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On Writ of Certiorari; Colorado Court of Appeals Case Number 19CA2033; Division I; Opinion by Judge Tow; Dailey and Hawthorne, JJ., concur

El Paso County District Court;
Honorable Lin Billings Vela;
Case Number 18CR6275

Petitioner
WAYNE SELLERS IV,

v.

Respondent
THE PEOPLE OF THE STATE OF COLORADO.

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Case No. 22SC738

OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

1. The brief does not comply with the applicable word limits set forth in C.A.R. 28(g). It contains 9,900 words. A separate motion to exceed the word limit has been filed.
2. The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A). For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Krista A. Schelhaas
Krista A. Schelhaas

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STATEMENT OF THE ISSUES

I. Whether a life without the possibility of parole sentence for felony murder is categorically unconstitutional following the Colorado General Assembly's reclassification of that offense.

II. Whether a life without the possibility of parole sentence is grossly disproportionate to the offense of felony murder following the Colorado General Assembly's reclassification of that offense.

INTRODUCTION

Under Colorado law, a defendant can be found guilty of felony murder without having killed anyone and without having any mens rea—even mere recklessness—regarding causation of the victim's death. In 2021, recognizing that a mandatory life-without-parole (LWOP) sentence for felony murder was excessive and disproportionate, the General Assembly reclassified felony murder from a class one felony to a class two felony, thereby abolishing LWOP sentences for felony murders in the future and instead imposing a sentencing range of 16 to 48 years.

This case is about Wayne Sellers, a young Black man who was only 20 years old when he committed a crime that subjected him to liability for felony murder

because his companion committed a homicide. A young Black man who, because he was sentenced under the old law, has no realistic hope of ever being released from prison.

By any yardstick, an LWOP sentence for felony murder in Colorado is cruel and unusual. The United States stands practically alone in the world *in allowing any criminal liability for felony murder*. And within the United States, Colorado's pre-2021 statute was an outlier for its breadth of conduct covered and extremely harsh mandatory penalty. The recent legislative reform Colorado is more in line with the vast majority of jurisdictions in this country, which would not allow a mandatory LWOP sentence for someone who neither kills anyone nor has any mens rea as to causation of a death.

It is inarguable that standards of decency have evolved to the point where we no longer tolerate the injustice of punishing Colorado's felony murder with the most severe sentence available under state law and without the safety valve of judicial discretion for cases that merit a less permanent and less punitive approach. "Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" *Graham v. Florida*, 560 U.S. 48, 59 (2010) (quoting *Weems v.*

United States, 217 U.S. 349, 367 (1910)). Mr. Sellers asks this Court to breathe meaning into the Eighth Amendment and Article II, Section 20 of the Colorado Constitution by holding that, given the recent legislative reform, LWOP for felony murder is now an unconstitutional penalty in Colorado.

STATEMENT OF THE CASE, FACTS, AND JUDGMENT BELOW

Factual background and procedural history.

Mr. Sellers' offense date was October 7, 2018, three years before Colorado's 2021 felony-murder legislative reform. Mr. Sellers was 20 years old when he got into a car with some other young people, leading to the events that would end a life and change the course of his own forever. Shots were exchanged between Mr. Sellers' companion and a teenager the companion and another of his acquaintances were trying to rob. (TR 10/08/19, pp 38:9-20, 43:11, 46.)

Mr. Sellers neither killed nor injured anyone. The prosecution's evidence showed that after he heard shots ringing out, he also fired a weapon, multiple times, from some distance away, down the street. (Env, EX 310, 9:52, 40:20; TR 10/08/19, p 49:12-21). The victim was shot and killed by Mr. Sellers' companion. (TR 10/03/19, pp 204:5-212:3.) The bullets from Mr. Sellers' pistol hit no one.

The prosecution charged Mr. Sellers with felony murder, based on the

predicate offense of robbery or attempted robbery, as well as other offenses not at issue here. (CF, p 10.) Three other participants, including the individual who killed the victim, were prosecuted in separate cases. (CF, p 54.)

At Mr. Sellers' trial, there was no dispute that the person who killed the victim was not Mr. Sellers but rather his companion. (TR 10/02/19, at p 100:5-6 (prosecution admitting in opening statement that victim "was struck by the shotgun held and fired by" the companion); TR 10/10/19, at p 43:3-5 (prosecutor arguing in closing that "[i]t doesn't matter that it was [the companion]'s . . . shotgun bullet that killed [the victim], Wayne Sellers is guilty for participating.").) The prosecutor proceeded under a theory of complicity as to the charge of felony murder and its predicate offense, attempted aggravated robbery. (CF, pp 626-33, 636-43, 647). And the prosecution argued in closing that jurors should convict on complicity liability as to the felony murder charge. (TR 10/10/19, at pp 39:20-40:5 (saying jurors should convict based on complicity instruction because it "[m]ay not have been Wayne Sellers' gun that actually fatally wounded [the victim], but he can be held accountable the same way as the weapon that actually did fatally shoot [the victim]").

The jury rejected Mr. Sellers' defense of abandonment or renunciation. (CF,

pp 660-70.) For the felony-murder conviction, Mr. Sellers received a mandatory LWOP sentence. (TR 10/11/19, p 17:16-19.)[1]

The Colorado legislature has abandoned LWOP for felony murder.

In 2021, while Mr. Sellers' direct appeal was pending, the General Assembly reformed felony-murder law in Colorado, changing that offense from a class one felony (first-degree murder) to a class two felony (second-degree murder).[2] Ch. 58, sec. 1, §§ 18-3-102, -103, 2021 Colo. Sess. Laws 235. Felony murder is now punishable by a sentence between 16 to 48 years. *See* §§ 18-1.3-401(1)(a)(V.5)(A), 18-3-103(1)(b), (3)(a), (4), C.R.S.[3]

The General Assembly determined that because felony murder does not

[1] The felony murder predicates of attempted aggravated robbery were merged into felony murder at sentencing. (TR 10/11/19, p 17:16-23; CF, p 658.) Mr. Sellers also received a 32-year sentence for a separate robbery of a different victim. (TR 10/11/19, pp 17:24-18:8; CF, pp 658-59.)

[2] Prospectively, when there is a jury finding that the defendant acted after provocation and under a sudden heat of passion, then felony murder is a class 3 felony. *See* § 18-3-103(1)(b) & (3)(b), C.R.S. (2021). The 2021 reform also made other changes. It required that the death be caused by a *participant* as opposed to by *any person*, which had previously included, for example, the scenario where a responding officer shoots and kills one of the participants in a felony. And it eased the elements for the affirmative defense.

[3] Because second-degree murder is a statutory crime of violence, the sentencing range is increased to at least the midpoint in, but not more than twice the maximum of, the presumptive range. §§ 18-1.3-406, 18-3-103(4), C.R.S.

require proof of deliberation, intent, or knowledge,[4] it should not be classified as the most serious murder, i.e., first-degree murder, and LWOP is not a just or proportionate sentence. The Sponsor noted the "structural imbalance in our sentencing laws," stating, "that most severe sanction of life without parole should be reserved where the proof has been made, the intent has been made." Hearing on S.B. 124 before the H. Judiciary Comm., 73rd Gen. Assemb. (April 7, 2021) (*House Hearing*) at 4:23:30; 4:26:19.[5]

The 2021 legislative change recognized the proportionality problem that results from punishing a strict-liability crime in the same way as intentional murder. Bill Sponsor Representative Weismann explained: "[A]nother foundation of criminal law is proportionality or the idea that the punishment should fit the crime…I bring Senate Bill 124 today because the felony murder doctrine as it currently exists in Colorado is a stark exception to both of those principles." *House Hearing*, at 4:20:03.

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[4] *See People v. Fisher*, 9 P.3d 1189, 1191 (Colo. App. 2000) (felony murder is a strict-liability crime because there is no requirement that the defendant or principal intend the death of the victim).

[5] Audio available at https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20210407/-1/11394. The numbers cited indicate the time stamp of the audio.

Several elected district attorneys testified in support of reform. Denver District Attorney Beth McCann emphasized how the bill would bring Colorado law more in line with other jurisdictions around the country:

> [I]n situations where people are not as culpable [as those who intentionally commit murder] but still a death results, it is appropriate to then hold them to the standard of a class two felony, which still embodies a significant penalty, up to 48 years in prison. So, I think in balancing all of the considerations, community safety, culpability, and how we are as a society—what we believe as a society is appropriate and fair in our criminal justice system, that I would urge your support for this change. I believe it will make our criminal justice system fairer and put us in line also with many, many other states throughout the country who have . . . felony murder as a lower level of murder, homicide.

House Hearing, at 4:59:12. The District Attorney for the Seventeenth Judicial District, veteran prosecutor Brian Mason, testified that his view of felony murder had evolved:

> I look at the felony-murder statute through the lens of culpability and appropriate punishment. For me, someone who participates in a serious felony where a victim is killed should be held accountable for their participation in that crime. *But when that person is not the actual assailant, did not wield the knife or pull the trigger, he should not face a life sentence in the Department of Corrections.*

House Hearing, at 455:35 (emphasis added).

The District Attorney for the Sixth Judicial District, Christian Champagne, likewise expressed concern for disproportionate sentencing and unjust penalties inherent in a law that mandates LWOP for felony murder. *Id.* at 4:52:45. And the District Attorney for the Twentieth District, Michael Dougherty, also supported the felony-murder reform bill. *House Hearing*, at 5:00:38.

Legislators also received input from local law professors, including Denver University Sturm College of Law Professor Ian Farrell, who provided wider international context for Colorado's extremely broad felony-murder statute:

> There is an almost unanimous consensus [among legal scholars] that felony murder should be abolished entirely. They have condemned felony murder as morally indefensible and an anachronistic and primitive relic of medieval law. Other nations outside the U.S. have followed the views of legal scholars. Felony murder has been all but abolished in the rest of the world.

Id., at 5:22:13.

The legislators observed that felony murder's draconian roots dated to possibly the 1200s. *Id.* at 4:27:45. For these legislators, the 2021 reform was not just sound policy, but a moral imperative. As Sponsor Senator Pete Lee explained, "by making these modifications it brings us significantly closer to a sentencing scheme that punishes people for what they actually did and with punishment

proportional to culpability. This bill brings us closer to the goals of justice and fairness with an opportunity for hope and a possibility for redemption." Hearing on S.B. 124 before the S. Judiciary Comm., 73rd Gen. Assemb. (March 18, 2021) (*Senate Hearing*), at 3:43:41.[6]

Senator Lee decried the disparate racial impact of the felony-murder statute, referencing a report showing that in the previous five years in Colorado, when felony murder was prosecuted as the sole theory of first-degree murder liability and where a conviction entered for a class one, class two, or class three felony, approximately 80% of the defendants were people of color. *Senate Hearing*, at 3:41:00. These comments were corroborated by the testimony and materials provided by Professor Phil Cherner, the legislative liaison for the Colorado Sam Cary Bar Association, who reported that in that same study, of defendants charged with felony murder as the only theory of first-degree murder who ended up going to trial and were convicted of that charge, 93% were people of color. *House Hearing*, at 5:49:47. Mr. Cherner's powerful testimony concluded:

> This is *intolerable*. It cannot be seen as business as

[6] Audio available at https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20210318/-1/11143. The numbers cited indicate the time stamp of the audio.

> usual, nor is merely reflection [*sic*] on society's troubles at large. To the contrary, racial disparity should be confronted wherever it raises its ugly head.

Id. at 5:50:15. The bill's House Sponsor, Representative Mike Weissman, agreed, emphasizing the problematic evidence of racial disparities. *Id.* at 5:57:10.

When signing the bill, Colorado Governor Jared Polis referenced a pending clemency case for a person serving LWOP for felony murder where the person who actually committed the murder had served his time and been released. The Governor said he was signing the bill to ensure "the punishment fits the crime." A. Burness, *Colorado is changing how it sentences people found guilty of felony murder,* <u>The Denver Post</u> (online edition), April 26, 2021.[7]

The new law was prospective and took effect September 15, 2021, a couple of years after Mr. Sellers was sentenced. Because of this legislative reform, Mr. Sellers challenged the constitutionality of his mandatory LWOP sentence in his direct appeal.

Notwithstanding this legislative sea change, the Court of Appeals rejected Mr. Sellers' constitutional challenges to his LWOP sentence for felony murder.

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[7] Available at https://www.denverpost.com/2021/04/26/colorado-felony-murder-prison-changes-bill-signed/ (last accessed Sept. 10, 2023).

The division below concluded that the categorical approach of Eighth-Amendment cruel-and-unusual-punishment analysis does not apply outside the context of cases involving juveniles or the death penalty. *People v. Sellers*, 2022 COA 102, ¶¶ 46, 54. Thus, the division did not address whether the evolving standards of decency of our maturing society render Mr. Sellers' mandatory LWOP sentence unconstitutional under the Eighth Amendment or article II, section 20 of the Colorado Constitution.

The division also rejected Mr. Sellers' claim that his LWOP sentence for felony murder was grossly disproportionate. *Id.* at ¶¶ 55-67. As a matter of first impression, the division held that "[f]elony murder is a per se grave or serious offense because it necessarily involves committing a violent predicate felony that results in the death of a person." *Id.* at ¶ 65. The division pointed to felony murder's categorization as a per se crime of violence and an extraordinary risk crime, noting "nothing in the statutory reclassification of felony murder suggests that the legislature no longer considers felony murder to be grave or serious." *Id*. at ¶¶ 65-66.

Regarding the harshness of the penalty, the division recognized that Mr. Sellers' life sentence "is potentially substantially longer than the maximum forty-

eight years a defendant in Sellers' shoes could receive under the amended statute, and that Sellers is not eligible for parole." *Id.* at ¶ 67. Relying on a 1999 court of appeals case, however, the division refused to find Mr. Sellers' LWOP sentence grossly disproportionate. *Id.* (citing *People v. Mandez*, 997 P.2d 1254 (Colo. App. 1999)).

SUMMARY OF THE ARGUMENT

The division erred by failing to apply traditional Eighth-Amendment categorical analysis to the mandatory LWOP sentence for felony murder in this case. Contrary to the division's threshold analysis, the U.S. Supreme Court has indeed applied the categorical analysis of Eighth-Amendment jurisprudence outside the context of juvenile and death-penalty cases. *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Weems*, 217 U.S. at 378. Given the breadth of Colorado's felony-murder statute, the evolving standards of decency that mark the progress of our maturing society demonstrate that mandatory LWOP for felony murder is a cruel and unusual punishment under the Eighth Amendment.

Under U.S. Supreme Court precedent, "[t]he analysis begins with objective indicia of national consensus." *Graham*, 560 U.S. at 62. The clearest objective evidence of society's current standards of decency are the laws passed by

legislatures. *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)). Forty-five jurisdictions in the United States do not provide for mandatory LWOP for felony murder where there is no requirement that the defendant killed the victim nor had any mens rea as to the commission of a homicide. (Appendix). This punishment is disproportionate—as the General Assembly recognized in 2021—and cruel and unusual under the Eighth Amendment.

Even absent evidence of a national consensus against a particular sentencing practice, this Court must exercise its own independent judgment. Given (i) the lack of penological justifications for LWOP for felony murder; (ii) the wide scope of felony-murder liability in Colorado; (iii) empirical evidence that in practice, felony murder disproportionately affects youths and minorities; and (iv) mandatory LWOP is Colorado's most severe penalty, this Court should declare mandatory LWOP for felony murder cruel and unusual punishment under the Eighth Amendment.

The cruel-and-unusual-punishments clause of article II, section 20 of the state constitution provides another alternative basis on which this Court could and should hold that the existing LWOP sentences for felony-murder convictions in

Colorado are unconstitutional.

If this Court does not grant relief on Issue I, it should do so on Issue II. Given the legislature's reclassification of felony murder, this Court should hold that Mr. Sellers' mandatory LWOP sentence is grossly disproportionate.

Mr. Sellers respectfully asks this Court to vacate his LWOP sentence and remand this case for him to be resentenced on felony murder as a class two felony with a sentencing range of 16 to 48 years, in line with the felony-murder reform that the legislature has adopted.

ARGUMENT

I. Following the Legislature's Reclassification of Felony Murder from a Class One Felony to a Class Two Felony, Mandatory LWOP for Felony Murder is an Unconstitutional Penalty in Colorado.

A. Standard of Review

Review is de novo. *People in the Interest of T.B.*, 2021 CO 59, ¶ 25; *Wells-Yates v. People*, 2019 CO 90M, ¶ 35.

B. Preservation

This issue is preserved. During Mr. Sellers' direct appeal, when the legislature reformed felony-murder law, Mr. Sellers moved to amend the opening brief to include a constitutional challenge to his LWOP sentence, and the court of

appeals ordered briefing and ruled on the issue. *Sellers*, ¶¶ 42-54; *see State v. Rogers*, 499 P.3d 45, 46-48 (Or. 2021) (holding sentence unconstitutional based on prospective legislative change that occurred during briefing on direct appeal).

Moreover, "given the nature of a categorical challenge," this Court may conclude that one "can bring such a challenge for the first time on appeal." *See State v. Ruggles*, 304 P.3d 338, 341 (Kan. 2013); *see also Sandoval v. State*, 975 N.W.2d 434, 438 (Iowa 2022) (same).

C. Discussion

1. The federal and state constitutions prohibit punishments that are cruel and unusual.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII; Colo. Const. art. II, § 20. This constitutional "prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.'" *Miller v. Alabama*, 567 U.S. 460 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005)). That right requires a punishment to be proportioned "to both the offender and the offense." *Id.*

"The [Eighth] Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency…,' against which [a reviewing

court] must evaluate penal measures." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citing *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

"To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" *Graham*, 560 U.S. at 58 (quoting *Trop*, 356 U.S. at 101). The Eighth Amendment acquires new meanings when, over time, "public opinion becomes enlightened by a humane justice." *Weems*, 217 U.S. at 378. The standards are not those "that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that 'currently prevail.'" *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Atkins*, 536 U.S. at 311). "The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change." *Graham*, at 58 (quoting *Kennedy*, 554 U.S. at 419).

Underlying the Eighth Amendment's proscription against cruel and unusual punishments is the animating principle of human dignity. *Trop*, 356 U.S. at 100; *see Gregg v. Georgia*, 428 U.S. 153, 182 (1976); *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring); *see also Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988).

2. The division erred in holding the categorical approach does not apply here.

The type of Eighth-Amendment challenge raised in the first issue before this Court is a "categorical challenge[]to a particular punishment 'as it applies to an entire class of offenders who have committed a range of crimes.'" *T.B.*, ¶ 27 (quoting *Graham*, 560 U.S. at 61). Under the categorical approach, the facts of a particular offender or crime are immaterial. As the U.S. Supreme Court has explained, "a threshold comparison between the severity of the penalty and the gravity of the crime does not advance the analysis." *Graham*, 560 U.S. at 61. Instead, the Court continued, "the analysis begins with objective indicia of national consensus." *Id.* at 62.

The division erred by failing to apply the Eighth-Amendment categorical approach. A key premise of the division's analysis was that neither the U.S. Supreme Court nor any other appellate court in the nation has applied the categorical analysis of Eighth-Amendment jurisprudence outside the context of juvenile and death-penalty cases. *Sellers*, ¶¶ 46, 54. This premise was incorrect. In *Trop*, the U.S. Supreme Court held that the Eighth Amendment prohibited the use, against an adult, of a punishment other than the death penalty—"denationalization," i.e., the removal of U.S. citizenship—as a sanction for military

desertion. 356 U.S. at 100-01. And in *Weems*, 217 U.S. at 363-64, 381-82, "the Court was confronted with a punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records, [and] it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character." *Trop*, 356 U.S. at 100.

More recently, in a case involving neither juveniles as a category of offenders nor capital punishment, the Court clarified that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain[]' proscribed by the Eighth Amendment." *Estelle*, 429 U.S. at 104 (citation omitted).

Even in the U.S. Supreme Court's Eighth-Amendment cases that address categorical challenges in juveniles or death penalty contexts, no language purports to limit the categorical approach to such cases. *See, e.g., Graham*, 560 U.S. 48; *Montgomery v. Louisiana*, 577 U.S. 190, 198 (2016); *Miller*, 567 U.S. 460[8];

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[8] The division noted that *Miller* "does not categorically bar a penalty for a class of offenders or type of crime." *Sellers*, ¶ 52 (quoting *Miller*, 567 U.S. at 483). But while *Miller* did not ban all LWOP sentences for murders committed by juveniles, it did apply the categorical approach in holding that *mandatory* LWOP for murders committed by juveniles violates the Eighth Amendment. 567 U.S. at 483-89. Moreover, *Miller* recognized one strand of Eighth-Amendment jurisprudence is "categorical bans on *sentencing practices* based on mismatches between the

Kennedy, 554 U.S. 407; *Roper*, 543 U.S. 551**;** *Atkins*, 536 U.S. 304.

Not surprisingly, and contrary to the division's mistaken assumption, appellate courts in other states have indeed applied the categorical approach of Eighth-Amendment analysis outside the contexts of juveniles and/or the death penalty. *See, e.g.*, *Sandoval*, 975 N.W.2d at 439-40 (addressing Eighth-Amendment categorical challenge to mandatory LWOP for nonjuvenile teenage offenders convicted of first-degree murder); *McCain v. State*, 582 S.W.3d 332, 336-46 (Tex. App. 2018) (addressing Eighth-Amendment categorical challenge to enhanced penalties for adult resulting where sexual abuse of child lasted more than 30 days); *State v. Blankenship*, 48 N.E.3d 516 (Ohio 2015) (addressing Eighth-Amendment categorical challenge to certain registration and address-verification requirements for adult convicted of sex offense); *State v. Williams*, 319 P.3d 528, 537-39 (Kan. 2014) (addressing Eighth-Amendment categorical challenge to mandatory lifetime post-release supervision for first-time adult offenders convicted of crimes involving possession of child pornography); *Ruggles*, 304 P.3d 341-46

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culpability of a *class of offenders* and the *severity of a penalty*." *Id.* at 470 (emphasis added).

(applying Eighth-Amendment categorical approach to appellant's challenge to adult's life sentence with parole eligibility after 25 years); *State v. Oliver*, 812 N.W.2d 636, 641-47 (Iowa 2012) (applying Eighth-Amendment categorical approach to appellant's challenge to adult's LWOP sentence for recidivist sexual offense).

For all these reasons, the division erred when it refused to apply the categorical approach to Mr. Sellers' Eighth-Amendment claim.

3. Objective indicia show an LWOP sentence for felony murder no longer comports with evolving standards of decency.

a. A clear national consensus has emerged against mandatory LWOP sentences for the broad felony murder liability that existed in Colorado pre-2021.

The U.S. Supreme Court has repeatedly held that "the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Atkins*, 536 U.S. at 312 (quoting *Penry*, 492 U.S. at 331).

Colorado's pre-2021-reform felony-murder statute—the statute at issue here—was an extreme outlier. The conduct within its ambit includes defendants who did not intend to kill and had no mens rea as to causing a death—not even recklessness. It is thus a "strict liability" statute with respect to the commission of a

homicide. *Fisher*, 9 P.3d at 1191.

The national consensus against mandatory LWOP for violating a broad scope of felony murder liability is compelling. The overwhelming majority of jurisdictions in the United States — 45 — do not allow for mandatory LWOP for felony murder liability that lacks any requirement the defendant killed the victim or had any mens rea with respect to causing the victim's death, nor that the victim's death was even caused by the felony the defendant committed. *See* Appendix. This number includes Colorado, which since 2021 has capped the sentence for felony murder at 48 years. §§ 18-1.3-406, 18-3-103(1)(b), (3)(a), (4).

This number of jurisdictions is well within the range of Supreme Court precedents finding that for purposes of the Eighth Amendment, a national consensus against a punishment has emerged. *See, e.g., Kennedy*, 554 U.S. at 426 (45 jurisdictions); *Roper*, 543 U.S. at 564 (30 jurisdictions); *Atkins*, 536 U.S. at 313-15 (same); *Enmund v. Florida*, 458 U.S. 782, 789-93 (1982) (42 jurisdictions).

As in *T.B.*, because "a substantial majority" of our sister jurisdictions decline to impose a mandatory LWOP sentence for a strict-liability felony murder offense with no requirement that the defendant have killed anyone nor that the defendant's felony caused the death, this Court should hold that Colorado's pre-2021 LWOP

penalty for felony murder is "truly unusual," and there is "a national consensus against such a punishment." *T.B.* at ¶ 62 (quoting *Atkins*, 536 U.S. at 316); *see also Thompson*, 487 U.S. at 822 n.7 (Whether action is "unusual" depends on frequency of its occurrence or magnitude of its acceptance.).

b. The Colorado legislature's 2021 reform to felony murder law provides powerful objective evidence of Colorado's societal standards.

The General Assembly's reclassification of felony murder as—at most—a class two felony with a sentencing range of 16 to 48 years is powerful evidence that Colorado's evolving standards of decency no longer sanction LWOP for felony murder. The legislature has now determined that those who are convicted of felony murder are less culpable and therefore deserving of lesser punishment than those who commit first-degree murder.

c. The views of the American Law Institute likewise demonstrate that mandatory LWOP for strict-liability felony murder is cruel and unusual.

The United States Supreme Court has also looked to the opinions of "respected professional organizations," to help illuminate "civilized standards of decency." *Thompson,* 487 U.S. at 830. As University of Colorado Law School Professor Aya Gruber testified before the House Judiciary Committee when the

2021 reform bill was under consideration, "In 1962, the American Law Institute's Model Penal Code rejected strict-liability felony murder because the crime lacks intent." *House Hearing*, at 5:27:25. Thus, one of the leading professional legal organizations in this country[9] decided, more than 60 years ago, not only that strict-liability felony murder should not merit an LWOP sentence but that there should be no such criminal liability at all.

4. This Court's independent judgment should lead it to conclude LWOP is an unconstitutional sentence for violation of Colorado's felony murder statute.

"Community consensus, while 'entitled to great weight,' is not itself determinative of whether a punishment is cruel and unusual." *Graham*, 560 U.S. at 67 (quoting *Kennedy*, 554 U.S. at 434). "In accordance with the constitutional design, 'the task of interpreting the Eighth Amendment remains our responsibility.'" *Graham*, 560 U.S. at 67 (quoting *Roper*, 543 U.S. at 575); *see also T.B.*, ¶ 63 ("Objective indicia of societal consensus inform our analysis, but 'the Constitution contemplates that in the end our own judgment will be brought to

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[9] The American Law Institute is "the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law." Available at https://www.ali.org/about-ali/ (last accessed Sept. 10, 2023).

bear' on whether" a sentencing practice is constitutionally permissible. (quoting *Atkins*, 536 U.S. at 312)).

"In making this judgment, [this Court] must consider whether 'the severity of the punishment in question' is disproportionate to 'the culpability of the offenders at issue in light of their crimes and characteristics'" and must assess "whether the challenged sentencing practice serves legitimate penological goals." *T.B.*, ¶ 63 (quoting *Graham*, 560 U.S. at 67).

a. LWOP is the most severe sentence imposed in Colorado.

LWOP "alters the offender's life by a forfeiture that is irrevocable… [depriving one of] the most basic liberties without giving hope of restoration." *Graham*, 560 U.S. at 69-70. The U.S. Supreme Court has viewed LWOP as "akin to the death penalty." *Id.* As the most severe punishment in Colorado, LWOP must be reserved for the most severe crimes, thus providing a "fundamental, moral distinction" between those crimes punishable by LWOP and those that are not. *See Kennedy*, 554 U.S. at 438.

b. LWOP is particularly severe for the reduced-culpability offense of strict-liability felony murder.

The U.S. Supreme Court "has recognized that defendants who do not kill,

intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment" than are regular murderers. *Graham*, 560 U.S. at 69. In passing the 2021 reform bill, the General Assembly determined that all people convicted of Colorado's felony murder have lower culpability than those convicted of first-degree murders.

Legislative testimony supports this point. A representative from the First Judicial District Attorney's Office testified that "intentionally causing the death of another is, frankly, not the same as participating in a dangerous course of conduct." *Senate Hearing*, at 4:01:15. The legislative change "brings felony murder…in line with other crimes where death results because of dangerous situations, but it's not necessarily the intent of the defendant." *Id.* at 4:01:30. The Seventeenth Judicial District Attorney testified, "the culpability of someone who commits felony murder…does not have the same level of culpability in my view, as someone who commits first-degree murder." *Id.* at 4:04:04.

The Court should give great weight to the General Assembly's finding that people convicted of felony murder are categorically less culpable.

c. LWOP for felony murder in Colorado fails to serve legitimate penological goals.

Retribution. The fundamental notion of retribution is that punishment is

tailored to personal responsibility and moral guilt. To further a retributive purpose, the sentence must be directly related to culpability. *Tison v. Arizona*, 481 U.S. 137, 149 (1987). The law must ensure the punishment an individual receives conforms to that individual's choices.

"American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to 'the degree of [his] criminal culpability.'" *Id.* at 800 (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975)).[10] Even among participants in a robbery, the culpability of a robber who does not kill "is plainly different from that of the robbers who killed." *Enmund*, 458 U.S. at 798.

In many felony-murder cases in Colorado, jurors have acquitted the defendant of first-degree murder after deliberation and any lesser-included offense but, because of the defendant's involvement in an actual or attempted predicate offense (often as a complicitor), they have convicted the defendant of felony murder. *See, e.g., People v. Leigha Ackerson*, Eagle County District Court Case No. 18CR85 (defendant acquitted of first-degree murder after deliberation and acquitted of conspiracy, but convicted of burglary and felony murder), *appeal*

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[10] In *Mullaney*, the Court emphasized the state could not shift the burden of proof to the defendant to show "heat of passion" sufficient to avoid conviction of murder. *Id*. at 703-04.

pending 21CA52).[11] This is a gross distortion of the retributive principle.

Another such distortion is that, with mandatory LWOP, the punishment inflicted on youthful adults is far more harsh than that inflicted on adults who are fully mature. This is contrary to well-established principles recognizing the lesser culpability of youths. Like the juveniles in *Graham*, an emerging-adult defendant "will on average serve more years and a greater percentage of [their] life in prison than" a fully mature adult offender. 560 U.S. at 70. Thus, a 20-year-old (such as Mr. Sellers) "and a 75-year-old each sentenced to life without parole receive the same punishment in name only." *Id.*

"This reality cannot be ignored." *Id.* at 71. The mature adult defendant may have had the opportunity to complete higher education, fall in love, have a family, watch their child graduate high school, assist an elderly parent, and attend that parent's funeral. By contrast, young, emerging adults ages 18-25 who were convicted of felony murder in Colorado and sentenced to mandatory LWOP at the very outset of their adult lives may have little to no hope for achieving or

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[11] A juror from Ms. Ackerson's trial testified in favor of the 2021 felony murder reform bill, disclosing the trauma she and other jurors experienced when they learned the sentence for Ms. Ackerson's felony-murder conviction was LWOP. *House Hearing*, at 5:16:35; *Senate Hearing*, at 4:28:16.

experiencing these milestones.

In 2021, the same year the General Assembly reformed Colorado felony-murder law, it also recognized that young adults deserve lesser punishments than more mature adults. In its Legislative Declaration to amendments to section 17-34-101, the General Assembly found and declared: "More recent research about brain development demonstrates that the brain functioning that guides and aids rational decision-making does not fully develop until a person is in his or her mid- to late twenties, which indicates that a young adult does not often possess the developmental maturity and decision-making skills of a mature adult." Ch. 448, sec. 1, 2021 Colo. Sess. Laws 2948 (H.B. 21-1209) ("Ch. 448"). The General Assembly extended the Juveniles Convicted as Adults Program (JCAP) for early parole to encompass those who were ages 18-20 at the time of their crimes—the sole exception being those serving LWOP sentences. § 17-34-101(1)(a).

Mandatory LWOP for all felony-murder defendants flaunts, not furthers retributive principles. Judges should be allowed to exercise their discretion to determine, on a case-by-case basis, what measure of retribution is appropriate within a sentencing range set by the legislature.

Deterrence. The theory of deterrence in sentencing for a homicide offense

assumes that "increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct." *Atkins*, 536 U.S. at 320. There is no rational reason to believe that someone contemplating committing a robbery would be deterred by an LWOP sentence but not by a 48-year sentence. As discussed, Colorado legislators have concluded that a potential maximum 48-year sentence is sufficient to satisfy society's interest in deterrence.

When the killing is committed by another person or is unintentional, there is no deterrent value. *See Enmund*, 458 U.S. at 799 ("the possibility that the death penalty will be imposed for vicarious felony murder will not 'enter into the cold calculus that precedes the decision to act.'" (quoting *Gregg*, 428 U.S. at 186)). The *Enmund* Court concluded there was no reason to believe death so often occurs during one of the underlying felonies that it would deter commission of the underlying felony. *Id.* The Court cited three studies showing that murder occurs in only one-half of one percent of all robberies. *Id*. at 799-800 nn.23-24.

Perhaps most importantly, because from 2021 and going forward, no felony murder in Colorado can receive a sentence of LWOP, the preexisting felony-murder LWOP sentences cannot provide future deterrence beyond the penalty for a class two felony.

Given the lesser moral culpability of those convicted of felony murder, this lack of deterrence is not enough to justify the harsh LWOP sentences being currently served. *Cf. Graham*, 560 U.S. at 72.

Incapacitation. Defending a mandatory LWOP sentence based on an incapacitation rationale assumes that every person convicted of felony murder is irredeemable and forever a danger to society, *id.,* and must "be isolated from society in order to protect the public safety." *See Ewing v. California*, 538 U.S. 11, 24 (2003). This theory is irrational. There are substantial differences in risk level among persons convicted of felony murder. The General Assembly declared: "Colorado has many offenders currently serving sentences in the Department of Corrections who committed crimes when they were less than twenty-one years old and who no longer present a threat to public safety." Ch. 448, *supra,* sec. 1(1)(c). The U.S. Supreme Court agrees, observing that youth enhances the prospect that, as the years go by and neurological development occurs, the person's "deficiencies will be reformed." *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 570); *see also Miller*, 567 U.S. at 471-72.

True, an LWOP sentence effectively separates prisoners from society. But there is no evidence that persons sentenced before September 15, 2021, pose a

greater risk that would warrant an LWOP sentence. Undoubtedly, many who might become eligible for release are elderly and infirm and pose no discernable risk. The penological goal of incapacitation can never justify a disproportionate, cruel, or unusual punishment that is out of step with the evolving standards of decency that are the hallmark of a modern criminal-justice system.

Moreover, many Colorado prisoners serving LWOP for felony murder are serving other lengthy sentences. Some were simultaneously convicted of additional counts of first-degree murder under a theory of liability other than felony murder, while many others are serving very lengthy term-of-years sentences in addition to the LWOP sentence for felony murder. Thus, society will continue to incapacitate those prisoners from whom society needs the most protection.

Rehabilitation. LWOP "forswears altogether the rehabilitative ideal…By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society." *Graham*, 560 U.S. at 74. That judgment is not appropriate for a strict-liability offense, because a person who does not kill after deliberation (or even knowingly) is not necessarily irredeemable.

The fact that LWOP treats young and old the same regarding the potential

for rehabilitation violates common sense. In its 2021 Legislative Declarations, the General Assembly recognized "persons [who] have not yet reached developmental maturity before the age of twenty-one years [ ] have a heightened capacity to change behavior and a greater potential for rehabilitation." Ch. 448, *supra,* sec. 1(1)(b). The potential for release, even "after lengthy incarceration creates hope for and helps develop maturity and responsibility in offenders who were juveniles or young adults when their crimes were committed." *Id*., (1)(d).

By reclassifying felony murder to a class two felony, the Colorado legislature has determined that, for persons convicted of felony murder, the rehabilitative principle is best served by returning sentencing discretion to judges.

d. This Court's independent judgment should be informed by troubling evidence of racial disparities.

The severity of the mandatory LWOP sentence for pre-2021 felony murder in Colorado is particularly troubling when considering the racially discriminatory application of Colorado's felony-murder law. *See* Amicus Curiae Brief of Scholars of Felony Murder and Constitutional Proportionality, at pp 7-8 (collecting studies).

This evidence that felony-murder law in Colorado has a racially disparate impact is sadly consistent with what happens nationally. A 2023 study found stark differences in how felony-murder liability affects members of different racial

groups:

> A national empirical study the authors conducted supports the claim of racialized group liability in the felony murder rule, demonstrating that Americans automatically individualize white men, yet automatically perceive Black and Latino men as group members. In addition to this core finding, the study also found that mock jurors disproportionately penalized men with Latino-sounding names compared to men with white or Black-sounding names, ascribing to them the highest levels of intentionality and criminal responsibility in a group robbery and ensuing homicide.

Cohen, G. Ben, et al., *Racial Bias, Accomplice Liability, and The Felony Murder Rule: A National Empirical Study* (Denver Law Review, forthcoming 2023)[12], at 1. A study of data provided by prosecutors in Cook County, Illinois, showed that "blacks are far more likely to be arrested for felony murder than whites"—74.8% of initiated cases were against Black defendants versus only 7.8% against whites.[13] The contrast is even more extreme considering the relative size of each racial

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[12] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4411658 (last accessed Sept. 11, 2023). An additional summary of some findings from this study is available at https://deathpenaltyinfo.org/news/law-reviews-racial-bias-in-felony-murder-and-accomplice-liability (last accessed Sept. 11, 2023).

[13] Albrecht, Kat, *Data Transparency & The Disparate Impact of the Felony Murder Rule* (Duke Center for Firearms Law, Aug. 11, 2020), available at https://firearmslaw.duke.edu/2020/08/data-transparency-the-disparate-impact-of-the-felony-murder-rule/ (last accessed Sept. 11, 2023).

group in the overall population in Cook County, Illinois, where Blacks make up less than 24% of the population, whereas whites constitute over 65%.[14] The study concluded that "81.3% of people sentenced under the felony murder rule in Illinois are black."[15] Last year, the Minnesota Department of Corrections published a report from a "Task Force on Aiding and Abetting Felony Murder" which similarly found that aiding and abetting felony murder disproportionately impacted Black people and youths.[16]

e. This Court should consider additional information contained in the amicus briefs when exercising its independent judgment.

The Spero Justice Center is submitting an amicus brief in support of Mr. Sellers' position that shares the stories of individuals who were convicted under the pre-2021 law and sentenced to LWOP for felony murder in Colorado. This amicus brief presents a powerful picture of rehabilitation even for serious crimes,

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[14] U.S. Census Bureau, *Quick Facts: Cook County, Illinois*, available at https://www.census.gov/quickfacts/fact/table/cookcountyillinois/PST045222 (last accessed Sept. 11, 2023).

[15] *Data Transparency & The Disparate Impact of the Felony Murder Rule*.

[16] Available at https://mn.gov/doc/assets/AAFM-LegislativeReport_2-1-22_tcm1089-517039.pdf (last accessed Sept. 11, 2023).

as well as the dangers of occasional wrongful conviction under the felony-murder doctrine. Such concerns should inform this Court's independent judgment.

5. The General Assembly's choice to make its felony-murder reform prospective does not prevent this Court from granting relief.

There are several examples from other states of prospective-only legislative sentencing reforms that resulted in appellate courts holding that because societal values had evolved, the previous punishment had become unconstitutional. *See, e.g.*, *State v. Bartol*, 496 P.3d 1013 (Or. 2021) (following non-retroactive capital-reform legislation recategorizing as non-death-eligible conduct that was previously death-eligible, maintaining appellant's death sentence would violate state constitution by "allow[ing] the execution of a person for conduct that the legislature has determined no longer justifies that unique and ultimate punishment, and it would allow the execution of a person for conduct that the legislature has determined is no more culpable than conduct that should not result in death."); *State v. Santiago*, 122 A.3d 1, 10 (Conn. 2015) (prospective abolition of the death penalty rendered that punishment cruel and unusual under state constitution); *Van Tran v. State*, 66 S.W.3d 790, 798 (Tenn. 2001) (following passage of prospective- only law prohibiting the execution of people with intellectual

disability, holding that continued execution of people with intellectual disability would violate state constitutional prohibition against cruel and unusual punishment); *Fleming v. Zant*, 386 S.E.2d 339, 342 (Ga. 1989) (same).

As this Court has aptly explained, "Consideration of . . . statutory changes as the most valid indicia of Colorado's evolving standards of decency is not equivalent to the retroactive application of those changes." *Wells-Yates*, ¶ 48.

Because no state legislature has the power "to mandate that a prisoner continue to suffer punishment barred by the Constitution," *Montgomery*, 577 U.S. at 204, the prospective nature of Colorado's 2021 reform of felony-murder law does nothing to prevent this Court from granting relief on constitutional grounds.

6. The Colorado Constitution prohibits the penalty of LWOP for violating Colorado's felony-murder statute.

This Court is the "final arbiter of the meaning of the Colorado Constitution." *Curious Theatre Co. v. Colo. Dep't of Pub. Health & Env't*, 220 P.3d 544, 551 (Colo. 2009). This is true even when the text is identical to the federal Constitution. *See Rocky Mountain Gun Owners v. Polis*, 2020 CO 66, ¶ 37, 467 P.3d 314, 324 ("even parallel text does not mandate parallel interpretation").

This Court has long recognized that "the Colorado Constitution provides more protection for our citizens than do similarly or *identically worded provisions*

of the United States Constitution." *People v. Young*, 814 P.2d 834, 842 (Colo. 1991) (emphasis added) (invalidating 1988 death-penalty statute as violating state constitutional prohibition against cruel and unusual punishment) (collecting cases). The Colorado Constitution is "written to address the concerns of our own citizens and tailored to our unique regional location… independent of and supplemental to the protections provided by the United States Constitution." *Id.*; *see Dean v. People*, 2016 CO 14, ¶ 14 (Colorado Constitution's due-process/equal-protection guarantee provides greater protections than federal Equal Protection Clause); *People v. McKnight*, 2019 CO 36, ¶¶ 38-43 (due to state-specific factors, a dog sniff, while not a search under the Fourth Amendment, constitutes a search under article II, section 7 of the Colorado Constitution, even though the provisions are worded substantially similar.)

One of the state-specific factors present in *McKnight* was Coloradans' decision to legalize recreational marijuana. Relevant here, Colorado's citizens have spoken clearly through their elected officials[17]—Coloradans no longer condone LWOP for strict-liability felony murder. Legislative hearing testimony showed that

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[17] The legislature "speaks for the people on matters of public policy of the state." *Van Tran*, 66 S.W.3d at 804.

97% of Coloradans polled believed felony murder did not deserve imprisonment for life. *House Hearing*, at 5:23:50.

Just as Colorado-specific factors in *McKnight* led this Court to depart from Fourth-Amendment jurisprudence and conclude a dog sniff constituted a search under the Colorado Constitution, the state-specific factor present here (the General Assembly's clear pronouncement that LWOP for felony murder does not comport with Colorado's standards) should lead this Court to rule that Article II, section 20 of the Colorado Constitution prohibits mandatory LWOP for felony-murder cases sentenced before the 2021 reform. *See also Bartol*, 496 P.3d 1013 (following non-retroactive capital-reform legislation prospectively rendering conduct such as appellant's no longer eligible for the death penalty meant that appellant's death sentence violated Oregon state constitution); *Santiago*, 122 A.3d at 55 (given state legislature's action, holding death penalty violated Connecticut state constitution) ("[F]ollowing its prospective abolition, this state's death penalty no longer comports with contemporary standards of decency and no longer serves any legitimate penological purpose."); *Van Tran*, 66 S.W.3d at 798 (following passage of prospective- only law prohibiting the execution of people with intellectual disability, holding that continued execution of people with intellectual disability

would violate Tennessee's state constitutional prohibition against cruel and unusual punishment); *Fleming*, 386 S.E.2d at 342 (statute prospectively prohibiting execution of individuals with intellectual disability meant such executions would violate Georgia state constitution).

Following the lead of these other states, this Court should hold that in the wake of the General Assembly's 2021 reform of Colorado's felony-murder law, the categorization of felony murder as first-degree murder carrying a mandatory LWOP sentence (received by Mr. Sellers and other defendants) violates article II, section 20 of the Colorado Constitution.

D. Conclusion and Remedy.

For all these reasons, this Court should hold that mandatory LWOP for violating Colorado's felony murder statute violates the cruel-and-unusual punishment clauses of the federal and state constitutions. U.S. Const. amend. VIII; Colo. Const. art. II, § 20. The appropriate remedy is clear: Mr. Sellers' felony-murder conviction should be reclassified as a class two felony, and this Court should remand this case for resentencing within the sentencing range already chosen by the legislature: 16 to 48 years. *See People v. Tate*, 2015 CO 42, ¶ 7 (remedy for unconstitutional sentencing scheme is found by evaluating legislative

intent); *People v. Montour*, 157 P.3d 489, 501-02 (Colo. 2007) (same).

II. Following the General Assembly's Reclassification of Felony Murder to a Class Two Felony, A Mandatory LWOP Sentence is Grossly Disproportionate.

A. Standard of Review

Review is de novo. *Wells-Yates*, ¶ 35.

B. Preservation

This issue is preserved. The division held that felony murder is per se grave and serious and therefore concluded that Mr. Sellers' sentence is not grossly disproportionate. *Sellers*, ¶¶ 66-67.

C. Discussion

The Constitution requires that the punishment "fit the crime." *Wells-Yates*, ¶1. "[N]o penalty is per se constitutional." *Solem v. Helm*, 463 U.S. 277, 290 (1983). Disproportionate penalties are barred by the Eighth Amendment and Article II, section 20 of the Colorado Constitution.

Colorado has employed two similar but distinct analytical tools, one in habitual offender cases and the other in non-habitual offender cases. In either, the severity of the punishment is a factor. LWOP is the most serious penalty under Colorado law, significantly more severe than a term within the class two felony

range, which can be as low as 16 years in prison—and can even be probation—and at most a 48-year sentence. Life-without-parole terms "share some characteristics with death sentences that are shared by no other sentences." *Graham*, 560 U.S. at 69. Thus, the severity of the punishment factor weighs heavily in favor of a finding of gross disproportionality in either analysis.

1. LWOP is a grossly disproportionate penalty for Colorado's felony murder offense, in light of the legislative reclassification

Very rarely has this Court considered proportionality in a non-habitual context. *People v. Smith*, 848 P.2d 365 (1993). The non-habitual context matters. Analysis in habitual cases cannot be divorced from the facts of the instant and prior offenses, lending it to this Court's threshold focusing on whether the offense is "grave and serious,"[18] without necessarily scrutinizing the penalty. That analysis doesn't work in Sellers' case, because the legislature has already declared that the punishment does not fit the crime.

The non-habitual context focuses on the *relationship* between the statutory elements and the statutory penalty. When "a ***comparison*** of the gravity of the

[18] *See Wells-Yates,* ¶ 13 (describing the "*Gaskins* shortcut" of *People v. Gaskins*, 825 P.2d 30 (Colo. 1992)).

offense and the harshness of the penalty" reveals the mandatory minimum sentence does not "fit the crime," no amount of further factual review will change that legal conclusion. *Smith*, 848 P.2d at 374 (emphasis added) (citing *Harmelin v. Michigan*, 501 U.S. 957 (1991)).[19]

The non-habitual context is especially relevant to the legislature's reclassification of felony murder because the nature of proportionality review itself is ultimately to respect the "province of legislatures" in fixing prison terms and making penological judgments. *Smith,* 848 P.2d at 373 (quoting *Harmelin*, 501 U.S. at 997); *see Solem*, 463 U.S. at 290 (instructing courts to "grant substantial deference" to legislative determinations about types of crimes and punishments); *Gore v. United States,* 357 U.S. 386, 393 (1958) (questions regarding severity of punishment are peculiarly issues of legislative policy); *Weems*, 217 U.S. at 379 ("The function of the legislature is primary…"). In the persuasive words of the Second Circuit:

> [T]he legislature's line drawing—when it fixes terms for imprisonment—is primary and presumptively valid. A legislative body may conduct hearings, take surveys, and hear a broad range of public opinion in

[19] "*Robinson v. California*, 370 U.S. 660, 667 (1962) ("[T]he question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold.").

> determining what is appropriate punishment. Hence, such a body is better equipped to determine what sentences should be imposed for given offenses.

United States v. Gonzalez, 922 F.2d 1044, 1053 (2d Cir. 1991) (cited in *Smith*, 848 P.2d at 374).

Here, the concerns of federalism present in *Harmelin*, 501 U.S. 957, are absent. This Court is not being asked to *override* a state legislature's penological determination, but instead, to fully *implement* it. The General Assembly already determined that, in all possible circumstances underlying a felony murder, the LWOP penalty is disproportionate to this strict-liability offense.

By ignoring the significant contextual difference between two analytically different proportionality challenges, the Division ends up expanding the *Gaskins* shortcut to the non-habitual context. *See Sellers*, ¶ 57 (citing *Smith*), leaving it to this Court to determine whether, in light of the legislative reclassification, the statutory penalty "fits" the offense.

In light of the legislative re-classification, it does not. LWOP is grossly disproportionate because the legislature has determined Colorado's felony-murder offense should carry a sentence as low as 16 years. This Court should rule that the LWOP penalty for felony murder does not satisfy the *Smith/Harmelin* standard

applicable to non-habitual challenges.

2. LWOP is a grossly disproportionate penalty for Mr. Sellers' felony-murder offense, given the legislative reclassification.

The legislative reclassification is also important to the alternative analytical fool, the challenge "to the excessiveness of a particular punishment for a particular offender." *T.B.*, ¶ 27 (quoting *Graham*, 560 U.S. at 59).

One characteristic of Mr. Sellers is his youth. Young adults like Mr. Sellers (only 20 years old) end up serving many more years in prison than their older counterparts. *Graham*, 560 U.S. at 70-71. Mr. Sellers felony-murder-LWOP sentence means he cannot access many rehabilitative programs that will now be available to other felony-murder prisoners who were young adults at the time of the offense. Even with the maximum 48-year-sentence, young adults convicted of felony murder are eligible to apply for a specialized parole program after serving 20 years of imprisonment. § 17-34-101(1)(a)(I), (II). Mr. Sellers is not.

It bears repeating that Mr. Sellers did not kill anyone. No Jury found he intended to kill anyone.

In denying Mr. Sellers' claim that his LWOP sentence was grossly disproportionate, the division below relied on *Mandez*, 997 P.2d 1254. *Sellers,* ¶ 67. But *Mandez* teaches us why legislative classifications merit great deference.

The *Mandez* Court relied upon the legislative judgment that felony murder was equivalent to intentional murder. 997 P.2d at 1272-73. But society's standards and the legislative determination have evolved. Today, felony murder is deemed equivalent to second-degree murder. Legislative reclassification matters. This Court said so in *Wells-Yates*, ¶¶ 45-47 and *People v. McRae*, 2019 CO 91, ¶ 22.

In *Wells-Yates*, this Court was emphatic: even if an offense was previously designated "per se grave or serious" and even if the ameliorative amendments do not apply retroactively, the court must consider them in light of evolving standards of decency. *See Wells-Yates*, ¶ 27. This statutory reclassification is "the most valid indicia of Colorado's evolving standards of decency" regarding the gravity of the offense and harshness of the penalty. *Wells-Yates*, ¶ 48; *see also People v. Penrod*, 892 P.2d 383, 388 (Colo. 1994) (legislature's reduction of penalty during appeal reflected its "current evaluation of the seriousness of the offense" and "should be considered in determining whether defendant's sentence is grossly disproportionate").

In light of the General Assembly's reclassification, felony murder cannot be deemed a per se grave and serious offense. It is a strict liability offense that does not require that the defendant knowingly participate in any way in the killing or

even know it is happening. It "includes wide-ranging conduct, not all of which rises to the level of grave or serious." *Wells-Yates*, ¶ 13.

It cannot be said that "in every potential factual scenario," the offense of felony murder "necessarily involve[s] grave or serious conduct." *Wells-Yates*, ¶ 63. Not all felony murder predicate offenses have been declared grave and serious, and at least one of them—second-degree burglary—has been excluded by the court of appeals. *People v. Session*, 2020 COA 158, ¶ 49; *see also Wells-Yates*, at ¶ 65 n.17 (acknowledging open question regarding whether second-degree burglary is "per se grave and serious").

The mandatory nature of the LWOP penalty exemplifies the reasons why *Wells-Yates* found the per-se-grave-or-serious standard particularly unfair. The mandatory nature of the LWOP penalty renders the sentence "nearly impervious to attack on proportionality grounds," *id.* at ¶ 62 (internal quotation omitted), because by definition, all of the imposed sentences are the same. The careful comparison of sentences contemplated by the individualized proportionality framework is distorted by the mandatory nature of the penalty.[20] Going forward, judges will be

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[20] The disfavored *Gaskins* shortcut "suggests that the outcome of an abbreviated proportionality review under these circumstances will always be a finding of no inference of gross disproportionality." *Wells-Yates*, ¶ 26.

selecting from a range of choices but for all prior sentences like Mr. Sellers, it is a mandatory one-size-fits-all penalty.

This Court should follow the analysis of the Georgia Supreme Court and declare mandatory LWOP sentences for pre-2021 felony murder in Colorado grossly disproportionate:

> Based on the foregoing factors and, in particular, based on the significance of the sea change in the General Assembly's view of the appropriate punishment for teenage oral sex, we could comfortably conclude that Wilson's punishment, as a matter of law, is grossly disproportionate to his crime without undertaking the further comparisons outlined in *Harmelin* and *Ewing*.

Humphrey v. Wilson, 652 S.E.2d 501, 509 (Ga. 2007); *see also Bartol*, 496 P.3d 1013.

In short, given the clear distinction in available penalties resulting from the 2021 reform, this Court can and should find the LWOP sentence grossly disproportionate on appeal, without needing to undertake any intra-jurisdictional or inter-jurisdictional comparisons.[21] Colorado's legislative change reflects the current societal standards that felony murder should not be punishable by LWOP.

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[21] Alternatively, this Court can and should simply rely on the new legislative framework when undertaking the intra-jurisdictional and inter-jurisdictional comparisons.

D. Conclusion

This Court should hold that LWOP is a grossly disproportionate sentence for felony murder given the Colorado General Assembly's reclassification of the offense to a class two felony with a maximum sentence of 48 years. Because Mr. Sellers' LWOP sentence for felony murder is grossly disproportionate, it violates the Eighth Amendment and article II, section 20 of the Colorado Constitution. Therefore, this Court should vacate the LWOP sentence, reclassify Mr. Sellers' felony-murder conviction as a class two felony, and remand to the division below to remand to the district court for resentencing within the range of 16 to 48 years.

In the alternative, this Court should declare that felony murder is not "per se grave and serious," rule that an inference of gross disproportionality exists, and remand for a proportionality hearing and allow the parties to develop the issues and facts.

CONCLUSION

More than a century ago, the U.S. Supreme Court eloquently recognized the high moral stakes at issue in Eighth-Amendment jurisprudence:

> The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the

limits of civilized standards.

Trop, 356 U.S. at 100. Our civilization has moved beyond using a strict-liability form of felony murder to condemn people to die in prison who did not kill and who had no intent to kill or other mens rea as to the commission of a homicide. Our legislature has recognized that LWOP is an excessive and disproportionate sanction for such an offense and that the appropriate criminal sanction is the same as that for second-degree murder (committed knowingly): a sentence within the range of 16 to 48 years. Mr. Sellers respectfully asks this Court to vacate his LWOP sentence and remand this case for resentencing on his felony-murder conviction as a class two felony offense with a sentencing range of 16 to 48 years.

Respectfully submitted,

s/ Krista A. Schelhaas
Krista A. Schelhaas, #36616

CERTIFICATE OF SERVICE

I certify that on the 11th day of September 2023, a copy of the foregoing OPENING BRIEF was filed through the Colorado Courts E-Filing System, with a copy checked to be sent to the Office of the Attorney General, Criminal Division.

s/ Krista A. Schelhaas
Krista A. Schelhaas