

**[J-53-2019]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 18 EAP 2018
	:	
Appellee	:	
	:	
v.	:	
	:	
MICHAEL FELDER,	:	
	:	
Appellant	:	
	:	

ORDER

PER CURIAM

AND NOW, this 12th day of April, 2022, the Application for Reargument is hereby **DENIED**.

Justice Donohue files a concurring statement in which Justice Wecht joins.

Justice Brobson did not participate in the consideration or decision of this matter.

Former Justice Saylor did not participate in the consideration or decision of this Application for Reargument.

A True Copy
As Of 04/12/2022

Attest: 
Patricia A. Johnson
Chief Clerk
Supreme Court of Pennsylvania

**[J-53-2019]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 18 EAP 2018
	:	
Appellee	:	
	:	
v.	:	
	:	
MICHAEL FELDER,	:	
	:	
Appellant	:	
	:	

CONCURRING STATEMENT

JUSTICE DONOHUE

FILED: April 12, 2022

I agree that this application for reargument should be denied. I write separately to express my view that, in a proper case, the concerns voiced by Felder and the Commonwealth are well-stated and warrant our attention.

In my view, in reargument and response, Felder and the Commonwealth present an unpreserved as-applied challenge to Felder’s sentence. See Application for Reconsideration at 3 (“[A] life without parole sentence imposed upon a youth (at the time of the offense) who is transiently immature is unconstitutionally disproportionate.”); Commonwealth’s Answer at 6 (“Defendant still has a viable disproportionate sentencing claim under the Eighth Amendment, as do other corrigible defendants sentenced to de facto life without parole.”). *Jones v. Mississippi*, --- U.S. ---. 141 S. Ct. 1307 (2021), held that a judge’s discretion to impose a sentence below life imprisonment without the

possibility of parole (“LWOP”) is both constitutionally necessary and constitutionally sufficient. Thus, based on the arguments presented by Felder, as a categorical matter the constitutionality (i.e., the legality) of an actual LWOP sentence must be affirmed so long as the trial judge had discretion to impose something less. Therefore, even if *Felder* is serving a de facto life sentence, for purposes of the Eighth Amendment his sentence is constitutional. Because that is the only issue presented in this case, I agree that the petition for reargument should be denied. *Commonwealth v. Felder*, 269 A.3d 1232, 1247 (Pa. 2022) (Donohue, J., concurring) (“Preliminarily, it is imperative to note that the only issue before the Court is whether the de facto life sentence was constitutional pursuant to the Eighth Amendment.”).

However, *Jones* itself explicitly stated that there was no as-applied challenge in that case. “Moreover, this case does not properly present—and thus we do not consider—any as-applied Eighth Amendment claim of disproportionality regarding Jones’s sentence.” *Jones*, 141 S. Ct. at 1322. As the Dissent stated, “For present purposes, sentencers should hold this Court to its word: *Miller* and *Montgomery* are still good law.” *Id.* at 1337 (Sotomayor, J., dissenting). In the accompanying footnote, the Dissent noted the Court’s as-applied caveat, and stated that “such a claim should be controlled by this Court’s holding that sentencing ‘a child whose crime reflects transient immaturity to life without parole ... is disproportionate under the Eighth Amendment.’” *Id.* at n.6 (quotation marks and citation omitted). See *Felder*, 269 A.3d at 1246 n.16 (acknowledging that “*Jones* did not resolve whether a juvenile homicide offender may raise a viable as-applied Eighth Amendment claim challenging the disproportionality of a

given sentence.”). Because that argument was not preserved, we have no occasion to consider it at this time, and I concur in the denial of the application for reargument.

Justice Wecht joins this concurring statement.