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IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 3 WAP 2024

COMMONWEALTH OF PENNSYLVANIA

v.

DEREK LEE,
appellant

BRIEF FOR *AMICUS CURIAE* THE OFFICE OF ATTORNEY GENERAL IN SUPPORT OF THE COMMONWEALTH

Appeal from the decision of the Superior Court, 1008 WDA 2021, June 13, 2023, affirming the judgment of sentence for second degree murder, CP-02-CR-16878-2014, entered December 19, 2016, in the Court of Common Pleas of Allegheny County.

RONALD EISENBERG
Chief Deputy Attorney General
RICHARD P. BIELAWA III
Deputy Attorney General
HUGH J. BURNS, JR.
Assistant Chief Deputy Attorney General
Appeals Section
MICHELE K. WALSH
Executive Deputy Attorney General
Criminal Law Division
MICHELLE A. HENRY
Attorney General
Commonwealth of Pennsylvania

Office of Attorney General
1600 Strawberry Square
Harrisburg, Pennsylvania 17120
(267) 940-6676
reisenberg@attorneygeneral.gov
July 26, 2024

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STATEMENT OF INTEREST

The Attorney General is the chief law enforcement officer of the Commonwealth. It shall be her duty "to uphold and defend the constitutionality of all statutes" unless the law compels otherwise. 71 P.S. § 731-204(a)(3). That duty does not depend on the Attorney General's beliefs about the merits of the statute in question. The statute in question here is 18 Pa. C.S. § 1102(b), which prescribes the sentence for the crime of second degree (felony) murder. The Attorney General believes, with the Governor, that reform of that statute would be appropriate. But that does not make the law unconstitutional, and nothing in the applicable legal test supports such a claim.

The Office of Attorney General therefore files this *amicus* brief. No one other than the Office authored or paid for it in whole or in part.

SUMMARY OF ARGUMENT

Briefs are easy. Lawmaking is hard. Pressure is applied, through public and private statements. Tradeoffs are made; legislative priorities are bargained over. If the issue is considered important enough, agreements are reached. If not, it is because there is insufficient public will – because society has not yet reached consensus. The lawmaking process is how you tell.

Admittedly, a ruling from this Court, striking down the existing statute, would avoid much of the messy, difficult work of statutory reform. It would force the General Assembly's hand. But this Court is a coequal branch of the Commonwealth's government. It should not be seen as a tool to be used as leverage over the legislature.

The brief filed on behalf of the Governor rightly advocates for change to the current felony murder statute. The brief suggests that mandatory life without parole should remain the proper penalty for many felony murders, but that lesser penalties should be available for lesser culpability. The Attorney General shares that conviction, and looks forward to working with all interested parties toward that end.

But this case, respectfully, is not the appropriate means to achieve the goal. The Court does not invent constitutional interpretations to serve policy objectives, however worthy they are. Instead this Court relies on more neutral principles to understand the Framers' intent: not policy concerns in themselves, but the text of the

provision in question, its history, and legal rules in other states that may shed light on its meaning.

Nothing in the text or history of the "cruel punishments" clause suggests that it was intended to bar life without parole as the punishment for felony murder. Indeed, almost immediately after the clause was enacted, legislators promptly passed a new law punishing felony murder by death, and the penalty has remained either death or life without parole ever since.

Nor is there anything in the laws of other states to suggest that Pennsylvania's constitution must be understood to prohibit felony murder LWOP. The claim here is that other jurisdictions consider that punishment to be unavailable where the felony murderer did not personally kill or intend to kill. But many other states require LWOP even in that circumstance.

The policy arguments here are compelling, but the judicial process is ill-suited to their proper resolution. The legislative and executive branches have the necessary and sufficient powers to ensure just and fair punishment for the crime of felony murder.

ARGUMENT

As noted in the *amicus* brief of the Pennsylvania District Attorney's Association, most of the briefs filed in support of the defendant are policy arguments in favor of changes that can properly made by the Pennsylvania General Assembly, representing the people of this Commonwealth.

It is worth noting as well that such *amicus* briefs do not themselves represent the people of Pennsylvania. The brief of the "criminologists and law professors," for example, is signed by twenty academics employed by various universities, four of which are in Pennsylvania. The brief of the "scholars of Eighth Amendment law" offers the names of eighteen professors, one of whom is employed in Pennsylvania. The brief of the "special rapporteur" comes from four experts associated with the United Nations Human Rights Council, which normally focuses on areas such as the Middle East.[1]

The exception is the brief filed on behalf of the Governor of Pennsylvania. The Office of Attorney General respectively offers some comments in response to that brief.

[1] *See, e.g.*, "Detailed findings on the military operations and attacks carried out in the Occupied Palestinian Territory from 7 October to 31 December 2023, https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session56/a-hrc-56-crp-4.pdf.

I. The current sentence for felony murder dates back to the framing of the "cruel punishments" clause.

The brief filed on behalf of the Governor suggests, at 9, that Pennsylvania law is different than federal law, because our Constitution prohibits "cruel punishments," not "cruel and unusual punishment." On this basis the brief avers that the felony murder statute is invalid under the Pennsylvania Constitution.

But the text and history of the Pennsylvania provision belie this argument. At almost the same time that Pennsylvania Framers enacted the "cruel punishments" provision, Pennsylvania legislators enacted the death penalty for felony murder. Since that time, and for the next 230 years, the "cruel punishments" clause has been maintained and reenacted in tandem with the punishment for felony murder, which has always and only been either death or life without parole. Whatever "cruel punishment" might mean in other contexts, therefore, it plainly was never intended to bar life without parole as the sentence for felony murder.

Pennsylvania's "cruel punishments" clause originated with the Constitution of 1790, Art. IX, Section 13. In 1794, in one of the first legislative sessions after the new constitution took effect, the General Assembly passed a law setting death as the only punishment for first degree murder. As first drafted, that bill defined first degree murder as premeditated, deliberate killing. But the legislature saw fit to expand the definition to include a killing "committed in the perpetration of or attempt to perpetrate any arson, rape, robbery or burglary." Act of April 22, 1794, § 2, 15 Stat.

at Large 174, 175; *see* Edwin R. Keedy, History of the Pennsylvania Statute Creating Degrees of Murder, 97 U. PA. L. REV. 759, 770–73 (1949). Many of these legislators were the same people who had just served as delegates to the convention that produced the 1790 Constitution. Plainly they did not believe their freshly minted "cruel punishments" clause to preclude the death penalty as the sole punishment for felony murder.

Nor did their successors. The Constitution of 1790 was replaced by the Constitution of 1838, which was replaced by the Constitution of 1874, which was replaced by the Constitution of 1968. Throughout all these reenactments, the only change to "cruel punishments" was to move the clause from Article IX to Article I.

And as the "cruel punishments" clause remained unchanged, so did the punishment for felony murder. The provisions of the 1794 statute were reenacted in 1860. Act of March 31, 1860, P. L. 382 §75. Until 1925, the only sentence was death. That year the legislature expanded the punishment to allow for either death or life. Act of May 14, 1925, P.L. No. 411, §§ 1, 2. And in 1974, after the creation of the Crimes Code, felony murder was reclassified as second degree murder, with life imprisonment now as the sole penalty. Act of March 26, 1974, P.L. 213, No. 46, § 2.[2]

[2] As this Court has held, "life imprisonment" means life without parole. *Hudson v. Pennsylvania Board of Probation and Parole*, 204 A.3d 392 (Pa. 2019); *Commonwealth v. Cobbs*, 256 A.3d 1192, 1217-18 (Pa. 2021).

In light of this history, it is not possible to read the words "cruel punishments" as a prohibition on life without parole as the sentence for felony murder. Had their intent been to create such a restriction, the people of Pennsylvania had over two centuries to rewrite the cruel punishments clause, or to alter the punishment for felony murder. They did neither. Instead they repeatedly reaffirmed both. Perhaps the sentence for some *other* crime may still be challenged as inconsistent with the text and history of the cruel punishments clause. But not the sentence for felony murder.[3]

II. At least eighteen other states – not just one – mandate LWOP for felony murderers who did not kill or intend to kill.

The argument has been made that Pennsylvania's sentence for felony murder is an extreme outlier, as only one other state has a similar law. The suggestion is that the Pennsylvania Constitution must be read to prohibit life without parole as the

[3] The brief filed on behalf of the Governor alternatively appears to suggest that the felony murder sentence is independently invalid under the United States Constitution. The brief suggests that felony murder encompasses a wide range of conduct, and that the legislature cannot constitutionally presume to place all felony murderers in the same class. But this is just another version of the now-discredited "irrebuttable presumption" doctrine. *See Commonwealth v. Torsilieri*, 316 A.3d 77, 113-23 (Pa. 2024) (Wecht, J., concurring in relevant part).

In a similar vein, the brief suggests that less culpable adult murderers should be treated like juvenile murderers under *Miller v. Alabama*, 567 U.S. 460 (2012), and so should receive individualized rather than mandatory sentencing proceedings. But the Supreme Court has made clear that *Miller*'s requirements do not apply to adults, but only to juveniles. *Jones v. Mississippi*, 593 U.S. 98, 110 (2021) ("an offender under 18"). Thus, *Miller* does not mean that every distinction in culpability requires discretionary sentencing; otherwise every mandatory minimum sentence would be uncon-stitutional. *See also Commonwealth v. Felder*, 269 A.3d 1232, 1235 (Pa. 2022) (*Jones* "severely narrowed the holdings of *Miller* and *Montgomery* as previously understood by many courts, including this one").

penalty for a felony murderer who did not specifically intend to kill and whose own hands did not directly do the killing.

Review of state laws, however, shows that Pennsylvania is not an "outlier" at all. At least seven other states mandate a sentence of life without parole for all felony murder. And another eleven states mandate that same sentence for at least some felony murders, even if the murderer did not personally kill or intend to kill. There is plainly no national "consensus" against felony murder LWOP for "nonkillers," and no warrant for disregarding the text and history of the constitutional provision at issue.

These states, in addition to Pennsylvania, mandate life without parole for all felony murder:

- Iowa: defendant guilty of first degree murder if he participates in any forcible felony and co-felon causes death of another; mandatory LWOP, whether or not defendant himself killed or intended to kill; Iowa Code § 707.2, § 902.1

- Louisiana: defendant guilty of second degree murder if he participates in any of fifteen listed felonies (many more than Pennsylvania) and co-felon causes death of another; mandatory LWOP, whether or not defendant himself killed or intended to kill; La. Rev. Stat. § 14:30.1(A)(2), § 14:30.1(B).[4]

- Mississippi: defendant guilty of capital murder if he participates in any of eight listed felonies and co-felon causes death of another; mandatory LWOP, whether or not defendant himself killed or intended to kill; Miss. Code § 97-3-19(2)(e), § 47-7-3(1)(c).

[4] Louisiana is the only mandatory LWOP state other than Pennsylvania that happens to denominate felony murder as "second degree." Other states on the list use different numbers, or don't use "degrees" at all. But the constitutional question, of course, turns not on the label but on the actual crime and its punishment.

- North Carolina: defendant guilty of first degree murder if he participates in robbery, burglary, arson, kidnapping, rape or other sex offense, and co-felon causes death of another; mandatory LWOP, whether or not defendant killed or intended to kill; N.C. Gen. Stat. § 14-17(a).

- South Carolina: defendant guilty of aggravated murder if he participates in burglary, criminal sexual conduct, armed robbery, or other listed felonies, and co-felon causes death of another; mandatory LWOP, whether or not defendant killed or intended to kill; *State v. Crowe*, 188 S.E. 2d 379 (S.C. 1972), S.C. Code § 16-3-20(A), § 16-3-20(C)(a)(1).

- South Dakota: defendant guilty of first degree murder if he participates in burglary, robbery, rape, kidnapping, arson, or discharge of explosive, and co-felon causes death of another; mandatory LWOP, whether or not defendant killed or intended to kill; S.D. Codified Laws § 22-16-4, § 24-15-4.[5]

- Wyoming: defendant guilty of first degree murder if he participates in burglary, robbery, sexual assault, child sexual abuse or kidnapping, arson, escape, or resisting arrest, and co-felon causes death of another; mandatory LWOP, whether or not defendant killed or intended to kill; Wyo. Stat. § 6-2-101(a), § 6-2-101(b), § 6-10-301(c).

And the following states mandate life without parole for at least some felony murders, even if the defendant did not kill or intend to kill:

- California: defendant guilty of first degree murder if he is major participant in robbery, burglary, rape, or one of other listed felonies, acts with reckless indifference, and co-felon causes death of another; mandatory LWOP, whether or not defendant himself killed or specifically intended to kill; Cal. Penal Code § 189(a), § 189(e)(3), § 190.2(a)(17), § 190.2(d).

- Connecticut: defendant guilty of murder if he participates in arson, kidnapping, or sexual assault, and co-felon causes death of another; mandatory LWOP, whether or not defendant killed or intended to kill; Conn. Gen. Stat. § 53a-54d, § 53a-54b(5), § 53a-54b(6), § 53a-35a(1)(B).

[5] *See State v. Frazier*, 646 N.W.2d 744 (S.D. 2002) (rejecting Eighth Amendment challenge).

- Delaware: defendant guilty of first degree murder if he participates in any felony and co-felon recklessly causes death of another; mandatory LWOP, whether or not defendant killed or intended to kill; Del. Code tit. 11 § 636(a)(2), § 4209(a).

- Idaho: defendant guilty of first degree murder if he participates in rape, robbery, burglary, or other listed felonies, acts with reckless indifference, and co-felon causes death of another; death or mandatory LWOP, whether or not defendant killed or intended to kill; Idaho Code § 18-4003(d), § 18-4004, § 19-2515(1), § 19-2515(7)(b), § 19-2515(9)(g), § 19-2515(9)(h).

- Illinois: defendant guilty of first degree murder if he participates in any forcible felony and co-felon causes death of a police officer, fireman, first aid provider, or other listed persons; mandatory LWOP, whether or not defendant killed or intended to kill; 720 Ill. Cons. Stat. § 5/9-1(a)(3), § 5/5-8-1(c).

- Massachusetts: defendant guilty of first degree murder if he participates with actual malice in felony punishable by life with parole, and co-felon causes death of another; mandatory LWOP, whether or not defendant personally killed or specifically intended to kill; Mass. Gen. L., ch. 265, § 1, § 2.

- Michigan: defendant guilty of first degree murder if he participates with wanton and willful disregard in any of fifteen listed felonies (many more than Pennsylvania), and co-felon causes death of another; mandatory LWOP, whether or not defendant killed or intended to kill; Mich. Comp. Laws § 750-316.[6]

- Minnesota: defendant guilty of first degree murder if he participates in forcible sexual assault and co-felon causes death of another; mandatory LWOP, whether or not defendant killed or intended to kill; Minn. Stat. § 609.185(a)(2), § 609-106 subd. 2(1).

- New Hampshire: defendant guilty of first degree murder if he participates in sexual assault, arson, or armed robbery or burglary, and co-felon knowingly causes death of another; mandatory LWOP, whether or defendant himself

[6] Although Michigan's felony murder standard is, on its face, slightly more restrictive than Pennsylvania's, it still has about the same number of defendants serving life without parole for felony murder – over 1,000. https://felonymurderreporting.org/states/mi/.

killed or specifically intended to kill; N.H. Rev. Stat. § 630:1-a(I)(b), § 630:1-a(III).

- New Mexico: defendant guilty of first degree murder if he participates in "any felony," knowing of strong probability of death, and co-felon causes death of police officer; mandatory LWOP, whether or not defendant himself killed or specifically intended to kill; N.M. § 30-2-1(A)(2), § 31-20A-2, § 31-20A-5(A).

- Tennessee: defendant guilty of first degree murder if he participates in rape and co-felon causes death of another; death or mandatory LWOP, whether or not defendant himself killed or intended to kill; Tenn. Code § 39-13-202(a)(5), § 39-13-202(c)(2).

Pennsylvania's felony murder sentencing scheme, therefore, is hardly aberrant among the states. To be sure, there are moderately more states without mandatory life than those with it. Some make LWOP optional rather than mandatory, but then exercise that option regularly.[7] Some require lengthy terms of years that are

[7] Florida, for example, has optional LWOP but as many felony murderers serving life without parole as Michigan and Pennsylvania. https://felonymurderreporting.org/states/fl/.

At least ten additional states also permit life without parole for felony murder: Georgia, Ga. Code § 16-5-1; Maryland, Md. Code Crim. Law § 2-201; Nevada, Nev. Rev. Stat. § 200.030; North Dakota, N.D. Cent. Code § 12.1-16-01, § 12.1-32-01; Oklahoma, Okla. Stat. tit. 21, § 701-7, § 701-9; Rhode Island, R.I. Gen. Laws § 11-23-1, § 11-23-2; Tennessee, Tenn. Code § 39-13-202; Utah, Utah Code § 76-5-202(2)(b), § 76-3-207.7(2)(a); Vermont, 13 Vt. Stat. § 2301, § 2303(a)(1); and West Virginia, W. Va. Code § 61-2-1, § 61-2-2, § 62-3-15.

just short of LWOP.[8] Some lack any LWOP option for felony murder.[9] Some have no felony murder rule at all.[10]

But it's not a vote. The diversity of these approaches is a reflection of our federalist system, which allows the states to confront differing problems, to implement differing values, and to experiment with differing solutions. Nothing in the Pennsylvania Constitution (or the federal) requires this Commonwealth to follow the felony murder policy choices of other states' legislatures.

III. Where the other *Edmunds* factors fail, "policy" alone cannot justify invalidation of a statute.

The defense *amicus* briefs touch on all the *Edmunds* factors used for evaluating state constitutional claims,[11] but tend to concentrate on the last factor, policy considerations. The Attorney General agrees with some of these concerns. As a policy matter, second degree murder penalties should be subdivided into smaller categories of conduct.

But policy insights, no matter how unique, are no substitute for the other

[8] *E.g.*, Tennessee, Tenn. Code § 39-13-202(a), § 39-13-202(c)(1)(C), § 40-35-501(h)(2) (60-year mandatory minimum for felony murder not subject to mandatory LWOP).

[9] Only nine states fall into this group: Alabama, Alaska, Colorado, Kansas, Maine, Missouri, Nebraska, Texas, and Wisconsin.

[10] This is the smallest category, with only two states: Hawaii and Kentucky.

[11] 1) text; 2) history; 3) law in other states; 4) policy considerations. *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991).

Edmunds factors. Neither the text nor the history of the cruel punishment clause warrant abrogation of the felony murder statute, nor do other states' laws. If *Edmunds* could be reduced to a debate about the proper punishment for felony murder, it would no longer be a legal test at all; it would just be a pretext for policymaking.

IV. There is no way to sidestep the retroactivity question.

Others would have this Court declare the felony murder statute unconstitutional – and then rest. The proposal is that the Court leave it to the legislature to figure out what to do about the retroactivity consequences of its ruling.

The concern about retroactivity is understandable. If the Court declares the second degree murder statute invalid, and then declares that ruling retroactive, then literally everyone now in prison for that offense would have to be resentenced. It has been suggested that relatively few of these proceedings would actually result in a lower sentence. But that assumption very much remains unproven. It would likely depend on a variety of factors, such as the county in which the resentencing occurs. After invalidation, there would be no required minimum sentence, so in theory, a prosecutor could choose to seek time-served for every convicted second-degree murderer in her or his jurisdiction.

A. If the statute is unconstitutional, retroactivity must be decided by the courts, not the legislature.

Unfortunately, such practical considerations are simply off the table once the statute has been struck down. Neither the legislative nor the executive branch can declare a moratorium on resentencings. If this Court decides that the felony murder statute is unconstitutional, then this Court must decide whether its decision is retroactive. Retroactivity would itself be a constitutional question. *See, e.g.*, *Commonwealth v. Cunningham*, 81 A.3d 1, 8 (Pa. 2013) (deciding retroactivity of *Miller*), *overruled on other grounds by Montgomery v. Louisiana*, 577 U.S. 190 (2016); 42 Pa. C.S. § 9545(b)(iii) (post-conviction review for new constitutional rights recognized by this Court and held retroactive by this Court).

The result of that inquiry might be in some doubt after the decision of the United States Supreme Court in *Jones v. Mississippi*, *supra*, which interpreted the Court's decision in *Montgomery*. *See Commonwealth v. Cobbs*, *supra* (discussing *Jones*); *Commonwealth v., Felder*, *supra* (same). But what is not in doubt is that the Court would have to resolve the issue one way or the other, preferably sooner rather than later. And that resolution would have to apply to all final judgments, or none. Retroactivity does not discriminate between those who might be more or less deserving candidates for relief.

B. The commutation process can be an effective way forward.

The retroactivity problem is just one of the reasons that legislative reform of the felony murder statute is preferable to judicial decree. As the state survey suggests above, there are many ways to describe, and distinguish among, the multifarious criminal acts that fall under the felony murder label. And there is a vast range from which to assign potential sentencing options to each of these acts. The task of making those decisions is complex, both practically and morally. The Office of Attorney General is prepared to work with the legislature and the Governor to start the job.

But in the meantime, there is much that can be done. The Governor has expansive authority to review felony murder LWOP sentences under his constitutional commutation powers. PA. CONST. Art. IV, § 9. Other *amicus* briefs have argued that commutation is an inadequate solution, because the rate has varied widely under past governors. But that fact only underscores the breadth of the Governor's discretion. If the problem is pace, it can be ramped up, at the election of the executive branch, by applying more resources. There is no constitutional restriction on the size of the staff assigned to review commutation matters.

But no extraordinary resources should be needed, because, as the Governor's brief explains, the number of ripe cases is not actually that large. The Department of Corrections has already determined that at least half of those convicted of felony murder were the actual killer, which would disqualify them under the Governor's

proposed criteria. Of those that remain, many, even if not the actual killer, may have intended to kill, and so would also be excluded. And of those who still remain, many have been convicted only in recent years, and are not yet at the point where commutation would be appropriate. That is the great benefit of the commutation process; it permits precisely the case-by-case, individualized consideration that justice deserves.

All of these measures, both legislative and executive, can be undertaken presently. Of course, members of these branches may have disagreements about how exactly to proceed. But the absence of consensus is not evidence of unconstitutionality. It is simply how our lawmaking process works.

CONCLUSION

For these reasons, the Office of Attorney General respectfully requests that this Court affirm the ruling below.

Respectfully submitted,

/s/ *Ronald Eisenberg*

MICHELLE A. HENRY
Attorney General
Commonwealth of Pennsylvania
MICHELE K. WALSH
Executive Deputy Attorney General
RONALD EISENBERG
Chief Deputy Attorney General
RICHARD BIELAWA
Deputy District Attorney
HUGH J. BURNS, JR.
Ass't Chief Deputy Attorney General

Office of Attorney General
1600 Strawberry Square
Harrisburg, PA 17120
(267) 940-6676
reisenberg@attorneygeneral.gov
July 26, 2024

CERTIFICATE OF COMPLIANCE WITH RULE 2135

This brief is 3,905 words long, which is within the 7,000-word limit for *amicus curiae* briefs under Pa. R. App. P. 531.

CERTIFICATE OF COMPLIANCE WITH RULE 127

This brief complies with Pa. R. App. P. 127(a) and the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Ronald Eisenberg

RONALD EISENBERG
Chief Deputy Attorney General

Office of Attorney General
1600 Strawberry Square
Harrisburg, Pennsylvania 17120
(267) 940-6676
reisenberg@attorneygeneral.gov