

**IN THE SUPREME COURT OF PENNSYLVANIA**

No. 180 WAL 2023

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COMMONWEALTH OF PENNSYLVANIA, Respondent

v.

DEREK LEE, Petitioner

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**BRIEF OF *AMICUS CURIAE* RODERICK & SOLANGE MACARTHUR  
JUSTICE CENTER AND AMERICAN CIVIL LIBERTIES UNION  
OF PENNSYLVANIA IN SUPPORT OF PETITIONER**

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On Petition for Allowance of Appeal from the Judgment of the  
Superior Court of Pennsylvania at No. 1008 WDA 2021 dated June 13, 2023,  
Affirming the Judgment of Sentence of the Court of Common Pleas of Allegheny  
County at CP-02-CR-0016878-2014 dated December 19, 2016

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## INTRODUCTION

Over 1,000 people in Pennsylvania are serving life sentences without an opportunity for parole—or, life without parole (“LWOP”)—for felony-murder.<sup>1</sup> A felony-murder conviction does not require any intent to kill; in fact, the person convicted frequently did not take a life.<sup>2</sup> Instead, they engaged in criminal conduct (for example, they acted as the getaway driver during a robbery) during which someone else (an accomplice, a third-party, even a police officer) killed someone.<sup>3</sup> As such, they have diminished culpability for the death—yet are serving one of the harshest sentences possible.<sup>4</sup> Pennsylvania is one of only two states that mandates life-without-parole sentences for people convicted of felony-murder, regardless of whether they actually killed or intended to kill someone.<sup>5</sup>

The injustice of LWOP sentences for felony-murder is striking—and unconscionable. Seventy percent of those serving LWOP sentences for felony-

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<sup>1</sup> Carrie Johnson, *Life-without-parole For ‘Felony Murder’: Pa. Case Targets Sentencing Law*, NPR (Feb. 4, 2021), <https://www.npr.org/2021/02/04/963147433/life-without-parole-for-felony-murder-pa-case-targets-sentencing-law>

<sup>2</sup> *See id.*

<sup>3</sup> *See id.*

<sup>4</sup> *Id.*

<sup>5</sup> *See* 18 Pa.C.S. § 1102(b) (mandatory life imprisonment for second-degree murder) and 61 Pa.C.S. § 6137(a) (no parole for life sentence).

murder in Pennsylvania are Black—despite Black people making up only eleven percent of the state’s population.<sup>6</sup>

*Amici curiae* write to spotlight the racially discriminatory administration of justice in felony-murder charging and sentencing, and in the application of LWOP sentences more generally. This brief discusses the reasons for these disparities, which are not a reflection of greater culpability or criminality among Black Americans, but rather a result of biases—often unconscious—among decisionmakers in the criminal legal system. It also outlines the devastating impacts these disproportionately long sentences have on Black families. The stark racial disparity in application of this extreme punishment accentuates the need for this Court to consider whether Pennsylvania’s felony-murder statutes constitute “cruel punishment” under Article I, section 13 of the commonwealth’s constitution.

#### **INTEREST OF AMICUS CURIAE<sup>7</sup>**

*Amicus curiae* The American Civil Liberties Union of Pennsylvania (ACLU of Pennsylvania) is a non-profit, nonpartisan organization dedicated to defending

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<sup>6</sup> Johnson, *supra* note 1.

<sup>7</sup> This brief has not been authored, in whole or in part, by counsel to any party in this appeal. No party or counsel to any party contributed money intended to fund preparation or submission of this brief. No person, other than the amicus, their members, or their counsel, contributed money that was intended to fund preparation or submission of this brief. The amicus, their members, and their counsel have not represented any of the parties to the present appeal in another proceeding involving similar issues, nor have they been parties in a proceeding or legal transaction that is at issue in the present appeal.

and expanding individual rights and personal freedoms throughout Pennsylvania. Through advocacy, public education, and litigation, the ACLU of Pennsylvania works to preserve and enhance liberties grounded in the United States and Pennsylvania constitutions and civil rights laws. In recent years, the ACLU of Pennsylvania has focused resources on promoting respect for people's constitutional rights in Pennsylvania's criminal legal systems. *See, e.g., League of Women Voters of Pennsylvania v. DeGraffenreid*, 265 A.3d 207 (Pa. 2021) (challenging proposed constitutional amendments that undermine criminal defendants' rights); *Kuren v. Luzerne Cnty.*, 637 Pa. 33 (Pa. 2016) (challenging constitutionality of indigent defense system); *J.H. v. Dallas*, 15-cv-02057-SHR (M.D. Pa., Jan. 27, 2016) (challenging prolonged wait times for incompetent criminal defendants to access treatment); *Doe v. McVey*, 513 F.3d 95 (3d Cir. 2008) (challenge to unfair application of Megan's Law supervision to out-of-state offenders). A chief concern animating the ACLU's criminal-law-reform work is the disparate impact the criminal legal systems typically have on people whose rights have historically been denied based on their race or ethnicity.

*Amicus curiae* The Roderick and Solange MacArthur Justice Center (RSMJC) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC attorneys have led civil rights battles in areas including police misconduct, the rights of the

indigent in the criminal justice system, compensation for the wrongfully convicted, and the treatment of incarcerated people. RSMJC has served as merits counsel, amicus counsel, or amicus curiae in numerous cases around the country challenging both racial disparities in the criminal legal system and excessive or unfair sentences, including *Scott v. Pennsylvania Board of Probation and Parole*, No. 397 MD 2020 (Commw. Ct. Pa. July 8, 2020) (urging Supreme Court of Pennsylvania to declare life without parole sentences for felony-murder convictions unconstitutional under state constitution); *Terry v. United States*, 141 S. Ct. 1858, 1860 (2021) (urging the elimination of the disparity between crack and powder cocaine sentencing); *People v. Silas*, 68 Cal. App. 5th 1057, 284 Cal. Rptr. 3d 48, 55 (Cal. 2021) (arguing that it was improper for a prosecutor to strike a prospective juror who expressed support for Black Lives Matter); *Jones v. Mississippi*, 141 S.Ct. 1307 (2021) (arguing that a sentencer must make a finding that a juvenile is permanently incorrigible for imposing a LWOP sentence); and *Osby v. United States*, 832 Fed.Appx. 230, (4th Cir. 2020), cert. denied, S. Ct. (U.S. Oct. 4, 2021) (No. 20-1693) (challenging the consideration of acquitted conduct in calculating a sentence).

## ARGUMENT

### I. Black Americans Receive Disproportionately Harsh Sentences For Felony-Murder

Felony-murder charging and sentencing exemplifies the deep racial disparities pervasive in our criminal punishment system. The data, from within and without Pennsylvania, are shocking.

Take, for example, a study that found Black and Latino people were twelve times more likely to be convicted of felony-murder than white people.<sup>8</sup> The study also found that 66.7% of white people who were convicted of felony-murder started out with more serious offenses—such as intentional murder—and pleaded down to felony-murder.<sup>9</sup> Only 38.5% of Black and Latino defendants, meanwhile, had their more-serious charges reduced to felony-murder—the remaining 61.5% of these defendants started out with felony-murder as the most serious charge.<sup>10</sup> This means that white people convicted of felony-murder are more likely to have purposefully caused the death for which they are incarcerated—and are therefore, on average, more culpable—than Black and Latino people convicted of felony-murder.

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<sup>8</sup> Greg Egan, *George Floyd's Legacy: Reforming, Relating, and Rethinking Through Chauvin's Conviction and Appeal Under a Felony-Murder Doctrine Long-Weaponized Against People of Color*, 39 Minn. J.L. & Ineq. 543, 545 (2021).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 548.

Yet, perversely, white people convicted of felony-murder were given lighter sentences, on average, than people of color. White people convicted of felony-murder received reduced sentences 25% of the time, compared to 16% for nonwhite people with the same conviction.<sup>11</sup> Nonwhite people convicted of felony-murder received reduced sentences about as often as they received aggravated sentences, whereas white people received a reduced sentence 2.5 times as often as an aggravated sentence.<sup>12</sup>

A white decedent compounds the injustice. In those cases, prosecutors are significantly more likely to charge Black defendants with felony-murder than when the decedent was any other race.<sup>13</sup> Meanwhile, counties across the country with more Black victims of homicide have statistically fewer LWOP sentences.<sup>14</sup>

Pennsylvania offers a particularly stark example of this disparity. In the keystone state, over 70 percent of people sentenced to die in prison for a death they had no intention to cause—and that was, in fact, caused by another person—are

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<sup>11</sup> *Id.* at 546.

<sup>12</sup> *Id.*

<sup>13</sup> See William J. Bowers, Glenn L. Pierce, & John F. McDevitt, *Legal homicide: Death as punishment in America*, Boston: Northeastern University Press 1864-1982 (1984).

<sup>14</sup> Michael L. Radelet & Glenn L. Pierce, *Race and prosecutorial discretion in homicide cases*, 19 L. & Soc'y Rev. 587, 592 (1985); Brandon L. Garrett, Travis M. Seale-Carlisle, Karima Modjadidi, & Kristen M. Renberg, *Life Without Parole Sentencing in North Carolina*, 99 N.C. L. Rev. 279 (Jan. 1, 2021), <https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=6815&context=nclr>.

Black.<sup>15</sup> Meanwhile, Black Pennsylvanians make up only 11% of the state’s population.<sup>16</sup>

## **II. Racial Disparities in LWOP Felony-Murder Sentencing Are The Result Of Bias And Systemic Inequities, Not Disproportionate Criminality**

The data above conclusively show that inequitable felony-murder LWOP sentencing cannot be explained by the rate at which Black and white Americans commit felonious offenses. Instead, racial bias and systemic inequality, both of which impact the criminal legal system from arrest to sentencing, drive disparities in LWOP sentences for felony-murder.

### *a. Racial Bias*

The criminal legal system is shaped by the biases—both explicit and implicit—of those administering it. Explicit bias refers to a person’s clear feelings and attitudes toward a group of people.<sup>17</sup> When an actor harbors explicit bias, his or her behaviors with regard to members of that group are conducted with intent.<sup>18</sup> Meanwhile, human brains are also susceptible to “implicit” racial bias, “an automatic positive or negative preference for a group, based on one’s subconscious

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<sup>15</sup> See Johnson, *supra* note 1.

<sup>16</sup> *Id.*

<sup>17</sup> Kimberly Papillon, *Conscious & Unconscious Biases in Health Care, Module 3: Bias and Well-Meaning People*, National Center for Cultural Competence at Georgetown University (July 2012), <https://nccc.georgetown.edu/bias/module-3/1.php>.

<sup>18</sup> *Id.*

thoughts” and personal characteristics.<sup>19</sup> Implicit bias often exists in the absence of racial animus; indeed, humans are seldom aware of the implicit bias driving their decision-making.<sup>20</sup> Implicit bias is pervasive precisely because people are unaware of these biases, leading them to be “unwittingly complicit in the perpetuation of discrimination.”<sup>21</sup> These biases, though often not grounded in hatred, nonetheless can result in discriminatory outcomes, including in employment, medical care, and as relevant here, criminal justice.<sup>22</sup>

The racial disparity in felony-murder sentencing is the cumulative effect of bias at every stage of the criminal process—searches, arrests, case processing, charging, plea bargaining, jury selection, trial strategy, and sentencing.<sup>23</sup> This makes sense: All humans, including police, prosecutors, defense counsel, judges, and jurors, are susceptible to implicit bias, and many harbor explicit bias as well. The

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<sup>19</sup> See, e.g., U.S. Dep’t of Just., *Understanding Bias: A Resource Guide* (2015), <https://www.justice.gov/file/1437326/download>; Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 *Duke L.J.* 345, 351 (2007); Patricia G. Devine, *Stereotypes and prejudice: Their automatic and controlled components*, 56 *J. Personality & Soc. Psych.* 5 (1989).

<sup>20</sup> Levinson, *supra* note 19, at 350.

<sup>21</sup> Patricia G. Devine, Patrick S. Forscher, Anthony J. Austin & William T. L. Cox, *Long-term reduction in implicit race bias: A prejudice habit-breaking intervention*, 48 *J. Exp. Soc. Psych.* 1267 (2012).

<sup>22</sup> *Id.*

<sup>23</sup> See Sonja B. Starr & M. Marit Rehani, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 *Yale L.J.* 1 (Oct. 2013).

cumulative impact of bias among citizens fulfilling these roles practically guarantees the unjust outcomes pervasive in Pennsylvania.

Although the data show police are no more susceptible to bias than ordinary members of the community, bias by the police has real consequences.<sup>24</sup> Research overwhelmingly confirms police stop Black people more than white people, search and arrest them more frequently once stopped, and treat them more harshly for the same violations.<sup>25</sup> For example, Black people in Philadelphia make up 71% of those stopped by police, but only 44% of the city's population.<sup>26</sup> Meanwhile, white people account for just 22% of police stops and 35% of the population.<sup>27</sup> Overall, Black people account for a higher share of the stops in all but one Philadelphia police service area; in several, they are stopped at a rate of over five times their share of the population.<sup>28</sup> Of those who are frisked after being stopped by police, 82% are Black and only 12% are white.<sup>29</sup> Black people are also over 50% more likely to be stopped

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<sup>24</sup> Joshua Correll, Bernadette Park, C. Judd, B. Wittenbrink, Melody Sadler, & Tracie Keese, *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. Personality & Soc. Psych. 1006, 1015 (2007).

<sup>25</sup> Michael R. Smith & Geoffrey P. Alpert, *Explaining Police Bias: A Theory of Social Conditioning and Illusory Correlation*, 34 Crim. Just. & Behav. 1262, 1263 (2007) (collecting studies).

<sup>26</sup> *Bailey v. City of Philadelphia*, No. 10-2952, Memorandum of Law in Support of Plaintiffs' Motion to Mandate Racial Bias Remedial Measures at 3 (E.D. Pa. Mar. 18, 2021).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

without reasonable suspicion than white people.<sup>30</sup> In another study, police exhibited “shooter bias” in simulated exercises involving shooting perpetrators and sparing innocent bystanders.<sup>31</sup> Police officers were quicker to shoot Black perpetrators than white perpetrators, and hesitated longer to spare Black bystanders than white bystanders.<sup>32</sup>

Bias in prosecution is just as widespread as in policing—and plays an outsized role in determining sentence length.<sup>33</sup> A study of more than 48,000 cases found that prosecutors exercised discretion to drop the top charge of white defendants 25% more often than when the person charged was Black.<sup>34</sup> Another study showed that federal prosecutors were nearly twice as likely to charge Black men with offenses carrying mandatory minimum sentences as similarly-situated white men, even controlling for poverty, unemployment, and other factors.<sup>35</sup> Pennsylvania data also show that when Black people exercise their constitutional right to go to trial rather

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<sup>30</sup> *Id.* at 4.

<sup>31</sup> Correll, et al., *supra* note 24.

<sup>32</sup> *Id.*

<sup>33</sup> Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. Rev. 2031, 2081 (2010).

<sup>34</sup> Elizabeth Hinton, LeShae Henderson, & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, Vera Institute of Justice at 8 (May 2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>.

<sup>35</sup> Starr & Rehavi, *supra* note 23, at 28-29.

than enter a guilty plea, they pay a higher “trial penalty”—a phrase used to describe the phenomenon that people found guilty after trial instead of initially pleading guilty receive harsher sentences—than white people facing similar charges.<sup>36</sup>

Racial bias persists at the sentencing and post-sentencing phases, too. Black people are more likely than white people to receive aggravated sentences, even controlling for criminal history and other factors.<sup>37</sup> Nationally, across all offenses, Black men’s sentences are 20 times longer on average than white men’s,<sup>38</sup> even where a Black person has a comparable criminal record to a similarly situated white person.<sup>39</sup> Another study found that Black men were 21.2% less likely than white men to receive a reduced sentence from a judge without a request from the

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<sup>36</sup> Tushar Kansal, *Racial Disparity in Sentencing: A Review of the Literature*, The Sentencing Project at 9 (Jan. 2005), [https://www.opensocietyfoundations.org/publications/racial-disparity-sentencing#publications\\_download](https://www.opensocietyfoundations.org/publications/racial-disparity-sentencing#publications_download).

<sup>37</sup> Hinton, et al., *supra* note 34, at 8.

<sup>38</sup> See Christopher Ingraham, *Black Men Sentenced to More Time for Committing the Exact Same Crime as a White Person, Study Finds*, The Washington Post (Nov. 16, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/11/16/black-men-sentenced-to-more-time-for-committing-the-exact-same-crime-as-a-white-person-study-finds/>; see also Aris Folley, *Study: Two-Thirds of Prisoners Serving Life Sentences are People of Color*, The Hill (Mar. 2, 2021), <https://thehill.com/homenews/news/541285-study-two-thirds-of-prisoners-serving-life-sentences-are-people-of-color>.

<sup>39</sup> Kansal, *supra* note 36, at 2; Equal Justice Initiative, *Sentencing Commission Finds Black Men Receive Longer Sentences Than White Men For Same Crime* (Nov. 20, 2017), <https://eji.org/news/sentencing-commission-finds-Black-men-receive-longer-sentences/>.

prosecutor.<sup>40</sup> Even when Black men receive a below-guidelines sentence, their sentences are 16.8% longer than white men who receive below-guideline sentences.<sup>41</sup> Robust empirical scholarship demonstrates that in homicide cases, judges and juries disproportionately impose the harshest possible penalty—including, where applicable, the death penalty—where the decedent is white and the person facing charges is Black.<sup>42</sup>

*b. Systemic Inequities*

The massive racial disparity in life without parole sentences for people convicted of felony-murder is the product of racial bias at every step of the way through the system. But it is not the only driver of sentencing disparities. Systemic inequities also play a role.<sup>43</sup>

To start, decades of “tough on crime” policy—starting in the 1970s—targeted Black men, in particular, and pushed them into the criminal punishment system.<sup>44</sup> In Pennsylvania and across the country, judges use criminal history to enhance

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<sup>40</sup> Equal Justice Initiative, *supra* note 39.

<sup>41</sup> *Id.*

<sup>42</sup> Radelet & Pierce, *supra* note 14, at 590-91.

<sup>43</sup> Weihua Li, *The Growing Racial Disparity in Prison Time*, The Marshall Project (Dec. 3, 2019), <https://www.themarshallproject.org/2019/12/03/the-growing-racial-disparity-in-prison-time>.

<sup>44</sup> Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, The Atlantic (Oct. 2015), [https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/?utm\\_source=copy-link&utm\\_medium=social&utm\\_campaign=share](https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/?utm_source=copy-link&utm_medium=social&utm_campaign=share).

sentences, making it more likely that someone will receive life without parole for a death they personally did not cause.<sup>45</sup>

The reasons why increased incarceration in the United States disproportionately left Black men with long criminal records are rooted in the country's long history of racial injustice. Presumptions of guilt and dangerousness based on racial stereotypes have led to the over-policing of Black neighborhoods, making the people living in those neighborhoods more likely to be arrested than other citizens.<sup>46</sup> This over-policing is not related to crime rates; in Philadelphia, predominantly Black neighborhoods have a significantly higher rate of police stops than predominantly white neighborhoods that have higher violent crime rates.<sup>47</sup> Once arrested, Black people have confronted the biases discussed above every step of the way, resulting in disproportionately long criminal records—which, in turn, enhance their sentences.

Unequal financial resources borne of centuries of purposeful discrimination also matter. A skilled defense attorney can shield a person facing criminal conviction from the harshest sentence. Studies show that white people facing criminal charges are “much more likely to hire a private attorney” than Black people, likely because

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<sup>45</sup> See 204 Pa. Code § 303.

<sup>46</sup> Coates, *supra* note 44.

<sup>47</sup> Bailey Memorandum of Law, *supra* note 26, at 5.

of disparities in personal and family wealth.<sup>48</sup> (In 2016, the net worth of an average Black family was \$17,150, compared to \$171,000 for typical white family—nearly ten times greater—due to “the effects of accumulated inequality and discrimination, as well as differences in power and opportunity that can be traced back to this nation’s inception.”<sup>49</sup>) Retention of a private attorney, in turn, “tends to result in less severe sentences.”<sup>50</sup> This is especially true in Pennsylvania, where, according to this Court, public defender’s offices “are chronically underfunded and understaffed, and are hard-pressed to meet the baseline demands of the Sixth Amendment, raising the disconcerting question of whether counties are complying with *Gideon* [*v. Wainwright*],”<sup>51</sup> the seminal U.S. Supreme Court case holding that people facing state criminal charges have a constitutional right to counsel. “[T]o describe the state of affairs in [Pennsylvania’s public defender officers] as approaching crisis stage is not an exaggeration.”<sup>52</sup>

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<sup>48</sup> Kansal, *supra* note 36, at 10.

<sup>49</sup> Kriston McIntosh, Emily Moss, Ryan Nunn, & Jay Shambaugh, *Examining the Black-white Wealth Gap*, Brookings (Feb. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/>.

<sup>50</sup> *Id.*

<sup>51</sup> *Kuren v. Luzerne Cnty.*, 637 Pa. 33, 37-38, 146 A.3d 715, 717-18 (2016) (citing *Gideon*, 372 U.S. 335, 342 (1963)).

<sup>52</sup> *Id.*

### III. Life Without Parole Disproportionately Impacts Black Families

This disproportionate racial impact has devastating consequences not only for people sentenced to die in prison, but also for their loved ones, who have been convicted of no crime.

Most obviously, having a family member serving an LWOP sentence is economically destabilizing. An incarcerated loved one often transforms from a breadwinner and source of support into someone in need of financial assistance. Every year of incarceration, families must pay almost \$1,000 per year for essentials at the prison commissary, like food, to ensure basic nutrition and toiletries to help maintain health and hygiene.<sup>53</sup> Food represents the vast majority of spending in commissaries; over 70% of money spent at commissaries goes to food and beverages to supplement the notoriously “small portions of unappealing food” served in prison cafeterias.<sup>54</sup> Another major category of commissary spending is hygiene products, like toilet paper, antacid tablets, vitamins, hemorrhoid ointment, antihistamines, shower sandals, and eye drops.<sup>55</sup> Commissary goods are typically as expensive or more expensive than comparable goods outside of the prison—in some prisons, basic

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<sup>53</sup> Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, Prison Policy Initiative (May 2018), <https://www.prisonpolicy.org/reports/commissary.html>.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

necessities cost 50 percent more than they do in the free world.<sup>56</sup> Families of incarcerated Pennsylvanians are also charged huge sums to stay in touch with their incarcerated loved one, whether through fees for phone calls or emails.<sup>57</sup> Because these means of communicating are essential to the health and wellbeing of incarcerated people as well as their loved ones, they are expenses that many have no choice but to endure.<sup>58</sup>

But the catastrophic consequences of a loved one's long-term incarceration are deeper than financial. In particular, children suffer. Parental incarceration leads to child poverty, homelessness, and food insecurity.<sup>59</sup> School-age children with an incarcerated parent are more likely than their peers to suffer adverse health impacts,

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<sup>56</sup> *See id.*

<sup>57</sup> Peter Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons and Private Phone Providers*, Prison Policy Initiative (Feb. 2019), [https://www.prisonpolicy.org/phones/state\\_of\\_phone\\_justice.html](https://www.prisonpolicy.org/phones/state_of_phone_justice.html).

<sup>58</sup> Creasie Finney Hairston, *Family Ties During Imprisonment: Important to Whom and for What?*, 18(1) *J. of Socio. & Soc. Welfare* 87-104 (1991).

<sup>59</sup> Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, 278 *N.I.J. J.* 1, 3 (Mar. 2017) <https://www.ojp.gov/pdffiles1/nij/250349.pdf>; Ross Parke & K. Allison Clarke-Stewart, *Effects of Parental Incarceration on Young Children*, Urban Institute at 16 (Jan. 30, 2002), <https://www.urban.org/sites/default/files/publication/60691/410627-Effects-of-Parental-Incarceration-on-Young-Children.PDF>; The Anne E. Casey Foundation, *A Shared Sentence: The Devastating Toll of Parental Incarceration on Kids, Families and Communities*, at 3 (Apr. 2016), <https://assets.aecf.org/m/resourcedoc/aecf-asharedsentence-2016.pdf>; Robynn Cox & Sally Wallace, *Identifying the Link Between Food Insecurity and Incarceration*, 82(4) *S. Econ. J.* 1062-77 (2016), <https://www.jstor.org/stable/26632307>.

including migraines, asthma, depression, anxiety, and posttraumatic stress disorder.<sup>60</sup> They are more likely to develop learning disabilities, including attention deficit hyperactivity disorder,<sup>61</sup> and perform poorly in school.<sup>62</sup> They are more vulnerable to recruitment into a gang, substance abuse, and teen pregnancy,<sup>63</sup> and more likely to drop out of school.<sup>64</sup> Finally, children of incarcerated parents are six times more likely on average to become incarcerated themselves—restarting a devastating cycle for impacted families.<sup>65</sup> These consequences have been observed independent of other social and economic indicators.<sup>66</sup>

LWOP, therefore, heaps significant harms on Pennsylvania’s Black children. In doing so, it perpetuates the racial disparities outlined in this brief. Given these harms, it cannot be justified for people who have diminished culpability, like those convicted of felony-murder.

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<sup>60</sup> Leila Morsy & Richard Rothstein, *Mass Incarceration and Children’s Outcomes: Criminal Justice Policy is Education Policy*, Economic Policy Institute (Dec. 15, 2016), <https://files.epi.org/pdf/118615.pdf>; The Anne E. Casey Foundation, *supra* note 59, at 3.

<sup>61</sup> Morsy & Rothstein, *supra* note 60.

<sup>62</sup> Martin, *supra* note 59, at 3.

<sup>63</sup> *Id.*

<sup>64</sup> Morsy & Rothstein, *supra* note 60, at 15.

<sup>65</sup> Martin, *supra* note 59, at 2.

<sup>66</sup> Morsy & Rothstein, *supra* note 60, at 1; The Anne E. Casey Foundation, *supra* note 59, at 3.

#### **IV. Racial Disparities in Sentencing Delegitimize The Criminal Legal System**

Unjust sentencing schemes are not destructive only for those impacted. They also contribute to a crisis of legitimacy that threatens to undermine the American criminal legal system as a whole. Research shows that racial disparities, in particular, undermine the perceived legitimacy of our criminal justice institutions among all people, not just those who are discriminated against. When individuals perceive the legal system as unfair or illegitimate, they are less likely to obey the law, less likely to seek assistance through the law, and less likely to assist authorities in enforcing the law.

The effectiveness of the legal system depends largely on public cooperation.<sup>67</sup> Individuals are more likely to follow the law when they have institutional trust in legal authorities and perceive the law as legitimate.<sup>68</sup> The perceived moral legitimacy of a law has been shown to be a better predictor of compliance than the perceived likelihood or severity of punishment for violating that law.<sup>69</sup> People who are exposed to laws that they perceive as unjust are more willing to violate even

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<sup>67</sup> Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 *Crime and Just.* 283, 284 (2003).

<sup>68</sup> *Id.* at 286.

<sup>69</sup> Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 *Wake Forest L. Rev.* 211, 259-60 (2012).

completely unrelated laws.<sup>70</sup> This relationship between perceived legitimacy and compliance is not only seen in the general public; it holds among previously incarcerated people as well.<sup>71</sup>

Lack of perceived legitimacy also impairs the ability of courts and law enforcement to investigate crime and keep people safe. Individuals who experience or learn of injustice in the criminal system are less likely to cooperate with that system by reporting offenses or turning in evidence.<sup>72</sup> Instances of experiencing or witnessing injustice have been shown to reduce 911 calls reporting crime, particularly in Black communities.<sup>73</sup> Such effects can result from relatively low-profile local incidents as well as high-profile national stories.<sup>74</sup> A breakdown in institutional trust does not just encourage individuals to break the law; it discourages innocent victims from turning to the criminal legal system for protection and recourse.

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<sup>70</sup> Janice Nadler, *Flouting the Law*, 83 Tex. L. Rev. 1399, 1414 (2005).

<sup>71</sup> Andrew V. Papachristos, Tracy L. Meares & Jeffrey Fagan, *Why Do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Gun Offenders*, 102 J. Crim. L. & Criminology 397, 436 (2012).

<sup>72</sup> Bowers & Robinson, *supra* note 69, at 258.

<sup>73</sup> Matthew Desmond, Andrew V. Papachristos & David S. Kirk, *Police Violence and Citizen Crime Reporting in the Black Community*, 81 Am. Soc. Rev. 857, 865 (2016).

<sup>74</sup> *Id.* at 871.

In judging the legitimacy of courts and police, people place significantly more weight on fairness than on the effectiveness of those institutions in controlling crime.<sup>75</sup> So, legitimacy can be damaged when there is disparity between the public perception of the harm associated with a particular crime and the severity of the punishment for that crime—that is, when the severity of the punishment is perceived as “unfair” relative to the severity of the crime.<sup>76</sup> Even when a punishment would otherwise be considered fair, legitimacy is undermined when there is a perceived inequality in application of the law.<sup>77</sup>

Racial disparities in the criminal justice system erode public trust for all people, not just those impacted by racial biases. In one study, perceived bias against *other* races made white respondents less confident even in their *own* interactions with police, to say nothing of their confidence in the system as a whole.<sup>78</sup> In other words, perceived bias against anyone damages the legitimacy of the criminal justice system in the eyes of everyone. Disparate sentencing like that at issue here is, unsurprisingly, a significant cause of perceived racial bias.<sup>79</sup>

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<sup>75</sup> Tyler, *supra* note 67, at 318.

<sup>76</sup> Jeffrey Fagan, *Legitimacy and Criminal Justice*, 6 Ohio St. J. Crim. L. 123, 130 (2008).

<sup>77</sup> *Id.*

<sup>78</sup> Lawrence D. Bobo & Victor Thompson, *Unfair by Design: The War on Drugs, Race, and the Legitimacy of the Criminal Justice System*, 73 Soc. Res. 445, 463 (2006).

<sup>79</sup> *See id.* at 458-59.

## CONCLUSION

The racial disparities in the application of LWOP sentences for felony-murder are unconscionable. They amount to a gross miscarriage of justice, wreak havoc on Black families, and undermine the legitimacy of our criminal legal system as whole.

*Amici* respectfully urge this Court to grant review of Mr. Lee's case.

Dated: July 13, 2023

Respectfully submitted,



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**CERTIFICATES OF COMPLIANCE**  
**Certification Pursuant to Rule 531**

I hereby certify that no person or entity other than staff of the American Civil Liberties Union of Pennsylvania and Roderick & Solange MacArthur Justice Center has: (1) paid in whole or part for the preparation of the amicus curiae brief filed by the ACLU in this matter, or (2) authored, in whole or in part, the amicus curiae brief filed by the ACLU in this matter.

Dated: July 13, 2023



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**Certification of Word Count**

I hereby certify that this brief contains 4,429 words, exclusive of cover, tables and certifications, as determined by the word-count feature of Microsoft Word, the word-processing program used to prepare this brief.

Dated: July 13, 2023



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**Certificate of Compliance with Pa.R.A.P. 127**

I hereby certify, pursuant to Pa.R.A.P. 127, 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



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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of *Amicus Curiae* was served via email this 13th day of July, 2023 upon the following parties of record:

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