challenge.

ADA McCarthy I thought it was too. Oh. And I'm prepared to respond to that, that as applied, it is not unconstitutional. Appellant has many sympathies and and and and mitigating factors on his side. The Commonwealth has history and this court's precedent on its side. Felony murder doctrine was adopted by the Pennsylvania legislature in 1794, 4 years after it enacted ratified the first constitution including, the prohibition against cruel punishments.

Judge: But nobody just sorry to belabor this, mister McCarthy, but I don't I shouldn't say nobody. For present purposes, we don't we don't need to question the felony murder doctrine. The question is, I thought, whether mandatory life without parole and felony murder is constitutional. And so that's the that seems to me the issue or at least an issue here. Without without troubling the felony murder doctrine, the question of whether the the judge were being required being required upon that verdict to sentence to life without parole. ADA McCarthy: Well, that's my

point, your honor. The felony murder doc, the sentence for felony murder was mandatory since its inception. And in 1794, it was death. And that was amended in 1925 to be either life or death. And amended yet again in 1974 just to be life with parole. Mandatory. And this court has repeatedly found that that was an appropriate exercise by the legislature to punish someone underlying violent felony.

Judge: Now there's the problem right there. That's the mens rea, to engage in the underlying felony. That is not what these defendants are being punished for. They're being punished for a murder. And therein lies the issue with whether or not that is cruel, to punish someone for an act, where no, intent or recklessness or any other level of mens rea has been established. That's the argument for why it is cruel. Well, are there don't we have a general rule in this commonwealth that in order to punish someone, there has to be a mens rea? ADA McCarthy: Yes. Judge: Okay. And we don't have a mens rea for the act for which these defendants are being punished. ADA McCarthy: Well, it has been the law of Pennsylvania, the legislature imposed or general assembly imposed it again all along that you are being punished for participating in a violent crime which was foreseeable.

Judge: There you go. I mean, what about what about the, infamous now getaway driver? What about what about the Who's the offender? ADA McCarthy: I got him right now. Yeah.

But but but I got him right here. This is a facial challenge. Let's let's talk about somebody who is not this defendant. Let's talk to let's talk about someone to which this crime attaches, which is the getaway driver. ADA McCarthy: The legislature or the general assembly recognize that violent felonies participation in a violent felony is dangerous conduct, that innocent victims' lives are lost, and that we must deter that kind of conduct and there is a severe penalty applied.

Judge: And as Justice Donahue said, there is a punishment for the Felony. For the plaintiff's murder, punishment? ADA McCarthy: The general assembly has. ADA McCarthy: It's not that it's double dipping. Although they are often sentenced for the underlying felony too.

Yeah. But they're sentenced for life without parole for agreeing agreeing to commit the crime, Judge: participating accessory liability. ADA McCarthy: It is absolutely accomplice liability, which is what we noted in our brief. Accomplice liability, each and every member who participates is responsible to the same degree and can be punished to the same degree. Judge: And that's For the crime in which they intended to participate.

Correct? ADA McCarthy: Okay. Well, then we're we're back to We impute. And that's this this court's, language that we impute to the least culpable of the confederate Confederates that In theory, these are naturally foreseeable consequences. Yes.

ADA McCarthy: Yes, your honor. The problem so so I think the discussion though is Judge: isn't it the question is, can this argument, if we adopt it, will the felony murder charge even survive? Because if we say if we say in order for you to be, held accountable for the crime of felony murder, constitutional, you have had to you had to have some sort of an intent to kill, then you wouldn't need felony murder. Correct. You have manslaughter or or or, you know, any any other form of homicide because there was an actual intent or recklessness.

There there's another charge. But if we go along the lines and and start looking at whether it's cruel and unusual because there was no intent to kill, then that destroys felony murder all all along, all the way.

Judge: But that's the argument, isn't it? That that's the argument, of the appellant in this case. I mean, that's why there's a facial challenge. It goes to the fact that this is someone who did not kill and did not intend to kill. I don't know how you I don't know how you wrap that in a different package other than you are attacking the, definition of the crime itself. And particularly, when we start talking about, individualized sentencing for individuals in this circumstance. I don't know how you do that without looking at the mens rea for the commission of the act for which he or she is going to be punished, which is a murder. I mean, that's why I think in part and parcel, of this challenge that, is is sitting before us is how you deal with the definition of this crime in terms of the punishment that's being doled out.

ADA McCarthy: I've thought throughout this whole process. We're always talking about individualized assessment and personal responsibility. And that's always a question of sentencing. Correct. So if we've if the Commonwealth has established the elements of the offense as defined by the General Assembly, then we've proven the crime. Now what shall his sentence be? And in this case, the legislature has decided that the deterrent effect of life without parole for to people who are engaging in violent conduct to deter them because this is a natural and and common outcome from home invasion involving robbery and rape. So that's exactly what the legislature was punishing and why it is a heightened and very, very heightened because it's without the possibility of parole. But of course, that doesn't end the question because the sympathetic, the truly true mute wheel man, and I have him right here,

Judge: Wheel man. I like that. i t's better than getaway driver. ADA McCarthy: Better than the getaway right. Those those mitigating factors are gonna be presented to, instead of the parole board, the governor's pardons board. There's our constitution provides for executive And how often does that happen? Well, it's happened more recently than before.

Is the briefs But that's the vagrancy of the administration, is it not? It is not so much a vagrancy. I should yes. I'll agree with that statement. There were several administrations where they had almost none.

None. But that hasn't been the case in the last two administrations. But that's not how you deal with the constitutional challenge. And I understand the problem here. I think you you can you can see, the the struggle Right. Involved. But, that doesn't it doesn't change the basic dynamic here, which is individuals are being punished for a crime for which no level of mens re has been established, and which is which is truly, contrary to, anything that, I can count as fear in a sentencing scheme. Well, you you would say that imputing it is the same as demonstrating a mens rea. Correct. And that's what this court has said time and again. Judge Well, that's the mens reoff on accomplice liability theory, generally. Right. ADA McCarthy But specifically, it's the second degree murder. It's in my brief. Right.

Judge: But but I one thing I didn't understand that you said a moment ago is, that you you seem to indicate you were calling for individualized assessment. And that seems to be the opposite of a categorical sentence for a second degree murder conviction. So why wouldn't, why wouldn't a a determination that, mandate that that life without parole is still available, but it can't be mandatory, but must be the the product of an individualized determination, putting aside the administrative problems of the minimum that we didn't get to with you yet, but putting that aside for a moment, why wouldn't that resolve the matter? Since you you called for an I thought a moment ago, you called for an individualized

adjudication. ADA McCarthy I didn't call for it, your honor. I agreed with justice I did it's the purpose of sentencing. It's the purpose of sentencing. Right? But it doesn't happen that that's my point. But it doesn't happen in these cases.

Right? Once there's the once there's the verdict, it isn't individualized. That's the point. ADA McCarthy Well, as a constitutional matter, we have ratified and placed in our constitution the power of the governor of executive clemency, which supplements, doesn't replace, but supplements individualized sentences. Judge: But that's but that's not again, that's not an look, it may be constitutional, end of story, but if it's unconstitutional, it's not an answer to say the governor can pardon. That I mean, you you don't seriously maintain

ADA McCarthy No. No. I don't do that. I did not mean to suggest that simply because that exists. The statute must be must be unconstitutional because it doesn't include it within the sentencing.

Judge: Counsel, let let me ask you a question. You've been at this for a long time. Just put on another hat for a moment. If this court were to strike down, this sentence as unconstitutional, what would your suggestion be for, the court's option in terms of, a remedy? Do we do nothing and say we're gonna give the legislature 6 months, to, you know, devise another, paradigm for these situations? Or what would you, what would you see as a plausible outcome of that kind of ruling? And with without any prejudice to the fact that I know you disagree with it.

ADA McCarthy Yeah. I I believe that as has been mentioned by several of your honors, you should not be engaging in the kind of negotiation that we could do if we were the judiciary committee of the Senate and barter as to what the minimum should be. I think it would have to be what you just suggested. I think that's the only remedy that's available to this court at this time, is if you find it unconstitutional, then your honor's correct, it has retroactive application and everyone has to be resentenced. And what's the minimum? What what we're gonna resentence them to what? We're only saying they're eligible for parole, but when? That's a legislative determination. As your honor wrote in Hairston, this court defers to the general assembly in these kinds of matters. And what would be Judge: We have done that. It's actually when we have declared, for instance, the Meghan's law to be unconstitutional, when given the legislature a period of time to remedy it, they they do it. They know how to do it.

ADA McCarthy: Yes. They have. They have. What if they don't? I mean, what's I mean, that's what's the I'm not as optimistic as the chief is. I mean, what what what happens if the generals I mean, the general assembly can't reach some kind of bipartisan agreement and get it through 2 houses. There's not a lot of legislative days available over the next over the next 6 months, or 3 months, however it is. I suppose the governor could call him back in for a special session. I don't know. But but let's assume at the end of the day, it doesn't happen. What what what do we what power do we have?

Judge: Well, strike the statute then. I I imagine you are. Which is what which puts traffic. ADA McCarthy: Which then puts it truly puts the pressure on them to address the problem. I I see that as a possible outcome. But, to your point that you just made, you know, they have an amicus brief filed by the governor of you know, they have an amicus brief filed by the governor of Pennsylvania supporting their position. I find it hard to believe that if this were put back in the legislature and the governor were to take the reins in this, it can't be resolved. I could easily Oh, I I don't think you've you're you're from Pittsburgh. Right? ADA McCarthy Yeah. I'm not in Harrisburg. Judge: From I'm from Harrisburg.

ADA McCarthy Fair. Fair. But but I I think it's the easiest legislative, fix if the general assembly so desired would be to amend parole board to give jurisdiction over persons serving, second degree murder convictions that they would be eligible to the term of pick your number 25 40, what have you. But that again is a matter for the legislature. It's almost like the Megan's Law Registry changes that happened recently is the idea that if you if you've been on the register for

so many years, you can petition to come off of it. Yeah. I mean, that seems to be like an e the the easiest fix if you've been serving life without parole for x number of years, you're parole eligible. And that that wouldn't necessarily require resentencing.

ADA McCarthy It would seem to be a great legislative fix. I just don't know how we could come up with a number. I don't believe you can, but I think it is the best fix because that provides what I've already mentioned before, individualized assessment. If you have those sympathetic mitigating factors to say, I should not spend the rest of my life in prison Judge Or aggravating factors. ADA McCarthy Or aggravating factors as presented by the commons.

Treat a recidivist completely different than you wanna treat a guy that comes out of the box and and gets, you know, at 18 felony murder, which is his first conviction. I mean, this all this does is really allow individualized sentencing that you're talking about. It allows resentencing for the trial judge to take a look at the individual, his or her participation in the actual underlying crime, as well as their prior history or lack thereof. ADA McCarthy I think you said that the trial judge, I meant the parole board. Parole board.

If we were to if you were to strike down the statute and everyone needs to be resentenced, then yes. And as you pointed out yourself, justice McCaffrey, we're not talking about just going in and having a sentencing conference. We're talking about having mini trials. We're gonna present all the evidence, both mitigating and aggravating factors, etcetera, to prove that this is not just the wheel man, this is someone who engaged in violent conduct as a part of the, corrupt consent decree. Judge: But that would go to their mens rea.

ADA McCarthy Correct. Judge: But that would go to the mens rea. I mean, we keep getting back to what this statute, the felony murder statute does not require. And that's what it does not require. That determination of what the defendant intended, vis a vis the commission of the murder. Well Or or was it recklessness? I mean, there are and, you and I agree that, I mean, generally speaking, if there is no designated mens reaing a crime, we at least apply recklessness standard. ADA McCarthy At least. That's the fallback. Judge At least. t's the fallback. At least. That doesn't even happen here. That doesn't even happen here. So I mean, this notion of going back for individualized sentencing, from my perspective, you can call it mitigating circumstances or aggravating circumstances.

From my point of view, consistent with our sentencing standards, you have to determine what the defendant had in mind vis a vis the commission of that murder. I agree with you, sir, your honor, to the extent that that goes to finding whether they're guilty of the crime. Judge: Counsel, do I understand that you are against a retroactive application? Should we find it unconstitutional because it requires judges to work? No, your honor.

ADA McCarthy No. Judge: That is not my point. Boy, that's a loaded question. That is not my point, your honor. As a trial judge, I think that's our job.

Judge i've never heard a judge campaign for the job by saying, I don't wanna take a case. I agree with that point. I require the legislators to work. Yes. Right?

I require them to work. Mister McCarthy, to that point, Judge: I think it's intriguing. So you've got the front end sentencing. I'm a little concerned about the idea of having a whole slew of people resentenced. I let I'm intrigued by the idea of saying that the the parole code has to be remedied some way in the sense that certain number of of these people who are serving or served at a minimum time sort of have legislatures handled SORNA, are eligible to be considered for parole.

What if we what if we gave the legislature again, assuming assuming the the appellant wins here, what if we gave the legislature a specific time to figure out if it can, what that would look like in terms of the number of years you would have had to have been serving this sentence before you're eligible? And if they don't, we just say, everybody who's serving is eligible, and we put it all in the parole board. ADA McCarthy Yeah. But you you can't do that because somebody could have been convicted 5 years ago for felony murder. And if we're gonna start it Right.

Judge But that's the stick. That's the stick to the general assembly, and that's the stick to the parole board is to say is to say, you guys you guys you guys legislate and figure out a certain number of years. And if you don't, constitutionally, the only remedy we can give is everybody has to get it. That's now now they'll they'll deny the 5 year or they'll deny the 10 year or something like that, but then it's on the parole board to to figure it all out. How's how's that isn't that better than sending everybody back for resentencing?

ADA McCarthy: Yes. Yes, it is. And to my to your point, justice Daugherty, having resentencing hearings. My point was that resentencing hearings are not simply conferences and agreeing and discussing how what the sentence should be as in the after there's just been a trial and all the evidence has been heard. We're talking about cases that have been sitting for 20 or 30 or 40 years. We're gonna go in front of judges who've never heard of this defendant or know anything about it. And that puts

Judge: But that happens every day. Yeah. Exactly. I've had people come to force that we don't know who they are.

Judge: When I was a trial judge, I never knew the defendants. But we presented the the case to you directly. My point is these are judges who are now coming to the case draft. Still present the case file because individualized sentencing require individual require individualized considerations. The parole board only takes a look at the adjustment while somebody's in prison and whether or not the parole board thinks he or she should be paroled. Individualized sentencings required an individualized resentencing hearing where you can take a look at the factors we just talked about. A, their participation or lack thereof in the crime, their history. I mean, one of the I mean, justice Daugherty and I and justice Wecht were all trial judges. We sentenced individuals based upon who they were, based upon a lot of other considerations, mitigation factors, and aggravating factors. Isn't that a more appropriate sentence if we were to strike down this is unconstitutional?

ADA McCarthy Yes. But that's exactly what the the pardons board does. They don't just look at sentences, how they're adjusting talking about pardons. Judge: That would be based upon the politics, not the fairness aspect. Could we go back to amending the parole code? If that were the option that if we send it to the legislature, gave them so many days to fix this, and that was the option they chose. What would exactly have to be amended? Just the, years of sentence to be served before you're eligible? ADA McCarthy Well, the way the statute is more than that. I think it's probably just that. it's the jurisdiction of the parole board. The way it's phrased is that they have no jurisdiction over anyone serving a sentence of life without parole. So presumably, the the new statute would read that they have jurisdiction over those serving life without parole because of a sentence of second degree murder, which then gets into, all of the specifics as to the element, not just the elements, elements, the way the crime occurred and and mitigating and aggravating

factors. And and so while the parole board generally does not apply that, I I would argue that it should. That's not just how they're adjusting in prison, but to the extent that they were less culpable in the underlying crime.

Judge: But that's not what they do. I mean, that's that's not what they do. They look at the course of the defendant, the in in prison. No. That's part of what they do. Though they have sometimes the victims come back and testify to remind the parole board of how devastating the crime was.

ADA McCarthy I was going to say, your honor, in every case of a homicide coming before, the parole board, my office gets a letter asked to put up any additional information. We we get the record. We send them everything we think which is relevant to show that this is an aggravating case, and they do not deserve any clemency at this time. On occasion, we've even gone and appeared before the board and and testified. You're right though. The victim's, Crimes Victims Act provides that the victim and victim's family have a right to speak to the board. So it has been broadened in that respect. I can't say say it's as broad as a if we had a sentencing before a trial judge, but it has been broadened to some degree.

Judge: And it does it what else is it dependent on? I mean, if if we amended the parole code, then what? Somebody's been, in prison for, 20 years for felony murder.

ADA McCarthy Well, it's their opportunity. I thought that's all they were arguing for. That it's it's, cruel, that they not have the opportunity to go before the parole board. Life without the opportunity or possibility of parole. They're having given the opportunity, and we've done that with the juveniles as well.

Judge: The cruelty aspect is the lack of hope. I mean, there's there's literally zero opportunity regardless of how they've rehabilitated themselves over the course of their their terms of incarceration. I think that's the gist of the argument.

ADA McCarthy Right. There should be there should be the opportunity. That's the time recidivist who has a poor adjustment to prison situations ever get paroled.

ADA McCarthy: Yeah. There are some who serve long periods of incarceration and long periods in solitary confinement because they were so dangerous to the rest of the population.

Judge: Yes. Are there other questions for mister McCarthy? I think we've got it. ADA McCarthy Thank you so much. Thank you, your honors.

Concluded