No. A-

In the Supreme Court of the United States

WAYNE SELLERS IV,

Applicant,

v.

PEOPLE OF THE STATE OF COLORADO,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

To the Honorable Neil M. Gorsuch, Associate Justice and Circuit Justice for the United States Court of Appeals for the Tenth Circuit:

Pursuant to 28 U.S.C. § 2101(d) and Rule 13.5 of the Rules of this Court, applicant Wayne Sellers IV respectfully requests a 30-day extension of time, to and including January 29, 2025, within which to file a petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Colorado in this case.

The Colorado Supreme Court issued its judgment on September 30, 2024. Unless extended, the time to file a petition for a writ of certiorari will expire on December 30, 2024. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1257(a). A copy of the Colorado Supreme Court's opinion is attached.

1. Applicant Wayne Sellers IV was convicted of felony murder and sentenced to life imprisonment without the possibility of parole. He challenges his sentence as a cruel and unusual punishment under the U.S. Constitution's Eighth Amendment.

As described by the court below, applicant was involved in a robbery that led to the death of the victim, who was shot by another participant in the robbery. App., *infra*, 5. It is undisputed that applicant, who was 20 years old at the time of the crime, did not kill the victim and did not injure anyone. The State nevertheless charged applicant with first degree felony murder, a crime that did not require proof of knowledge, intent, or deliberation with respect to causing the victim's death. See *People* v. *Fisher*, 9 P.3d 1189, 1191 (Colo. App. 2000). At the time of applicant's trial, that offense was punished in Colorado by a mandatory sentence of life in prison without the possibility of parole. App., *infra*, 6. Applicant was convicted and sentenced to life in prison. The Colorado Supreme Court rejected applicant's Eighth Amendment challenge to his sentence.

2. The petition for a writ of certiorari will argue that review is warranted because the decision below cannot be reconciled with the holdings of this Court, which have recognized that the Eighth Amendment "guarantees individuals the right not to be subjected to excessive sanctions." *Roper* v. *Simmons*, 543 U.S. 551, 560 (2005). This principle flows from the basic precept that "punishment for crime should be graduated and proportioned" to the offense (*Weems* v. *United States*, 217 U.S. 349, 367 (1910)), so that the Eighth Amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." *Solem* v. *Helm*, 463 U.S. 277, 284 (1983); see *id.* at 285-286 ("When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights, they also adopted the English principle of proportionality.").

Among other things, the petition will contend that a mandatory sentence of life in prison without the possibility of parole, imposed for the offense of felony murder in which the defendant (a) did not kill or intend to kill; (b) was not demonstrated to act with any mens rea regarding death of the victim; and (c) was just 20 years old at the time of the offense, is unconstitutional. This is so for several reasons, among them:

First, "objective indicia of society's standards" are used to determine whether there is a "national consensus" against the challenged sentencing practice. *Roper*, 543 U.S. at 563. And here, U.S. jurisdictions overwhelmingly have rejected the imposition of a mandatory life sentence without the possibility of parole in the circumstances of this case, where the crime is felony murder and proof of intent to kill is not required. See Appellant's Opening Br. 20-21, *Sellers* v. *People*, No. 2022SC738 (Colo. Sup. Ct.) (citing statutes); Appellant's Reply Br. 12-14, *id.* (same). Indeed, Colorado itself has since reclassified felony murder to eliminate life imprisonment as a punishment—but that change was not made retroactive and therefore does not affect applicant's case. See App., *infra*, 7.

Second, this Court also is guided by its "understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose." *Kennedy* v. *Louisiana*, 554 U.S. 407, 421 (2008). The Court therefore considers the "culpability of the offenders * * * in light of their crimes and characteristics," along with the "severity of the punishment." *Graham* v. *Florida*, 560 U.S. 48, 67 (2010). And here, too, numerous considerations point decisively against the constitutionality of applicant's punishment, including:

a. Applicant's youth at the time of the offense. See, *e.g.*, *Thompson* v. *Oklahoma*, 487 U.S. 815, 838 (1988) (plurality opinion) (striking down the death penalty for offenders under sixteen); *Roper*, 543 U.S. at 568 (same for offenders under eighteen); *Graham*, 560 U.S. at 74 (striking down life without parole for nonhomicide offenders under eighteen); *Miller* v. *Alabama*, 567 U.S. 460, 479 (2012) (striking down life without parole for all offenders under eighteen).

b. The more limited culpability of a defendant who did not kill or intend to kill the victim. See, *e.g.*, *Enmund* v. *Florida*, 458 U.S. 782, 798 (1982) (striking down the death penalty for felony murder when the defendant did not kill, attempt to kill, or intend death to result); *Graham*, 560 U.S. at 69 (striking down life without parole for nonhomicide offenders under eighteen, in part because of the lesser culpability of nonhomicide offenders).

c. The severity of the punishment of life imprisonment without the possibility parole that is imposed on a youthful offender, which "alters the offender's life by a forfeiture that is irrevocable," leaving him "without * * * hope of restoration." *Graham*, 560 U.S. at 69-70. The Court has likened life-without-parole sentences imposed on juveniles "as akin to the death penalty." *Miller*, 567 U.S. at 475.

For all of these reasons, the petition will argue that review by this Court is warranted.

3. Applicant requests this extension of time to file the petition for a writ of certiorari because undersigned counsel had no involvement in the case before the

Colorado state courts. Counsel accordingly seeks additional time to review and familiarize himself with the record and with the complex issues presented here.

In addition, counsel primarily responsible for preparing the petition also has responsibility for a number of other matters with proximate due dates, including *American Association of Ancillary Benefits* v. *Becerra*, No. 24-cv-00783 (E.D. Tex.) (*amicus* brief in support of defendant due Dec. 18, 2024); *Schoenthal* v. *Raoul*, No. 24-2643 (7th Cir.) (*amicus* brief in support of appellants due Dec. 23, 2024); and *American Trucking Associations, Inc.* v. *Rhode Island Turnpike and Bridge Auth.*, No. 22-1795 (1st Cir.) (petition for rehearing due Dec. 20, 2024). Accordingly, an extension of time is warranted.

For the foregoing reasons, the application for a 30-day extension of time, to and including January 29, 2025, within which to file a petition for a writ of certiorari in this case should be granted.

Respectfully submitted.

/s/ Charles A. Rothfeld
CHARLES A. ROTHFELD*
Mayer Brown LLP
1999 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
crothfeld@mayerbrown.com

* *Counsel of Record*

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APPENDIX

DATE FILED
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CASE NUMBER: 2022SC738

ADVANCE SHEET HEADNOTE
September 30, 2024

2024 CO 64

No. 22SC738, *Sellers v. People*—Felony Murder—Life Without the Possibility of Parole.

In this petition, the supreme court considers whether a life without the possibility of parole ("LWOP") sentence for felony murder is categorically unconstitutional or, alternatively, grossly disproportionate to the offense of felony murder following the General Assembly's 2021 reclassification of that offense.

Based on objective indicia of societal standards and evolving standards of decency as expressed in legislative action and state practice, as well as the exercise of its independent judgment, the court now concludes that an LWOP sentence for felony murder for an adult offender is not categorically unconstitutional.

The court further concludes that, even assuming without deciding that felony murder is not per se grave or serious, Sellers's offense here was, in fact, grave and serious. Thus, his LWOP sentence, although severe, does not run afoul of the Eighth Amendment or article II, section 20 of the Colorado Constitution and therefore was not grossly disproportionate.

Accordingly, the court affirms the judgment of the division below, albeit partially on different grounds.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2024 CO 64

Supreme Court Case No. 22SC738
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 19CA2033

Petitioner:

Wayne Tc Sellers IV,

v.

Respondent:

The People of the State of Colorado.

Judgment Affirmed
en banc
September 30, 2024

Attorneys for Petitioner:
Johnson & Klein, PLLC
Gail Johnson
Boulder, Colorado

Samler and Whitson, P.C.
Hollis A. Whitson
Denver, Colorado

Schelhaas Law LLC
Krista A. Schelhaas
Littleton, Colorado

Attorneys for Respondent:
Philip J. Weiser, Attorney General

Katharine Gillespie, Senior Assistant Attorney General
Jessica E. Ross, Assistant Attorney General
Denver, Colorado

Attorneys for Amici Curiae American Civil Liberties Union of Colorado, Boston University Center for Antiracist Research, The Sentencing Project, Sam Cary Bar Association, and Colorado-Montana-Wyoming Area Conference of the National Association for the Advancement of Colored People:
Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, P.C.
Matthew D. Levitt
Evan M. Piercey
Elizabeth M. Platonova
New York, New York

Timothy R. Macdonald
Anna I. Kurtz
Sara R. Neel
Denver, Colorado

Matthew Segal
Boston, Massachusetts

Caitlin Glass
Boston, Massachusetts

Attorneys for Amici Curiae Colorado Criminal and Constitutional Law Scholars Justin Marceau and Sam Kamin:
Killmer, Lane & Newman, LLP
Andrew McNulty
Denver, Colorado

Andrea Lewis Hartung
Chicago, Illinois

Attorneys for Amici Curiae Colorado Criminal Defense Bar and Office of Alternate Defense Counsel:
The Noble Law Firm, LLC
Tara Jorfald
Heidi Tripp
Lakewood, Colorado

Attorneys for Amici Curiae Scholars of Felony Murder and Constitutional Proportionality Guyora Binder, Ian Farrell, Brenner Fissell, Aya Gruber, Alexandra Harrington, Robert Weisberg, and Ekow N. Yankah:
Fisher & Byrialsen, PLLC
Jane Fisher-Byrialsen
Denver, Colorado

Attorneys for Amicus Curiae Spero Justice Center:
Kristen M. Nelson
Dan M. Meyer
Denver, Colorado

JUSTICE GABRIEL delivered the Opinion of the Court, in which **CHIEF JUSTICE MÁRQUEZ**, **JUSTICE BOATRIGHT**, **JUSTICE HOOD**, **JUSTICE HART**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.

JUSTICE GABRIEL delivered the Opinion of the Court.

¶1 Petitioner Wayne Tc Sellers IV asks us to consider whether a life without the possibility of parole ("LWOP") sentence for felony murder is categorically unconstitutional or, alternatively, grossly disproportionate to the offense of felony murder following the General Assembly's 2021 reclassification of that offense.[1]

¶2 Based on objective indicia of societal standards and evolving standards of decency as expressed in legislative action and state practice, as well as the exercise of our independent judgment, we now conclude that an LWOP sentence for felony murder for an adult offender is not categorically unconstitutional.

¶3 We further conclude that, even assuming without deciding that felony murder is not per se grave or serious, Sellers's offense here was, in fact, grave and serious. Thus, his LWOP sentence, although severe, does not run afoul of the Eighth Amendment or article II, section 20 of the Colorado Constitution and therefore was not grossly disproportionate.

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[1] Specifically, we granted certiorari to review the following issues:

1. 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.
2. 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.

¶4 Accordingly, we affirm the judgment of the division below, albeit partially on different grounds.

I. Facts and Procedural History

¶5 In October 2018, Sellers and several friends planned to rob alleged drug dealers at gunpoint. One member of Sellers's group arranged to buy acid from O.T., and the two ultimately arranged a meeting. At the appointed time and place, the two met briefly, and O.T. showed the member of Sellers's group the acid. That member then ran off, and four men, including Sellers, approached O.T. One of the men flashed a gun and grabbed O.T.'s acid and backpack.

¶6 Sellers and his friends planned to do the same thing to K.H., who was at a different location. Sellers and his friends drove to that location, but this interaction tragically played out differently. Sellers and one of his friends ultimately fired their weapons at K.H., and Sellers's friend killed K.H. during the gunfire. After K.H. was shot, Sellers and his group left the scene. Sellers was later arrested.

¶7 Sellers was subsequently charged with first degree felony murder, aggravated robbery, two counts of conspiracy to commit aggravated robbery, three counts of attempted aggravated robbery, menacing, and six crime of violence counts. The case proceeded to trial in the El Paso County District Court.

¶8 A jury ultimately convicted Sellers on all counts, except for one of the conspiracy to commit aggravated robbery counts, menacing, and one crime of

violence count, which were dismissed. The trial court sentenced Sellers to a composite term of LWOP for the felony murder plus thirty-two years confinement and five years parole for the aggravated robbery conviction.

¶9 Sellers appealed, arguing, among other things, that under the Eighth Amendment to the United States Constitution, an LWOP sentence for felony murder is categorically unconstitutional. *People v. Sellers*, 2022 COA 102, ¶¶ 33, 46, 521 P.3d 1066, 1075, 1077. Alternatively, he contended that the division should remand his case for a proportionality review of his LWOP sentence. *Id.* at ¶¶ 33, 55, 521 P.3d at 1075, 1078.

¶10 In a unanimous, published opinion, the division affirmed Sellers's conviction and sentence. *Id.* at ¶ 68, 521 P.3d at 1080. (The division remanded the case to the trial court with instructions to impose concurrent sentences for Sellers's other convictions, a matter that is not before us. *Id.*) Specifically, the division concluded that Sellers's categorical challenge to the constitutionality of his LWOP sentence was not applicable in this case and that his sentence was constitutionally proportional. *Id.* at ¶ 43, 521 P.3d at 1076.

¶11 In support of these conclusions, the division noted that at the time Sellers committed the crimes at issue, felony murder was a class 1 felony that carried a minimum sentence of LWOP. *Id.* at ¶ 44, 521 P.3d at 1077 (citing §§ 18-3-102(1)(b) and 18-1.3-401(1)(a), C.R.S. (2018)). Although the division acknowledged that in

2021, the General Assembly had reclassified felony murder as a class 2 felony with a maximum sentence of forty-eight years, the division pointed out that the General Assembly also provided that its reclassification applied only to offenses committed on or after September 15, 2021, the date the reclassification took effect. *Id.* at ¶ 45, 521 P.3d at 1077 (citing §§ 18-3-103, 18-1.3-401(1)(a)(V)(A.1), 18-1.3-401(8)(a)(I), C.R.S. (2021)).

¶12 Based largely on this change in the law, Sellers argued that an LWOP sentence for felony murder is categorically unconstitutional. *Id.* at ¶ 46, 521 P.3d at 1077. The division disagreed, however, because Sellers cited no case—and the division was aware of none—that had extended the categorical approach to cases not involving the death penalty or juvenile offenders. *Id.* at ¶ 54, 521 P.3d at 1078. Indeed, the division observed that the Supreme Court had upheld LWOP sentences for adult offenders even in nonhomicide cases. *Id.* (citing *Harmelin v. Michigan*, 501 U.S. 957 (1991)).

¶13 Having so concluded, the division went on to consider, and reject, Sellers's alternative request to remand the case for an abbreviated proportionality review. *Id.* at ¶ 55, 521 P.3d at 1078. Instead, the division conducted the review itself and determined that felony murder is a per se grave or serious offense (because it necessarily involves a violent predicate felony resulting in the death of a person) and that, therefore, Sellers's LWOP sentence was not grossly disproportionate,

despite the subsequent legislative amendments. *Id.* at ¶¶ 55, 65–67, 521 P.3d at 1078–80.

¶14 Sellers then petitioned for a writ of certiorari in this court, and we granted his petition.

II. Analysis

¶15 We begin by setting forth the applicable standard of review and the basic tenets of the Eighth Amendment and article II, section 20 of the Colorado Constitution. We then discuss the pertinent case law addressing categorically unconstitutional sentences, and, applying that law to the facts before us, we conclude that LWOP sentences for felony murder for adult offenders are not categorically unconstitutional. Finally, we conduct an abbreviated proportionality review of Sellers's LWOP sentence for felony murder, and we conclude that, on the facts presented, the sentence was not grossly disproportionate to the offense.

A. Standard of Review and the Eighth Amendment

¶16 We review de novo the constitutionality of statutes. *People in Int. of T.B.*, 2021 CO 59, ¶ 25, 489 P.3d 752, 760. We likewise review de novo whether a sentence is grossly disproportionate to the offense, in violation of the Eighth Amendment and article II, section 20 of the Colorado Constitution. *Wells-Yates v. People*, 2019 CO 90M, ¶ 35, 454 P.3d 191, 204.

¶17 The Eighth Amendment and article II, section 20 of the Colorado Constitution are identical and provide, "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. To decide 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 v. Florida*, 560 U.S. 48, 58 (2010) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). This prohibition "guarantees individuals the right not to be subjected to excessive sanctions." *Miller v. Alabama*, 567 U.S. 460, 469 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005)). This right stems from the concept that punishment for a crime should be proportionate to both the offender and the offense. *Miller*, 567 U.S. at 469.

¶18 Supreme Court case law addressing the proportionality of sentences falls within two general categories: (1) cases in which the Court implements the proportionality standard through categorical restrictions and (2) cases in which the Court considers all of the circumstances of the case to determine whether the length of a term-of-years sentence is unconstitutionally excessive or grossly disproportionate to the offender or the offense. *Graham*, 560 U.S. at 59. Sellers argues that we should vacate his LWOP sentence under both or either of these

categories and remand his case for resentencing. We consider his contentions in turn.

B. Categorical Unconstitutionality

¶19 Sellers first contends that an LWOP sentence for felony murder is categorically unconstitutional in light of the General Assembly's 2021 reclassification of felony murder from a class 1 felony with a mandatory LWOP sentence to a class 2 felony with a maximum sentence of forty-eight years. In Sellers's view, the General Assembly's reclassification of felony murder as a class 2 felony shows that standards of decency have evolved in Colorado to the extent that its citizens will no longer tolerate punishing felony murder offenders with the most severe sentence available under state law. We are unpersuaded.

¶20 In determining whether a sentence is categorically unconstitutional, the Supreme Court has first considered "'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue." *Graham*, 560 U.S. at 61 (quoting *Roper*, 543 U.S. at 563). In this regard, the Court has observed that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Id.* at 62 (quoting *Atkins v. Virginia*, 536 U.S. 304, 312 (2002)). The Court has, however, recognized measures of consensus beyond just legislation. *Id.* For example, the Court has noted that

actual sentencing practices are also important in the Court's inquiry into consensus. *Id.*

¶21 After considering objective indicia of societal standards, the Court has next exercised its independent judgment to decide whether the punishment at issue violates the Eighth Amendment. *Id.* at 61. In making this determination, the Court has observed that it is to be guided by the standards set forth in controlling precedents and also by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose. *Id.* This exercise of the Court's independent judgment requires consideration of the culpability of criminal defendants in light of their crimes and characteristics, as well as the severity of the punishment at issue. *Id.* at 67.

¶22 Prior to *Graham*, the Supreme Court limited its application of the categorical approach to cases involving the death penalty. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (concluding that the Eighth Amendment precludes the imposition of the death penalty for the rape of a child when the crime did not result, and was not intended to result, in the death of the victim); *Roper*, 543 U.S. at 578 (concluding that the Eighth and Fourteenth Amendments forbid the imposition of the death penalty for offenders who were under the age of eighteen when they committed their crimes); *Atkins*, 536 U.S. at 321 (prohibiting the

imposition of the death penalty for defendants with significant intellectual disabilities).

¶23 In *Graham*, 560 U.S. at 82, the Court considered for the first time whether the categorical approach prohibits an LWOP sentence for a juvenile defendant who did not commit homicide. The Court concluded that it does. *Id.*

¶24 The Court, however, revisited this question two years later in *Miller*, 567 U.S. at 479. Again considering whether the Eighth Amendment prohibits the imposition of a mandatory LWOP sentence for a juvenile offender, the Court this time held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Id.* In so concluding, the Court distinguished *Roper* and *Graham* on the ground that, in the case before it, the Court was not categorically barring a penalty for either a class of offenses or a type of crime. *Id.* at 483. Rather, the Court's ruling "mandate[d] only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id.*

¶25 Like the division below, we are unaware of any court that has applied the categorical approach to cases not involving either the death penalty or juvenile offenders, and Sellers cites none. *See Sellers*, ¶ 54, 521 P.3d at 1078.

¶26 Nor have we found a national consensus that a mandatory sentence of LWOP for felony murder for an adult offender is categorically impermissible. To

the contrary, courts in a number of our sister states have upheld LWOP sentences for felony murder for adult offenders. *See, e.g.*, *Sosebee v. State*, 893 S.E.2d 653, 659–60 (Ga. 2023) (concluding that a recidivist offender's LWOP sentence for felony murder arising from a fatal car accident that occurred while the offender was attempting to flee from a police stop was not grossly disproportionate to his offenses under the Eighth Amendment); *Harte v. State*, 373 P.3d 98, 101–02 (Nev. 2016) (concluding that an LWOP sentence for felony murder, which was within the statutory limits, was not so grossly disproportionate to the crime as to constitute cruel and unusual punishment).

¶27 To the extent that Sellers cites to decisions that have imposed sentences for felony murder that were less severe than an LWOP sentence, we note that those cases appear to have arisen in states in which the applicable statutes did not allow for the imposition of an LWOP sentence for felony murder. *See, e.g.*, *Todd v. State*, 917 P.2d 674, 679–81 (Alaska 1996) (noting that the maximum sentence for felony murder under the applicable state statute was ninety-nine years, and concluding that consecutive sentences for felony murder and the predicate felony of first degree robbery do not violate double jeopardy); *State v. Reardon*, 486 A.2d 112, 120–21 (Me. 1984) (noting that the maximum sentence for felony murder was twenty years under the applicable state statute, and concluding that a fourteen-year sentence for felony murder was not disproportionate or cruel and

unusual). These cases do not support Sellers's assertion that many state courts have concluded that an LWOP sentence for felony murder is categorically unconstitutional. The cases simply do not address that issue. Nor have we seen other cases or authorities supporting Sellers's assertion or indicating that a national consensus has arisen (either in case law or state statutes) against the imposition of LWOP sentences in felony murder cases involving adult offenders.

¶28 For these reasons, we cannot say that the objective indicia of society's standards preclude LWOP sentences in cases like this one.

¶29 Nor does the exercise of our independent judgment lead us to conclude that LWOP sentences for felony murder for adult offenders are categorically unconstitutional. As noted above, the Supreme Court's case law instructs that we must exercise our independent judgment to decide whether, in light of controlling precedent and our understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose, an LWOP sentence for felony murder violates the Eighth Amendment. *Graham*, 560 U.S. at 61. As part of this analysis, we must consider, among other things, "whether the challenged sentencing practice serves legitimate penological goals." *Id.* at 67. In particular, the Court has indicated that, in conducting our analysis, we must assess the four recognized goals of penal sanctions, namely, retribution, deterrence, incapacitation, and rehabilitation. *Id.* at 71. We therefore proceed to that analysis.

¶30 Retribution refers to "[p]unishment imposed for a serious offense." *Retribution*, Black's Law Dictionary (12th ed. 2024). Retribution is, of course, a legitimate reason to punish, but the criminal sentence must be directly related to the offender's personal culpability. *Graham*, 560 U.S. at 71.

¶31 Deterrence has been defined as "[t]he act or process of discouraging certain behavior, particularly by fear; esp., as a goal of criminal law, the prevention of criminal behavior by fear of punishment." *Deterrence*, Black's Law Dictionary (12th ed. 2024). Deterrence is premised on the idea that a person will take a possible punishment into consideration when making decisions about whether to engage in certain behaviors. *Graham*, 560 U.S. at 72.

¶32 Incapacitation is "[t]he action of disabling or depriving of legal capacity." *Incapacitation*, Black's Law Dictionary (12th ed. 2024). Placing an offender in prison incapacitates that offender so that the offender cannot commit further crimes (other than in prison itself) or endanger public safety. *Graham*, 560 U.S. at 72.

¶33 Finally, rehabilitation has been defined as "[t]he process of seeking to improve a criminal's character and outlook so that he or she can function in society without committing other crimes." *Rehabilitation*, Black's Law Dictionary (12th ed. 2024). Rehabilitation is "a penological goal that forms the basis of parole systems." *Graham*, 560 U.S. at 73.

¶34 As Sellers asserts, one can reasonably argue that his LWOP sentence did not serve all four of these goals. Specifically, although an LWOP sentence for committing a felony that resulted in another's death might well serve the purposes of retribution, deterrence, and incapacitation, it arguably does not serve the goal of rehabilitation because a person who receives an LWOP sentence is given no opportunity to rehabilitate themselves and reenter the community.

¶35 We cannot say, however, that the fact that an LWOP sentence for felony murder might not satisfy one (or even more than one) of the above-described penological goals necessarily overrides the lack of a national consensus discussed above. *Cf. Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring in part and concurring in the judgment) (noting that "the Eighth Amendment does not mandate adoption of any one penological theory" and that federal and state courts "have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation"). Specifically, absent a consensus among states that an LWOP sentence for felony murder for an adult offender is always inappropriate, we perceive no basis for overriding the law in effect at the time Sellers committed the offenses that mandated an LWOP sentence for felony murder or the clear legislative declaration applying the reclassification of LWOP only to offenses committed after September 15, 2021.

¶36 We are not persuaded otherwise by Sellers's request that, notwithstanding the above-described case law construing the Eighth Amendment, we should interpret the Colorado Constitution to render an LWOP sentence for felony murder committed prior to September 15, 2021 categorically improper. To be sure, "we are free to construe the Colorado Constitution to afford greater protections than those recognized by the United States Constitution." *Millis v. Bd. of Cnty. Comm'rs*, 626 P.2d 652, 657 (Colo. 1981). To date, however, we have not interpreted article II, section 20 of our constitution to provide greater protection than the Eighth Amendment. Nor have we interpreted article II, section 20 to conclude that an adult's LWOP sentence for felony murder is categorically unconstitutional. And considering the unambiguous statutory language mandating an LWOP sentence for felony murder committed before September 15, 2021, we are not persuaded that we should do so now.

¶37 Accordingly, we conclude that under the Eighth Amendment and article II, section 20 of the Colorado Constitution, Sellers's LWOP sentence for felony murder is not categorically unconstitutional, and we proceed to consider whether that sentence is nonetheless grossly disproportionate to the offense in this case.

C. Gross Disproportionality

¶38 Sellers argues that his LWOP sentence is grossly disproportionate to the offense of felony murder, especially in light of the General Assembly's 2021 reclassification of felony murder. Again, we are unpersuaded.

¶39 "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Solem v. Helm*, 463 U.S. 277, 288 (1983)); *accord Rutter v. People*, 2015 CO 71, ¶ 15, 363 P.3d 183, 188.

¶40 "Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." *Rummel v. Estelle*, 445 U.S. 263, 272 (1980). Thus, we have said, "[I]n conducting proportionality reviews in non-capital cases, courts will rarely conclude that a defendant's sentence is grossly disproportionate." *Rutter*, ¶ 16, 363 P.3d at 188.

¶41 In general, the fixing of prison sentences for specific crimes is properly within the legislature's province and not that of the courts. *Harmelin*, 501 U.S. at 998 (Kennedy, J., concurring in part and concurring in the judgment). Indeed, it is well settled that the legislature may properly define criminal punishments without providing the court with any sentencing discretion. *Id.* at 1006. Reviewing courts should thus grant "substantial deference to the broad authority

that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals." *Solem*, 463 U.S. at 290.

¶42 As noted above, when the General Assembly reclassified felony murder, it expressly stated that its reclassification applies only to offenses committed after September 15, 2021, the date the reclassification became effective. This was nearly three years after the events in October 2018 that led to Sellers's felony murder conviction. "It is well established in Colorado that when the General Assembly indicates in an effective date clause that a statute shall apply prospectively, courts are bound by that language." *People v. Summers*, 208 P.3d 251, 257 (Colo. 2009). Accordingly, on its face, the legislative reclassification does not invalidate Sellers's LWOP sentence for felony murder.

¶43 Nonetheless, we must still examine whether Sellers's sentence was constitutionally disproportionate. *See Wells-Yates*, ¶ 48, 454 P.3d at 206 ("Whether statutory revisions apply retroactively 'is a separate and distinct question from whether a defendant's sentence is constitutionally proportionate.'") (quoting *Rutter*, ¶ 35, 363 P.3d at 191) (Gabriel, J., dissenting)); *see also Rutter*, ¶ 2, 363 P.3d at 185 (noting that even though "the legislature can change the classification of crimes, courts determine whether offenses are grave or serious for purposes of proportionality review").

¶44 In *Solem*, 463 U.S. at 290–92, the Supreme Court adopted a test to determine whether a sentence is proportionate to the crime for which the defendant was convicted. Although the Court described the test as having three steps, *id.*, we have construed it as having two, with the first step being comprised of two parts, *Wells-Yates*, ¶ 7 & n.4, 454 P.3d at 196–97 & n.4. First, the trial court should consider (a) the gravity or seriousness of the offense along with (b) the harshness of the penalty. *Id.* at ¶ 7, 454 P.3d at 197. Second, the court may compare the defendant's sentence to sentences for other crimes in the same jurisdiction and to sentences for the same crime committed in other jurisdictions. *Id.* We refer to the first step as an "abbreviated proportionality review" and to the second step as an "extended proportionality review." *Id.* at ¶ 10, 454 P.3d at 197.

¶45 When defendants challenge their sentences on proportionality grounds, reviewing courts in Colorado must complete an abbreviated proportionality review. *Id.* at ¶ 15, 454 P.3d at 198–99. Courts should conduct an extended proportionality review only when the abbreviated proportionality review gives rise to an inference of gross disproportionality. *Id.*

¶46 We have acknowledged that the first part of the abbreviated proportionality review—the determination of the gravity or seriousness of the offense—is "somewhat imprecise." *Id.* at ¶ 12, 454 P.3d at 198 (quoting *People v. Gaskins*, 825 P.2d 30, 36 (Colo. 1992)). Nonetheless, we have considered several factors in

conducting this review, including (1) the harm caused or threatened to the victim or society; (2) the magnitude of the crime; (3) whether the crime is a lesser-included or the greater-inclusive offense; (4) whether the crime involved an attempt to commit an act or a completed act; and (5) whether the defendant was a principal in or accessory to the crime. *Id.* We have also weighed factors relevant to the defendant's culpability, such as motive and whether the defendant's acts were negligent, reckless, knowing, intentional, or malicious. *Id.*

¶47 Pertinent here, we further examined in *Wells-Yates*, ¶¶ 40–53, 454 P.3d at 204–07, whether, in the course of conducting an abbreviated proportionality review, a court should consider statutory amendments enacted after the triggering offenses. On this point, we concluded that when determining the gravity or seriousness of an offense during an abbreviated proportionality review, "the trial court should consider relevant legislative amendments enacted after the date of the offense, even if the amendments do not apply retroactively." *Id.* at ¶ 45, 454 P.3d at 206. This is because such legislative enactments might inform our evaluation of the gravity or seriousness of the offense. *Id.* at ¶ 52, 454 P.3d at 207.

¶48 Lastly, we have identified certain crimes as per se grave or serious. *Id.* at ¶ 13, 454 P.3d at 198. For example, we have concluded that per se grave or serious crimes include aggravated robbery, robbery, burglary, accessory to first degree murder, and certain narcotics-related crimes. *Id.* at ¶¶ 13, 64–66, 454 P.3d at 198,

209. When a crime is per se grave or serious, a sentencing court may skip the determination regarding the gravity or seriousness of the offense and proceed directly to assess the harshness of the penalty. *Id.* at ¶ 13, 454 P.3d at 198.

¶49 Here, we begin by noting that we have never determined whether felony murder is a per se grave or serious offense. Unlike the division below, however, we perceive no need to decide whether it is because even assuming without deciding that it is not per se grave or serious, the application of the above-described factors to this case establish that Sellers's offense was, in fact, grave and serious.

¶50 In this case, the victim died in the course of an aggravated robbery that Sellers helped plan and carry out. Moreover, although Sellers did not personally kill the victim, he fired his weapon at the victim and was an active and willing participant in the events resulting in the victim's death. Considering all of these factors, and taking into account the legislative reclassification that was enacted several years after Sellers committed the crimes at issue, we conclude that Sellers's offense was, in fact, grave and serious.

¶51 Turning, then, to the harshness of the penalty, we must consider whether a sentence is parole eligible because parole can reduce the length of confinement, thereby rendering the penalty less harsh. *Id.* at ¶ 14, 454 P.3d at 198. In addition, we must consider the offense at issue, as well as the underlying offenses, to

determine whether, in combination, they so lack in gravity and seriousness as to suggest that the sentence is "unconstitutionally disproportionate to the crime, taking into account the defendant's eligibility for parole." *Id.* at ¶ 23, 454 P.3d at 201.

¶52 Here, Sellers's LWOP sentence renders him ineligible for parole and thus ensures that he will spend the rest of his life in prison. We recognize, as we must, that such a sentence is the harshest sentence that Colorado law currently authorizes. § 18-1.3-401(1)(a)(V)(F), C.R.S. (2024). Nonetheless, the Supreme Court has concluded that sentencing certain defendants who have committed felonies to LWOP does not necessarily run afoul of the Eighth Amendment. *See Harmelin*, 501 U.S. at 994–96 (concluding that an LWOP sentence for possessing a large amount of cocaine was not cruel and unusual).

¶53 In light of this case law, and considering the above-described facts and circumstances of this case, we cannot say that Sellers's LWOP sentence is one of the rare cases requiring us to conclude that the sentence is unconstitutional or grossly disproportionate to the crime that he committed. *See Rutter*, ¶¶ 16, 25, 363 P.3d at 188–89 (noting that courts in non-homicide cases will rarely find a defendant's sentence to be grossly disproportionate, and concluding, on the facts presented, that the defendant's ninety-six year drug sentence was not grossly disproportionate to his crime). Nor, for the reasons set forth above, do we perceive

a basis to afford Sellers greater protection under the Colorado Constitution on the question of gross disproportionality than is afforded under the Eighth Amendment.

¶54 In light of this determination, we need not proceed to an extended proportionality review.

III. Conclusion

¶55 For the foregoing reasons, we conclude that an LWOP sentence for felony murder for an adult offender is not categorically unconstitutional, nor was that sentence grossly disproportionate on the facts of this case.

¶56 Accordingly, we conclude that Sellers's LWOP sentence for felony murder was constitutional, and we affirm the judgment of the division below, albeit partially on different grounds.