

In The
Supreme Court of Pennsylvania

180 WAL 2023

COMMONWEALTH OF PENNSYLVANIA,

Respondent,

v.

DEREK LEE,

Petitioner.

ORDER

AND NOW, this ____ day of _____, 2023, it is hereby
ORDERED that the Application for Leave to Appear as *Amici Curiae* filed by The Sentencing Project; the Boston University Center for Antiracist Research; Fair and Just Prosecution, a Project of the Tides Center; and FAMM is **GRANTED**. The Prothonotary shall docket the brief attached to the Application.

In The
Supreme Court of Pennsylvania

180 WAL 2023

COMMONWEALTH OF PENNSYLVANIA,

Respondent,

v.

DEREK LEE,

Petitioner.

**APPLICATION OF THE SENTENCING PROJECT; THE BOSTON
UNIVERSITY CENTER FOR ANTIRACIST RESEARCH;
FAIR AND JUST PROSECUTION; AND FAMM
FOR LEAVE TO APPEAR AS *AMICI CURIAE***

On Petition for Allowance of Appeal from the Order of the Superior Court
Dated June 13, 2023, at 1008 WDA 2021, Affirming the Order Denying Motion
for Modification of Sentence of the Court of Common Pleas of Allegheny County,
Pennsylvania, dated July 26, 2021, at CP-02-CR-0016878-2014

MARK D. TATICCHI (PA. No. 323436)

Counsel of Record

ELIZABETH M. CASEY (PA. No. 325696)

FAEGRE DRINKER BIDDLE & REATH LLP

One Logan Square, Suite 2000

Philadelphia, PA 19103

mark.taticchi@faegredrinker.com

elizabeth.casey@faegredrinker.com

*Counsel for The Sentencing Project; the Boston University Center for Antiracist
Research; Fair and Just Prosecution, a Project of the Tides Center; and FAMM*

The Sentencing Project; the Boston University Center for Antiracist Research; Fair and Just Prosecution, a Project of the Tides Center; and FAMM (“Applicants”) apply pursuant to Pa.R.A.P. 123 and Pa.R.A.P. 531(b)(1)(iii) for leave to file the attached brief in support of the Petition for Allowance of Appeal filed by Petitioner Derek Lee.

The Sentencing Project is a national nonprofit organization established in 1986 to engage in public policy research, education, and advocacy to promote effective and humane responses to crime. The Sentencing Project has produced a broad range of scholarship and advocacy assessing the merits of extreme sentences in jurisdictions throughout the United States. Because this case concerns the lawfulness of imposing a life-without-parole sentence on individuals convicted of felony murder but who did not kill, did not intend to kill, and could not foresee a loss of human life, it raises questions of fundamental importance to The Sentencing Project.

The Boston University Center for Antiracist Research (the “Center”) is a nonpartisan, nonprofit university-based center that seeks to eliminate racism through integrated research, policy, narrative, and advocacy initiatives. Accordingly, the Center has a keen interest in challenging policies of criminalization and punishment that undermine fundamental principles of safety, justice, and healing, and disproportionately harm people of color. This case is of

crucial importance to the Center's mission because death-by-incarceration sentences for felony-murder convictions are disproportionate, racially biased, and unconstitutional.¹

Fair and Just Prosecution, a project of the Tides Center, is a nonprofit organization that brings together elected prosecutors from around the nation as part of a network of leaders committed to a justice system grounded in fairness, equity, compassion, and fiscal responsibility. The elected prosecutors who work with Fair and Just Prosecution hail from urban and rural areas alike and collectively represent nearly 20 percent of the nation's population. Fair and Just Prosecution is deeply interested in ensuring the legitimacy of the criminal justice system and is keenly aware of the troubling racial bias seen in the administration of the felony-murder rule in Pennsylvania and other States. Because prosecutors depend on the public's trust and belief in the legitimacy of law enforcement and the justice system in order to carry out their responsibilities, Fair and Just Prosecution believes that it is imperative that this Court grant review on the question whether 61 Pa.C.S. § 6137(a) violates the Cruel and Unusual Punishments Clause of the Eighth Amendment and the Cruel Punishments Clause of the Pennsylvania Constitution.

¹ The Center does not, in this brief or otherwise, represent the official views of Boston University.

FAMM, previously known as Families Against Mandatory Minimums, is a national, nonprofit, nonpartisan organization of over 75,000 members. FAMM was founded in 1991 to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. Today, FAMM pursues a broader mission of creating a more fair and effective justice system that respects American values of individual accountability and dignity while keeping communities safe. By mobilizing and sharing the stories of prisoners and their families who have been adversely affected by unjust sentences and prison policies, FAMM gives voice to incarcerated individuals, their families, and their communities. This case raises an issue within the heartland of that mission: challenging the constitutionality of mandatory life-without-parole sentences for individuals convicted of felony murder who did not kill, did not intend to kill, and could not foresee a loss of human life.

Given this case's salience to the core missions of each of the Applicants, they respectfully request leave to submit the attached amicus brief in support of the Petition for Allowance of Appeal in the above-captioned matter.

Dated: July 13, 2023

Respectfully submitted,

/s/ Mark D. Taticchi

Mark D. Taticchi (Pa. No. 323436)

Elizabeth M. Casey (Pa. No. 325696)

Faegre Drinker Biddle & Reath LLP

One Logan Square, Suite 2000

Philadelphia, PA 19103-6996

Tel: (215) 988-2700

mark.taticchi@faegredrinker.com

elizabeth.casey@faegredrinker.com

PROOF OF SERVICE

I hereby certify that on July 13, 2023, I caused the foregoing Application for Leave to Appear and accompanying proposed *amici curiae* brief to be served on the persons listed below by the PACFile electronic filing system, which service satisfies the requirements of Pa.R.A.P. 121:

Kevin Francis McCarthy
Allegheny County
District Attorney's Office
401 Courthouse
436 Grant Street
Pittsburgh, PA 15219

Ronald Michael Wabby, Jr.
Allegheny County
District Attorney's Office
401 Courthouse
436 Grant Street
Pittsburgh, PA 15219

Counsel for Respondent

Bret Grote
Quinn Cozzens
Abolitionist Law Center
P.O. Box 8654
Pittsburgh, PA 15221

Ashley Henderson
Deneekie Grant
Amistad Law Project
P.O. Box 9148
Philadelphia, PA 19139

Counsel for Petitioner

/s/ Mark D. Taticchi
Mark D. Taticchi

CERTIFICATE OF COMPLIANCE WITH PA.R.A.P. 127

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: July 13, 2023

/s/ Mark D. Taticchi
Mark D. Taticchi

EXHIBIT A

In The
Supreme Court of Pennsylvania

180 WAL 2023

COMMONWEALTH OF PENNSYLVANIA

Respondent

v.

DEREK LEE

Petitioner

***AMICI CURIAE* BRIEF OF THE SENTENCING PROJECT;
THE BOSTON UNIVERSITY CENTER FOR ANTIRACIST RESEARCH;
FAIR AND JUST PROSECUTION; AND FAMM**

On Petition for Allowance of Appeal from the Order of the Superior Court
Dated June 13, 2023, at 1008 WDA 2021, Affirming the Order Denying Motion
for Modification of Sentence of the Court of Common Pleas of Allegheny
County, Pennsylvania, dated July 26, 2021, at CP-02-CR-0016878-2014

RACHEL LOPEZ (PA. No. 318256)
COMMUNITY LAWYERING CLINIC
3509 Spring Garden Street
Philadelphia, PA 19104
rel62@drexel.com

CAITLIN GLASS
BOSTON UNIVERSITY CENTER
FOR ANTIRACIST RESEARCH
1 Silber Way
Boston, Massachusetts 02215
glassc@bu.edu

MARK D. TATICCHI (PA. No. 323436)
Counsel of Record
ELIZABETH M. CASEY (PA. No. 325696)
FAEGRE DRINKER BIDDLE & REATH LLP
One Logan Square, Suite 2000
Philadelphia, PA 19103
mark.taticchi@faegredrinker.com
elizabeth.casey@faegredrinker.com

*Counsel for The Sentencing Project; the Boston University Center for Antiracist
Research; Fair and Just Prosecution, a Project of the Tides Center; and FAMM*

TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY OF ARGUMENT	1
II. LEGAL FRAMEWORK	3
A. Eighth Amendment.....	3
B. Parole Eligibility and Felony-Murder Convictions.....	4
III. STATEMENT OF REASONS FOR ALLOWANCE OF APPEAL	5
A. Review Is Warranted Under Pa.R.A.P. 1114(b)(5) Because the Petition Involves the Constitutionality of Pennsylvania’s Parole-Eligibility Statute for Felony Murder.	5
1. Pennsylvania’s Sentencing Scheme Is Egregiously out of Step with the National Consensus.	6
2. Sentencing an Individual Convicted of Felony Murder to Life Without Parole Violates the Eighth Amendment’s Proportionality Principle.....	11
B. Review Is Warranted Under Pa.R.A.P. 1114(b)(4) Because the Superior Court’s Decision Raises an Issue of Substantial Public Importance: Pennsylvanians of Color Are Disproportionately Affected by the Life-Without-Parole Sentences that Felony- Murder Convictions Carry.	18
IV. CONCLUSION.....	20

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002).....	17
<i>Buck v. Davis</i> , 580 U.S. 100 (2017).....	19
<i>Commonwealth ex. rel. Smith v. Myers</i> , 261 A.2d 550 (Pa. 1970).....	4
<i>Commonwealth v. Brown</i> , 81 N.E.3d 1173 (Mass. 2017).....	8, 9
<i>Commonwealth v. Edmunds</i> , 586 A.2d 887 (Pa. 1991).....	3
<i>Enmund v. Florida</i> , 458 U.S. 782 (1982).....	12, 14
<i>Ewing v. California</i> , 538 U.S. 11 (2003).....	14
<i>Graham v. Florida</i> , 560 U.S. 48 (2010).....	<i>passim</i>
<i>Harmelin v. Michigan</i> , 501 U.S. 957 (1991).....	11
<i>Miller v. Alabama</i> , 567 U.S. 460 (2012).....	7, 13
<i>Montgomery v. Louisiana</i> , 577 U.S. 190 (2016).....	3, 11
<i>Mullaney v. Wilbur</i> , 421 U.S. 684 (1975).....	14
<i>People v. Aaron</i> , 299 N.W.2d 304 (Mich. 1980).....	6

<i>Roper v. Simmons</i> , 543 U.S. 551 (2005).....	3, 12, 15
<i>State v. Baird</i> , 175 A.3d 493 (Vt. 2017).....	8
<i>State v. Griffin</i> , 866 P.2d 1156 (N.M. 1993).....	8
<i>State v. Rice</i> , 683 P. 2d 199 (Wash. 1984)	8
<i>Tison v. Arizona</i> , 481 U.S. 137 (1987).....	14

STATUTES, RULES & REGULATIONS

18 Pa.C.S. § 1102(b).....	1, 4
18 Pa.C.S. § 2502(b).....	1, 4
61 Pa.C.S. § 6137(a)(1).....	<i>passim</i>
Cal. S.B. 1437	7
Colo. Rev. Stat. § 18-3-102	7
Colo. Rev. Stat. § 18-3-103	8
Conn. Gen. Stat. § 53a-54c	8
DE Code § 635(2)	8
Haw. Rev. Stat. § 707-701	8
Ky. Rev. Stat. Ann. § 507.020	8
Me. Stat. Title 17-A § 202	8
MN SF2909, https://www.revisor.mn.gov/bills/bill.php?b=Senate&f=SF2909&sn=0&y=2023	7
N.D. Cent. Code § 12.1-02-02.1	8

N.D. Cent. Code § 12.1-16-018

N.H. Rev. Stat. Ann. § 630:1-b.....8

Pa.R.A.P. 1114.....*passim*

S.B. 21-124, 73rd Gen. Ass., 2021 Reg. Sess. (Colo. 2021)7

OTHER AUTHORITIES

2020 Census Results Data Profiles, U.S. Census Bureau,
<https://data.census.gov/cedsci/profile?q=United%20States&g=0100000US>6

Alex Piquero, et al., *From Juvenile Delinquency to Adult Crime: Criminal Careers, Justice Policy, and Prevention* (2012)16

Andrea Lindsay & Clara Rawlings, *Life Without Parole for Second-Degree Murder in Pennsylvania: An Objective Assessment of Race* (2021) https://www.plsephilly.org/wpcontent/uploads/2021/04/PLSE_SecondDegreeMurder_and_Race_Apr2021.pdf.....15, 16, 19

Anup Malani, *Does the Felony-Murder Rule Deter? Evidence from FBI Crime Data*, Working Paper (2002)17

Ashley Nellis & Breanna Bishop, *A New Lease on Life* (2021), <https://www.sentencingproject.org/wp-content/uploads/2021/06/A-New-Lease-on-Life.pdf>.....6

Barbara Levine & Elsie Kettunen, *Paroling people who committed serious crimes: What is the actual risk?* (2014) https://www.prisonpolicy.org/scans/cappsmi/CAPPS_Paroling_people_who_committed_serious_crimes_11_23_14.pdf.....14

Fair and Just Prosecution, *Joint statement on sentencing second chances and addressing past extreme sentences* (2021), <https://fairandjustprosecution.org/wp-content/uploads/2021/04/FJP-Extreme-Sentences-and-Second-Chances-Joint-Statement.pdf>.....16

Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 *Crime and Just.* 199 (2013).....14

Elizabeth S. Scott, et al., <i>Young, Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy</i> , 85 Fordham L. Rev. 641 (2016).....	15
G. Ben Cohen, Justin D. Levinson & Koichi Hioki, <i>Racial Bias, Accomplice Liability, and The Felony Murder Rule: a National Empirical Study</i> , Den. L. Rev. (2023)	19
Guyora Binder & Ekow N. Yankah, <i>Police Killings as Felony Murder</i> , 17 Harv. L. & Pol’y Rev. 157 (2022).....	20
J.J. Prescott et al., <i>Understanding Violent-Crime Recidivism</i> , 95 Notre Dame L. Rev. 1643 (2014)	15
Mariel Alper et al., <i>2018 update on prisoner recidivism: A 9-year follow-up period (2005-2014)</i> (2018), https://bjs.ojp.gov/content/pub/pdf/18upr9yfup0514.pdf	14
National Research Council, <i>The Growth of Incarceration in the United States: Exploring Causes and Consequences</i> (2014)	18
Nazgol Ghandnoosh, et al., <i>Felony Murder: An On-Ramp For Extreme Sentencing</i> (2022).....	19
Nelson E. Roth & Scott E. Sundby, <i>The Felony-Murder Rule: A Doctrine at Constitutional Crossroads</i> , 70 Cornell L. Rev. 446 (1985).....	17
Paul H. Robinson & John M. Darley, <i>Does Criminal Law Deter? A behavioural science investigation</i> , 24 Oxford Journal of Legal Studies 173-205 (2004).....	18
Susquehanna Polling and Research, <i>Pennsylvania Statewide Omnibus Telephone Poll</i> (February 2023), https://famm.org/wp-content/uploads/Toplines-PAStatewide-Omnibus-FAMM-Feb2023.pdf	10

IDENTITY AND INTEREST OF *AMICI CURIAE*¹

Amici curiae are The Sentencing Project; the Boston University Center for Antiracist Research; Fair and Just Prosecution, a Project of the Tides Center; and FAMM (previously known as Families Against Mandatory Minimums)—organizations that engage in scholarship and/or advocacy related to criminal law, sentencing policies, and racial injustice. *Amici* advance their missions in several ways, including through amicus filings in this Court and other courts throughout the country. *Amici* are filing this brief to urge the Court to grant Derek Lee’s Petition for Allowance of Appeal because Pennsylvania’s lifetime ban on parole eligibility for individuals convicted of felony murder results in sentences that are disproportionate, racially biased, and unconstitutional.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

In Pennsylvania, some 1,100 people are serving life-without-parole sentences for felony murder, including many who did not take a life, did not intend to take a life, and had no expectation that a life would be taken.² That lifetime ban

¹ No party or counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

² As Petitioner explains, an individual’s sentence is the period of time—here, the duration of his or her natural life—for which an individual is remanded to the Commonwealth’s custody. Pet. at 26; see 18 Pa.C.S. §§ 2502(b), 1102(b). By contrast, Petitioner’s permanent, categorical disqualification from parole consideration is not part of his actual, formal sentence; it is, instead, the result of a different statute, Section 6137(a), which governs parole eligibility and prohibits the Parole Board from even considering a grant of parole for anyone serving a sentence of life imprisonment. § 6137(a)(1). Nevertheless, for simplicity’s sake, this brief will sometimes

on parole eligibility, which effectively guarantees a person will die in prison, is unconstitutional.

Petitioner amply shows why review is warranted, including (most significantly) because Section 6137 violates the Cruel Punishments Clause of the Pennsylvania Constitution. *Amici* agree with that conclusion and write here to explicate two related points. *First*, because Section 6137 is constitutionally infirm under the Eighth Amendment, it therefore also, *a fortiori*, fails under the more robust protection afforded by the Cruel Punishments Clause. *See* Pa.R.A.P. 1114(b)(5). *Second*, the question of Section 6137's constitutionality is of exceptional public importance, not only because of the severity of the punishment it imposes, but also because that punishment falls unevenly across racial lines: at last count, approximately 80 percent of these 1,100 individuals currently serving life-without-parole sentences in this Commonwealth are people of color. *See* Pa.R.A.P. 1114(b)(4), (5).

For these reasons, and those set forth in the petition for allowance of appeal, this Court's review is manifestly needed.

describe Section 6137(a)(1)'s disqualification from parole eligibility as a "life-without-parole sentence." That term is intended to refer to Section 6137(a)'s permanent ban on parole eligibility rather than their actual, court-imposed "sentence" of life imprisonment.

II. LEGAL FRAMEWORK

A. Eighth Amendment

The Eighth Amendment to the United States Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Proportionality is central to the analysis of sentencing practices under that proscription. *Montgomery v. Louisiana*, 577 U.S. 190, 206 (2016). When addressing categorical challenges to the proportionality of a sentence, like the one lodged by Petitioner, courts employ a two-pronged approach. They first assess “objective indicia of society’s standards, as expressed in legislative enactments and state practice” to determine whether there is a “national consensus...against” the imposition of the challenged penalty on the class sought to be excluded from the penalty.³ *Roper v. Simmons*, 543 U.S. 551, 563 (2005). Second, courts must consider “in the exercise of [their] own independent judgment” whether the punishment in question violates the Constitution. *Id.* at 564. That involves weighing the culpability of individuals in the challenged class against the severity of the offense in question and determining

³ Though *amici* address only the U.S. Constitution, this Court considers related case law from other States when determining whether Pennsylvania’s constitution provides greater protections than its federal counterpart, as explained in the Petition. *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991).

whether the challenged punishment serves legitimate penological goals. *Id.* at 568, 571-72.

B. Parole Eligibility and Felony-Murder Convictions

Under Pennsylvania's felony-murder rule, any accidental, reckless, negligent, or otherwise unintended killing during the commission of certain enumerated felonies constitutes second-degree murder and subjects the defendant to a mandatory life sentence. 18 Pa.C.S. §§ 2502(b), 1102(b). A person who acts as an accomplice to the underlying felony may likewise be convicted of felony murder and subject to the same term of imprisonment. *Id.* § 2502(b). The felony-murder rule represents one of the very few instances in criminal law where the element of intent is waived: to secure a felony-murder conviction in Pennsylvania, the only criminal intent the Commonwealth needs to prove is that the defendant intended to commit the felony during which a death occurred. *See Commonwealth ex. rel. Smith v. Myers*, 261 A.2d 550, 555 (Pa. 1970).

Because 61 Pa.C.S. § 6137(a)(1) makes all those serving a life sentence categorically ineligible for parole, every individual convicted of felony murder in this Commonwealth—including those who did not take a life, did not intend to take a life, and had no expectation that a life would be taken—will (absent executive clemency) remain in prison from conviction until death.

III. STATEMENT OF REASONS FOR ALLOWANCE OF APPEAL

As Petitioner persuasively shows, review is warranted on several of the grounds enumerated in Rule 1114(b). Pet. at 9, 25, 36. *Amici* write to underscore two of those grounds. *First*, Section 6137(a) cannot be squared with any legitimate penological principles, as demonstrated by the national consensus against similar sentencing paradigms—and review is therefore warranted under Rule 1114(b)(5). *Second*, review is warranted under Rule 1114(b)(4) because the disproportionate racial impact of Section 6137(a)(1) raises grave concerns regarding the fairness, equity, and evenhandedness of the Commonwealth’s penal system—an archetypal issue of “substantial public importance.”

A. **Review Is Warranted Under Pa.R.A.P. 1114(b)(5) Because the Petition Involves the Constitutionality of Pennsylvania’s Parole-Eligibility Statute for Felony Murder.**

Petitioner raises a fundamental question involving the constitutionality of Pennsylvania’s imposition of life without parole for someone convicted of felony murder. There is good reason to find that Section 6137 violates the Pennsylvania Constitution because the Eighth Amendment, which is narrower than its Pennsylvania counterpart, categorically prohibits imposing a life-without-parole sentence on an individual who did not intend to kill, for two interrelated reasons. *First*, that sentence runs contrary to evolving standards of decency as measured by developments in other States. *Second*, imposing a sentence that all but guarantees

a person will die in prison is neither proportionate given the lesser culpability of someone who commits felony murder nor justified by any penological purpose.

1. Pennsylvania’s Sentencing Scheme Is Egregiously out of Step with the National Consensus.

The constitutional problems in this case stem from a sentencing structure that is nearly unique in its punishment of individuals who did not take, or did not intend to take, the life of another. Indeed, only eight other States mandate life-without-parole sentences for all people convicted felony murder. And one of those States, Michigan, requires proof that the defendant possessed a culpable mental state vis-à-vis the *killing* specifically, not merely the underlying felony.⁴ As a result, only seven other States, which together account for just nine percent of the total U.S. population,⁵ possess a sentencing regime for felony murder that resembles Pennsylvania’s. And, most strikingly of all, 24 States and the District of Columbia *never* mandate the imposition of a life-without-parole sentence for felony-murder defendants who did not kill, intend to kill, or foresee a killing.⁶

As this survey shows, the practice at issue here is rarer than other punishments invalidated by the Supreme Court on Eighth Amendment grounds.

⁴ *People v. Aaron*, 299 N.W.2d 304, 329 (Mich. 1980).

⁵ See 2020 Census Results Data Profiles, U.S. Census Bureau, <https://data.census.gov/cedsci/profile?q=United%20States&g=0100000US>.

⁶ These States are Alabama, Alaska, Colorado, Georgia, Kansas, Maine, Maryland, Missouri, Montana, Nevada, New Hampshire, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

Compare, e.g., Miller v. Alabama, 567 U.S. 460, 483-84 (2012) (invalidating mandatory life-without-parole sentences for juveniles convicted of homicide offenses even though 29 jurisdictions allowed the practice).

Moreover, the recent trend in state sentencing regimes evidences a shift *away* from Pennsylvania’s approach. For example, in 2018, California passed SB 1437, which dramatically redefined felony murder for accomplices. Now, to be convicted as an accomplice for felony murder (i.e., someone who was involved in the offense but did not kill), an individual must have either intended to kill or been both a “major participant” in the underlying felony and acted with “reckless indifference to human life” in connection with the killing. In 2021, Colorado eliminated its mandatory life-without-parole sentence for felony murder, substituting in its place a sentence of 16 to 48 years in prison.⁷ At the same time, Colorado also removed two of the conditions required for a successful affirmative defense to felony murder, permitting more individuals to meet the defense’s requirements.⁸ And in May 2023, Minnesota passed a law stating that prosecutors cannot seek a conviction for felony murder unless a person was a major participant in the underlying felony and acted with extreme indifference to human life.⁹

⁷ Colo. Rev. Stat. § 18-3-102.

⁸ S.B. 21-124, 73rd Gen. Ass., 2021 Reg. Sess. (Colo. 2021).

⁹ MN SF2909, <https://www.revisor.mn.gov/bills/bill.php?b=Senate&f=SF2909&ssn=0&y=2023>.

The atypicality of Pennsylvania's approach is also apparent when measured against the nationwide approach to felony murder generally. Two States (Hawaii and Kentucky) have no felony murder law at all.¹⁰ Six States other than Michigan, discussed *supra*, require a culpable mental state for all felony-murder convictions; New Hampshire, for example, requires proof of extreme indifference to human life.¹¹

Still other States afford defendants an affirmative defense to a felony-murder prosecution where the defendant (1) did not commit the killing; (2) was not armed with a dangerous weapon; (3) reasonably believed that no other participant was armed; and (4) reasonably believed that no other participant intended to engage in conduct likely to result in death or serious bodily harm.¹² Pennsylvania provides no such defenses.

These statistics reflect the fundamental truth of felony-murder regimes like Pennsylvania's: they lead to disproportionate punishments for people who neither killed nor intended to kill or seriously harm anyone. Massachusetts' Supreme

¹⁰ Ky. Rev. Stat. Ann. § 507.020; Haw. Rev. Stat. § 707-701.

¹¹ N.H. Rev. Stat. Ann. § 630:1-b. Apart from Michigan, the six other States with a mens rea requirement are: Delaware, 11 DE Code § 635(2); Massachusetts, *Commonwealth v. Brown*, 81 N.E.3d 1173, 1178 (Mass. 2017); New Hampshire, N.H. Rev. Stat. Ann. § 630:1-b; New Mexico, *State v. Griffin*, 866 P.2d 1156, 1162 (N.M. 1993); North Dakota, N.D. Cent. Code § 12.1-02-02.1; and Vermont, *State v. Baird*, 175 A.3d 493, 496 (Vt. 2017).

¹² *E.g.*, Me. Stat. tit. 17-A § 202; *State v. Rice*, 683 P. 2d 199, 123-24 (Wash. 1984); *see also* Colo. Rev. Stat. § 18-3-103(1.5); Conn. Gen. Stat. § 53a-54c; N.D. Cent. Code § 12.1-16-01.

Judicial Court recognized this fact in its 2017 decision in *Commonwealth v. Brown*, 81 N.E.3d 1173 (Mass. 2017), in which it limited first-degree murder convictions to those in which the government can prove malice—i.e., intent to kill, intent to cause grievous bodily harm, or intent to do an act that a reasonable person would have known created a plain and strong likelihood of death. *Id.* at 1196 (Gants, C.J., concurring) (“[A] defendant who commits an armed robbery as a joint venturer will be found guilty of murder where a killing was committed in the course of that robbery if he or she ***knowingly participated in the killing with the intent required to commit it....***” (emphasis added)); *id.* at 1191 (“[W]here the defendant’s only participation in the crimes was to provide a firearm and hooded sweatshirts to his friends, knowing they intended to use them in the commission of an armed robbery, convictions of murder in the first degree on the theory of felony murder are not consonant with justice.”).¹³

By contrast, in Pennsylvania, the mere act of supporting or undertaking a felony temporally associated with a homicide, even when the death is not intended or reasonably foreseeable, can support a murder conviction, eliminating the

¹³ That is not to say that these mens rea requirements are alone sufficient to protect against disproportionate punishments. *See Amici Brief of Boston University Center for Antiracist Research et al., Commonwealth v. Fisher*, Dkt. No. SJC-13340 (Mass. Apr. 14, 2023). Still, Pennsylvania stands virtually alone in the breadth and severity of its felony-murder rule.

government's obligation to prove core elements of the common-law offense of murder: that the defendant committed the act and that he intended to do so.

It is thus highly doubtful that an individual like Petitioner Lee (whose co-defendant committed the homicide underlying his conviction) would have received a death-by-incarceration sentence had his crime occurred in almost any other State in the nation. That fact weighs heavily in favor of a finding that Pennsylvania's felony-murder sentencing regime is unconstitutionally cruel and unusual.

Were that not enough, consider the lay consensus against Section 6137(a) in this Commonwealth. An overwhelming 79 percent of Pennsylvanians in 2023 support changing the Commonwealth's mandatory life-without-the-possibility-of-parole sentence for felony-murder convictions. Susquehanna Polling and Research, *Pennsylvania Statewide Omnibus Telephone Poll* (February 2023), <https://famm.org/wp-content/uploads/Toplines-PAStatewide-Omnibus-FAMM-Feb2023.pdf> (showing 79 percent of respondents in favor of the position that "judges [should] be allowed to weigh the individual circumstances of each person involved in a felony murder, so that individuals who participate in a felony murder—but did not intend to injure or kill someone during the commission of a crime—can be sentenced differently, and less harshly, than those that did").

These developments underscore that the arc of history is bending further and further away from Pennsylvania's practice of mandating perpetual incarceration for

those convicted of felony murder. Review is needed to align Pennsylvania jurisprudence with the national consensus.

2. Sentencing an Individual Convicted of Felony Murder to Life Without Parole Violates the Eighth Amendment’s Proportionality Principle.

Even apart from consideration of the national consensus against the sentencing practice challenged here, Pennsylvania’s parole-eligibility statute runs afoul of the Eighth Amendment because it imposes sentences that are disproportionate and do not serve any legitimate penological purpose. Review is manifestly needed to remedy that result.

a. The Rationale Behind Felony-Murder Liability Does Not Justify a Lifetime Ban on Parole Eligibility.

“Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment.” *Montgomery*, 577 U.S. at 206. Whether a penalty comports with that guarantee depends on the court’s weighing of two factors: the severity of the punishment, on the one hand, and the defendant’s culpability, on the other.

In terms of penal severity, “life without parole is ‘the second most severe penalty permitted by law.’” *Graham v. Florida*, 560 U.S. 48, 69 (2010) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part

and concurring in the judgment)).¹⁴ Though technically less punitive than the death penalty, life without parole shares “some characteristics with death sentences that are shared by no other sentences,” *id.*; like capital punishment, it guarantees that—absent executive clemency—the person will die in prison.

And on the correlative question of culpability, the U.S. Supreme Court has repeatedly made clear that certain characteristics or circumstances can make an individual categorically less culpable—and hence, less deserving of the law’s most severe punishments.¹⁵ *Enmund v. Florida*, 458 U.S. 782, 795 (1982) (overturning the capital sentence of a defendant who aided and abetted a robbery during which a death occurred, observing that people who do not kill, intend to kill, or foresee that a life could be taken should be categorically restricted from the most serious punishments).

In particular, the Court’s jurisprudence regarding the categorical exclusion of young people from death and life-without-parole sentences is instructive here. Applying its proportionality analysis, the Court has in turn held that young people under the age of 18 cannot be sentenced to: the death penalty, *Roper*, 543 U.S. at

¹⁴ Given the longstanding gubernatorial moratorium on executions, a life-without-parole sentence is, as a practical matter, the most severe penalty currently permitted in this Commonwealth.

¹⁵ In light of the specific question presented here, *Amici* do not address whether death-by-incarceration is ever a just and proportionate sentence, and instead focus on the circumstances presented by Pennsylvania’s blanket diktat on parole eligibility for felony-murder convictions.

568; life without parole for a non-homicide offense, *Graham*, 560 U.S. at 69 (2010); or mandatory life without parole, *Miller*, 567 U.S. at 471 (striking down 29 state statutes mandating life without parole for minors). Those decisions rested on the reasoning that young people are inherently less culpable than adults due to their ongoing brain development, which makes them more impulsive and susceptible to peer pressure, and thus should not be eligible for the law’s harshest penalties. That thesis—that the presence of diminished culpability requires a concomitant reduction in the severity of the sentence imposed—applies with equal force to those convicted of felony murder, who lacked any intent to take a life.

In sum, the lesser culpability of a person convicted of felony murder—someone who did not intend to kill, and oftentimes did not actually kill—renders life without parole disproportionately harsh and therefore violates constitutional guarantees against excessive or cruel and unusual punishment.

b. Pennsylvania’s Parole Eligibility Statute Serves No Valid Penological Purpose.

The U.S. Supreme Court also instructs that “[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.” *Graham*, 560 U.S. at 71. None of the penological goals of retribution, rehabilitation, incapacitation, or deterrence justifies Pennsylvania’s blanket disentitlement to parole consideration for all those convicted of felony murder.

i. Retribution

First, retribution does not justify a lifetime ban on parole eligibility for a person who did not intend to kill. Retribution is dependent on culpability.

Tison v. Arizona, 481 U.S. 137, 149 (1987) (“The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.”). Culpability is dependent on a defendant’s intention—and therefore, his moral guilt. *Enmund*, 458 U.S. at 800 (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975)). It follows that retribution cannot justify imposing one of the law’s harshest penalties against people who did not kill or intend to kill.

ii. Rehabilitation and Incapacitation

Second, permanent incarceration, by its nature, rejects any rehabilitative goal and instead wholly embraces the goal of incapacitating an individual in perpetuity. Defending a life-without-parole sentence based on the rationale of incapacitation necessarily assumes that a person is irredeemable and must therefore “be isolated from society in order to protect the public safety.” *See Ewing v. California*, 538 U.S. 11, 24 (2003). But research has repeatedly demonstrated that extreme sentences do not make society safer,¹⁶ and, in fact, people who have been released from prison with violent convictions have particularly low recidivism rates.¹⁷

¹⁶ Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 *Crime and Just.* 199 (2013).

¹⁷ *See, e.g.*, Mariel Alper et al., *2018 update on prisoner recidivism: A 9-year follow-up period (2005-2014)* (2018), <https://bjs.ojp.gov/content/pub/pdf/18upr9yfup0514.pdf>; Barbara Levine &

The case for permanent incapacitation is further weakened by the fact that 73 percent of those statutorily prohibited from parole consideration in Pennsylvania for felony murder were age twenty-five years or younger at the time of their offense.¹⁸ As the U.S. Supreme Court has explained, for young people, “who are most in need of and receptive to rehabilitation, the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident.” *Graham*, 560 U.S. at 72-73.

While the Court’s jurisprudence on this issue is specific to minors, the Court recognized that “the qualities that distinguish juveniles from adults do not disappear when an individual turns 18.” *Roper*, 543 U.S. at 574. Rather, substantial research has shown that emerging adults experience the same susceptibility to impulsivity and peer pressure as younger adolescents.¹⁹ In

Elsie Kettunen, *Paroling people who committed serious crimes: What is the actual risk?* (2014) https://www.prisonpolicy.org/scans/cappsmi/CAPPS_Paroling_people_who_committed_serious_crimes_11_23_14.pdf; J.J. Prescott et al., *Understanding Violent-Crime Recidivism*, 95 *Notre Dame L. Rev.* 1643 (2014).

¹⁸ Andrea Lindsay & Clara Rawlings, *Life Without Parole for Second-Degree Murder in Pennsylvania: An Objective Assessment of Race* (2021) https://www.plsephilly.org/wpcontent/uploads/2021/04/PLSE_SecondDegreeMurder_and_Race_Apr2021.pdf.

¹⁹ See, e.g., Elizabeth S. Scott, et al., *Young, Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 *Fordham L. Rev.* 641, 642 (2016).

particular, studies show that crime rates peak around the late teenage years and only begin to gradually decline in the early twenties.²⁰

Particularly given that nearly half of those serving life-without-parole sentences for second-degree murder in Pennsylvania are age 50 or older and that nearly 60 percent have already served over 20 years, Lindsay & Rawlings, *Objective Assessment*, *supra* note 18, these studies undercut any argument that continued, indefinite parole ineligibility is justified by a need for incapacitation. *Cf.* Alex Piquero, et al., *From Juvenile Delinquency to Adult Crime: Criminal Careers, Justice Policy, and Prevention*, at 40 (2012) (“Criminal careers are of a short duration (typically under 10 years), which calls into question many of the long-term sentences that have characterized American penal policy.”).

Conversely, the rejection of rehabilitation contributes to the cruelty of parole ineligibility for felony murder. A law that all but guarantees a person will die in prison “makes an irrevocable judgment about that person’s value and place in society,” and “forswears altogether the rehabilitative ideal.” *Graham*, 560 U.S. at 74. In the context of felony murder, that judgment is unconstitutional.

²⁰ See Ashley Nellis & Breanna Bishop, *A New Lease on Life* (2021), <https://www.sentencingproject.org/wp-content/uploads/2021/06/A-New-Lease-on-Life.pdf>; Fair and Just Prosecution, *Joint statement on sentencing second chances and addressing past extreme sentences* (2021), <https://fairandjustprosecution.org/wp-content/uploads/2021/04/FJP-Extreme-Sentences-and-Second-Chances-Joint-Statement.pdf>.

iii. Deterrence

Given all that, the endurance of the felony-murder rule is troubling. Superficially, one might speculate that it serves a deterrence function. That is, society has an interest in reducing felonies, and the additional penalty provided by the felony-murder rule will deter individuals from engaging in crime on the margin. But the rule and its associated punishments have *no* proven deterrent effect.²¹ That makes sense, as the threat of death-by-incarceration can have little effect on someone who did not foresee that a life would be taken in the first place. *See Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (“[C]apital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.”); Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 Cornell L. Rev. 446, 451-52 (1985) (a severe felony-murder sentence provides little to no deterrence because the act to be deterred—the killing of another—was, by definition, either unintentional or undertaken by a third party).

Moreover, research on mandatory penalties has long documented that, even assuming a person is familiar with a relevant legal penalty, the deterrent effect of incarceration is more a function of the certainty of the punishment than of its

²¹ See, e.g., Garoupa & Klick, *Differential Victimization: Efficiency and Fairness Justifications for the Felony Murder Rule*, 4 Rev. L. & Econ. 407 (2008); Anup Malani, *Does the Felony-Murder Rule Deter? Evidence from FBI Crime Data*, Working Paper 14-25 (2002).

severity. See National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, 132-33 (2014); Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A behavioural science investigation*, 24 *Oxford Journal of Legal Studies* 173-205 (2004). Thus, lengthy mandatory sentences generally provide little additional deterrence and come at the expense of more effective investments in public safety. National Research Council, *The Growth of Incarceration in the United States*, *supra*.

At bottom, no penological theory justifies life-without-parole sentences for individuals convicted of felony murder. That determination, coupled with the lesser culpability of a person convicted of felony murder, compels the conclusion that Section 6137(a)(1) of the Parole Code violates the Eighth Amendment.

B. Review Is Warranted Under Pa.R.A.P. 1114(b)(4) Because the Superior Court’s Decision Raises an Issue of Substantial Public Importance: Pennsylvanians of Color Are Disproportionately Affected by the Life-Without-Parole Sentences that Felony-Murder Convictions Carry.

Finally, review of the decision below is immensely important because the sentencing paradigm endorsed below emphasizes racially disparate outcomes, to the severe detriment of non-white residents of this Commonwealth, and in particular, Black Pennsylvanians.

Data from Pennsylvania and elsewhere demonstrate consistently stark racial disparities among those convicted of felony murder. In Pennsylvania, four of

every five imprisoned individuals with a felony-murder conviction were people of color as of 2020; 70 percent were Black, though Black people make up only eleven percent of our population. Lindsay & Rawlings, *Objective Assessment*, *supra* note 18. Studies have found similar racial disparities in other States, as well, including California, Colorado, Illinois, Massachusetts, Minnesota, and Missouri. Nazgol Ghandnoosh, et al., *Felony Murder: An On-Ramp For Extreme Sentencing* (2022). Fisher *Amicus Br.*, *supra* note 13 at 21-33.

The racially disproportionate impact of the felony-murder rule is in part driven by the broad prosecutorial discretion the rule affords. In Pennsylvania, for example, prosecutors have the choice to charge accomplices with (i) the underlying felony alone, (ii) a felony and an unintentional killing (e.g., involuntary manslaughter), or (iii) a felony and a second-degree murder charge, which mandates life without the possibility of parole. That discretion leaves room for implicit bias to impact charging decisions and plea negotiations. Indeed, courts and scholars have recognized that unwarranted associations between race and criminality often impact decision-making in policing, prosecution, and sentencing. *See, e.g., Buck v. Davis*, 580 U.S. 100, 120 (2017) (describing the “powerful racial stereotype” in the context of sentencing that “black men [are] ‘violence prone’”); *see also* G. Ben Cohen, Justin D. Levinson & Koichi Hioki, *Racial Bias, Accomplice Liability, and The Felony Murder Rule: a National Empirical Study*

Den. L. Rev. (2023) (discussing research showing that “participants automatically individualize white men, while automatically de-individualizing Black and Latino men” and thereby may be more likely to impute guilt in cases involving defendants of color); Guyora Binder & Ekow N. Yankah, *Police Killings as Felony Murder*, 17 Harv. L. & Pol’y Rev. 157, 225 (2022) (“The strikingly disparate patterns of felony murder charging and conviction recently documented in metropolitan Chicago and Minneapolis, and in Pennsylvania and Colorado, suggest that felony murder is a crime prosecutors have seen little need to punish when committed by whites.”).

The status quo in Pennsylvania cannot be tolerated: hundreds of people of color have been sentenced to die in prison in this Commonwealth despite never having intended to take a life. Review of the parole-eligibility statute that permits that outcome is greatly needed.

IV. CONCLUSION

For these reasons, *amici* respectfully submit that the petition for allowance of appeal should be granted.

July 13, 2023

Respectfully submitted,

/s/ Mark D. Taticchi

Mark D. Taticchi (Pa. No. 323436)
Elizabeth M. Casey (Pa. No. 325696)
FAEGRE DRINKER BIDDLE & REATH LLP
One Logan Square, Suite 2000
Philadelphia, PA 19103
(215) 988-2700
mark.taticchi@faegredrinker.com
elizabeth.casey@faegredrinker.com

Rachel Lopez (Pa. No. 318256)
COMMUNITY LAWYERING CLINIC
3509 Spring Garden Street
Philadelphia, PA 19104
(215) 571-4704
rel62@drexel.com

Caitlin Glass, Esq.
BOSTON UNIVERSITY CENTER FOR
ANTIRACIST RESEARCH
1 Silber Way
Boston, MA 02215
glassc@bu.edu

*Counsel for Amici Curiae
The Sentencing Project and
the Boston University Center
for Antiracist Research*

CERTIFICATE OF TYPE-VOLUME COMPLIANCE

I hereby certify that this brief contains 4,467 words, as determined by the word-count feature of Microsoft Word 2016, the word-processing program used to prepare this brief, and excluding the portions of the brief exempted by Pa.R.A.P. 2135(d).

Dated: July 13, 2023

/s/ Mark D. Taticchi

Mark D. Taticchi

CERTIFICATE OF COMPLIANCE WITH PA.R.A.P. 127

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: July 13, 2023

/s/ Mark D. Taticchi
Mark D. Taticchi