

IN THE SUPREME COURT OF PENNSYLVANIA
No. 3 WAP 2024

COMMONWEALTH OF PENNSYLVANIA

v.

DEREK LEE,

Petitioner

**BRIEF OF *AMICI CURIAE* CRIMINOLOGISTS AND LAW PROFESSORS
IN SUPPORT OF PETITIONER**

On appeal from a decision of the Superior Court, 1008 WDA 2021, entered June 13, 2023, affirming a judgment of sentence imposed by the Court of Common Pleas of Allegheny County, CP-02-CR-16878-2014, dated Dec. 19, 2016

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TABLE OF CONTENTS

	<u>Page</u>
INTERESTS OF THE <i>AMICI CURIAE</i>	1
INTRODUCTION	1
ARGUMENT	3
I. <i>Amici's</i> perspective is critical to this Court's legal analysis.....	3
II. The development of Pennsylvania's unusually punitive felony murder rule.	4
III. Pennsylvania's felony murder rule serves no valid penological purpose.	5
a. Pennsylvania's felony murder rule is not justified by retribution.	7
b. Rehabilitation does not justify Pennsylvania's felony murder rule.	12
i. The vast majority of felony murder offenders will "age out" of their criminal behavior.	13
ii. Lifers often undergo significant rehabilitation during incarceration.	16
c. Deterrence does not justify Pennsylvania's felony murder rule.	19
d. Incapacitation does not justify mandatory life without parole for felony murder.	25
i. Pennsylvania's felony murder rule does not comport with the goal of incapacitation because punishment is not based on predictions of incorrigibility.	26
ii. The cost and inefficiency of incarcerating an elderly life without parole population is disproportionate to any gains accrued through incapacitation.	29
CONCLUSION	30

TABLE OF AUTHORITIES

CASES

<i>Commonwealth v. Coleman</i> , 285 A.3d 599, 613 (Pa. 2022)	8
<i>Commonwealth v. Derrickson</i> , 242 A.3d 667 (Pa. Super. Ct. 2020)	11
<i>Commonwealth v. Edmunds</i> , 526 Pa. 374 (1991)	2, 4
<i>Commonwealth v. Fisher</i> , 80 A.3d 1186 (Pa. 2013)	14
<i>Commonwealth v. Johnson</i> , 272 A.3d 497 (Pa. Super. Ct.), <i>appeal denied</i> , 286 A.3d 213 (Pa. 2022)	11
<i>Commonwealth v. Lambert</i> , 795 A.2d 1010 (Pa. Super. Ct. 2002)	12
<i>Commonwealth v. Lee</i> , 2024 WL 655325 (Feb. 16, 2024)	3
<i>Commonwealth v. Rivera</i> , 238 A.3d 482 (Pa. Super. 2020)	14
<i>Graham v. Florida</i> , 560 U.S. 48 (2010)	passim

CONSTITUTIONAL PROVISIONS

Pa. Const. Art. I § 13.....	3, 31
U.S. Const. Amend. XIII.....	3, 31

STATUTES

18 Pa. C.S. § 1102(a).....	13
18 Pa. C.S. § 1102(b).....	1
18 Pa. C.S. § 1102(d).....	14
18 Pa. C.S. § 2502(b).....	1, 14
18 Pa. C.S. §§ 306.....	13
42 Pa. C.S. § 2154.5.....	40
42 Pa. C.S. § 9711.....	13
61 Pa. C.S. § 6135(a)(1).....	15
61 Pa. C.S. § 6137(a)(1).....	1

REGULATIONS

204 Pa. Code § 303.11(a).....	8
Department of Corrections, <i>Policy 07.04.01.G.7.b</i> , COMMONWEALTH OF PENNSYLVANIA (eff. Dec. 13, 2019)	25
Department of Corrections, <i>Policy 07.06.01.L.2</i> , COMMONWEALTH OF PENNSYLVANIA (eff. Dec. 29,2011)	25
Department of Corrections, <i>Policy 07.06.01.M.1</i> , COMMONWEALTH OF PENNSYLVANIA (eff. Dec. 29, 2011)	25

OTHER AUTHORITIES

Andrea Lindsay, <i>Life Without Parole for Second-Degree Murder in Pennsylvania: An Objective Assessment for Sentencing</i> , PHILADELPHIA LAWYERS FOR SOCIAL EQUITY (2021)	5, 14, 16, 30
Anthony N. Doob & Cheryl Marie Webster, <i>Sentence Severity and Crime: Accepting the Null Hypothesis</i> , 30 CRIME & JUSTICE 143 (2003)	21
Barbara Levine & Elise Kettunen, <i>Paroling people who committed serious crimes: What is the actual risk?</i> , CITIZENS ALLIANCE ON PRISONS & PUBLIC SPENDING (2014)	28
Ben Crewe, Susie Hulley, and Serena Wright. <i>Swimming with the tide: Adapting to long-term imprisonment</i> . 34 JUSTICE QUARTERLY (2017).....	17
Catherine Insel <i>et al.</i> , <i>White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys, and Policy Makers</i> , CENTER FOR LAW, BRAIN & BEHAVIOR, MASSACHUSETTS GENERAL HOSPITAL (2022)	14, 15
Christopher Seeds, <i>Death By Prison: The Emergence of Life Without Parole and Perpetual Confinement</i> (2022)	4, 16
<i>Commutations of Life Sentences (1971 – Present)</i> , COMMONWEALTH OF PENNSYLVANIA	5
Daftary Kapur & Tina M. Zottoli, <i>Reentry Experiences of Released Juvenile Lifers in Philadelphia</i> , MONTCLAIR STATE UNIVERSITY (2022)	18, 28
Daftary Kapur & Tina M. Zottoli, <i>Resentencing Juvenile Lifers: The Philadelphia Experience</i> , MONTCLAIR STATE UNIVERSITY (2020)	18, 27
Daniel Nagin, <i>Deterrence in the Twenty-First Century</i> , 42 CRIME & JUSTICE 199 (2013)	19, 21, 24

Dirk van Zyl Smith & Catherine Appleton, <i>Life Imprisonment: A Global Human Rights Analysis</i> (2019).....	6, 7, 25
Gary Sweeten, Alex R. Piquero, & Laurence Steinberg, <i>Age and the explanation of crime, revisited</i> , 42 JOURNAL OF YOUTH AND ADOLESCENCE (June 2013)	13
James W. Marquat & Jonathan R. Sorensen, <i>Institutional and Post-release Behavior of Furman-Committed Inmates in Texas</i> , 26 CRIMINOLOGY (1988).....	24
Jeffrey Fagan & Alex R. Piquero, <i>Rational Choice and Developmental Influences on Recidivism Among Adolescent Felony Offenders</i> , 4 JOURNAL OF EMPIRICAL LEGAL STUDIES (Dec. 2007)	23
JJ Prescott, Benjamin Pyle, & Sonja B. Starr, <i>Understanding Violent Crime Recidivism</i> , 95 NOTRE DAME LAW REVIEW 1643 (2020)	13
John M. Darley, Catherine Sanderson and Peter LaMantia, <i>Community Standards for Defining Attempt: Inconsistencies With the Model Penal Code</i> , 39 AMERICAN BEHAVIORAL SCIENTIST 405 (1996).....	22
John M. Darley, Kevin M. Carlsmith and Paul H. Robinson, <i>The Ex Ante Function of the Criminal Law</i> , 35 LAW & SOCIETY REVIEW 165 (2001)	22
Kevin Bendesky, <i>The Key-Stone To The Arch”: Unlocking Section 13’s Original Meaning</i> , 26 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 201 (2023)	6
Kim S. Hunt & Billy Easley II, <i>The Effects of Aging on Recidivism Among Federal Offenders</i> , UNITED STATES SENTENCING COMMISSION (2017). 13, 28	
Marc Mauer & Ashley Nellis, <i>The Meaning of Life: The Case for Abolishing Life Sentences</i> (2018).....	6, 12, 13
Margaret E. Leigey, <i>The Forgotten Men</i> (2015)	5, 16, 21
Marco T. C. Stam, Hilde T. Wermink, Arjan A. J. Blokland, & Jim Been, <i>The effects of imprisonment length on recidivism: a judge stringency instrumental variable approach</i> , JOURNAL OF EXPERIMENTAL CRIMINOLOGY (2023).....	24
Margo Gardner & Laurence Steinberg, <i>Peer influence on risk taking, risk preference, and risky decision making in adolescence and adulthood: an experimental study</i> , 41 DEVELOPMENTAL PSYCHOLOGY 625 (2005).....	15

Marie Gottschalk, <i>Life Without Parole</i> (Charles J. Ogletree, Jr. & Austin Sarat, eds. 2012), <i>Chapter 7: No Way Out? Life Sentences and the Politics of Prison Reform</i>	17
Mark D. Cunningham & Jon R. Sorensen, <i>Nothing to Lose? A Comparative Examination of Prison Misconduct Rates Among Life-Without-Parole and Other Long-Term High-Security Inmates</i> , 33 CRIMINAL JUSTICE AND BEHAVIOR 683 (Dec. 2006)	17
Michael Tonry, <i>Punishment and Human Dignity</i> , 47 CRIME & JUSTICE 119 (2018).....	8
Michael Tonry, <i>Purposes and Functions of Sentencing</i> , 34 CRIME & JUSTICE 1 (2006).....	6, 21
Nat'l Acad. Sci., Eng'g & Med., <i>The Promise of Adolescence: Realizing Opportunity for All Youth</i> (2019).....	15
Paul H. Robinson, <i>Life Without Parole</i> (Charles J. Ogletree, Jr. & Austin Sarat, eds. 2012), <i>Chapter 4: Life Without Parole under Modern Theories of Punishment</i>	passim
Pennsylvania Parole Board, <i>Understand the Process: Your Parole Handbook</i> (Feb. 2022).....	19
Press Release, <i>Governor Shapiro Announces He Will Not Issue Any Execution Warrants During His Term, Calls on General Assembly to Abolish the Death Penalty</i> (Feb. 16., 2023)	8
Robert J. Sampson & John H. Laub, <i>Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70</i> , 41(3) CRIMINOLOGY (2003).....	13
Ross Kleinstuber & Jeremiah Coldsmith, <i>Is life without parole an effective way to reduce violent crime? An empirical assessment</i> , 19 CRIMINOLOGY & PUBLIC POLICY 617 (2020).....	20

INTERESTS OF THE *AMICI CURIAE*

*Amici curiae*¹ are 20 professional criminologists and law professors who study crime with the goal of reducing and preventing it. Collectively, *amici* have over 510 years of experience in the field of criminology and have published at least 70 books and 844 articles on related topics. *Amici* are aware of the strongest evidence-based findings in the field of criminology and of the justifications for, efficacy of, and consequences of incarceration. This case is of particular interest to *amici* because the best available evidence in our field refutes the utility of broad felony murder statutes and mandatory life without parole sentences.

INTRODUCTION

Pennsylvania has one of the broadest and most severe felony murder rules in the country.² A person can be convicted of felony murder, also known as “second-degree murder” under Pennsylvania law, 18 Pa. C.S. § 2502(b), merely by being involved in a felony during which a death

¹ Each *amicus curiae* is listed at the end of the brief.

² Because multiple statutes provide the elements, penalties, and parole-eligibility for a felony murder conviction, we refer to Pennsylvania’s felony murder statutory scheme as the “felony murder rule” for simplicity throughout this brief. See 18 Pa. C.S. § 2502(b) (classifies felony murder as “second-degree murder”); 18 Pa. C.S. § 1102(b) (mandates a life sentence for individuals convicted of second-degree murder); 61 Pa. C.S. § 6137(a)(1) (renders individuals serving life sentences ineligible for parole).

occurs. This offense does not require that the death was intentional or foreseeable, nor that the person charged with the offense had any involvement in the death at all, apart from being an accomplice to the underlying felony. Despite this, however, Pennsylvania law *requires* that a mandatory sentence of life without parole be imposed on *every person* convicted of felony murder. As a result, approximately 1,100 Pennsylvanians are currently serving a life sentence for felony murder and will never receive a parole hearing, regardless of their individual involvement in or culpability for the death.

Consistent with *Commonwealth v. Edmunds*, 526 Pa. 374 (1991), *Graham v. Florida*, 560 U.S. 48 (2010), and their progeny, the Court must consider the rule's penological purpose in its analysis of constitutionality under the Pennsylvania and United States Constitutions. Our decades of work and research studying the factors that contribute to and reduce the risk of criminal behavior confirm that Pennsylvania's felony murder rule serves no valid penological purpose. This is particularly so for individuals like Petitioner, who have been sentenced to life without parole for felony murder but who did not kill nor intend to kill the decedent. Our research and data-driven evidence show that providing an opportunity for parole to such offenders accords more closely with the purposes of punishment

without implicating public safety concerns, and at significant cost-savings to the Commonwealth.

ARGUMENT

I. *Amici's* perspective is critical to this Court's legal analysis.

This Court agreed to hear Petitioner's appeal of his mandatory life without parole sentence as unconstitutional under Article I, § 13 of the Pennsylvania Constitution, which prohibits "cruel punishment," Pa. Const. Art. I § 13, and under the Eighth Amendment of the United States Constitution, which prohibits "cruel and unusual punishment," U.S. Const. Amend. XIII. *Commonwealth v. Lee*, 2024 WL 655325 (Feb. 16, 2024). Our perspective is relevant to this Court's analysis under the Pennsylvania Constitution pursuant to *Commonwealth v. Edmunds*, which requires courts to consider "policy considerations, including unique issues of state and local concern" when interpreting the Pennsylvania Constitution's prohibition on "cruel punishments," 526 Pa. at 390. Likewise, our perspective is relevant to this Court's analysis under the Eighth Amendment of the United States Constitution, which must consider "[t]he penological justifications for the sentencing practice" in evaluating whether the sentence is "cruel and unusual." *Graham*, 560 U.S. at 71; *see also id.* at 67 (judicial analysis under the Eighth Amendment "requires consideration of the culpability of

the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question”).

II. The development of Pennsylvania’s unusually punitive felony murder rule.

Pennsylvania’s current practice—the permanent incarceration of everyone convicted of felony murder without meaningful opportunity for release—is in many ways inconsistent with historical practice. Until relatively recently, executive clemency—which provides the Governor with the power to issue pardons and commute (*i.e.*, reduce) sentences—was regularly used to commute the sentences of individuals serving life without parole. Christopher Seeds, *Death By Prison: The Emergence of Life Without Parole and Perpetual Confinement* 107 (2022) (“Commutation for lifers [*i.e.*, those serving life without parole] was regular. . . . As one legislator put it in 1961: ‘In the year 1951, life imprisonment in Pennsylvania meant that a prisoner had to serve 19.6 years in the penitentiary. . . .[I]n 1958, it meant that he had to serve 17.2. . . . This is what life imprisonment means.’”). In fact, in 1974, when changes to Pennsylvania’s criminal laws resulted in confusion as to whether such offenders would be eligible for parole, one state representative put it: “A sentence of life imprisonment is not necessarily a sentence of life imprisonment.” *Id.* at 113.

Unfortunately, the executive branch moved away from clemency as a means of mitigating the harshness of mandatory life imprisonment without parole. Whereas Governor Shapp granted 251 commutations of life sentences between 1971 and 1978, the eight Governors in office from 1978 through the present have granted a total of only 94 commutations of life sentences. Pennsylvania Board of Pardons, *Commutations of Life Sentences (1971 – Present)*, COMMONWEALTH OF PENNSYLVANIA.³

As a result, as of 2019, Pennsylvania was the state with the second highest number of offenders (5,436) serving life without parole, with approximately 1,166 of them serving the sentence for felony murder. Andrea Lindsay, *Life Without Parole for Second-Degree Murder in Pennsylvania: An Objective Assessment for Sentencing*, PHILADELPHIA LAWYERS FOR SOCIAL EQUITY 4 (2021). Pennsylvania also has third highest percentage of inmates serving life without parole (10%) of any state. Margaret E. Leigey, *The Forgotten Men* 2-5 (2015).

III. Pennsylvania’s felony murder rule serves no valid penological purpose.

Criminologists widely recognize—and analyze—four purposes of sentencing: retribution, rehabilitation, deterrence, and incapacitation. *E.g.*,

³ Available at <https://www.bop.pa.gov/Statistics/Pages/Commutation-of-Life-Sentences.aspx> (last visited April 19, 2024).

Marc Mauer & Ashley Nellis, *The Meaning of Life: The Case for Abolishing Life Sentences* 131 (2018); Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUSTICE 1, 6 (2006); Dirk van Zyl Smith & Catherine Appleton, *Life Imprisonment: A Global Human Rights Analysis* 2–9 (2019). Pennsylvania courts and the United States Supreme Court likewise recognize these commonly accepted purposes of sentencing.⁴ See *Commonwealth v. Coleman*, 285 A.3d 599, 613 (Pa. 2022) (“sentencing serves many purposes, including ‘protection of society, general deterrence (example to others), individual deterrence, rehabilitation, and retribution”); *Graham*, 560 U.S. at 71 (“the goals of penal sanctions that have been recognized as legitimate [are] retribution, deterrence, incapacitation, and rehabilitation”). See also 204 Pa. Code § 303.11(a) (“[Pennsylvania’s Sentencing Guidelines establish] a sentencing system with a primary focus on retribution, but one in which the recommendation[s] allow for the fulfillment of other sentencing purposes including rehabilitation, deterrence, and incapacitation.”).

⁴ A detailed historical analysis of Pennsylvania’s “cruel” punishment clause, directly relevant to this Court’s review under *Edmunds*, found that this constitutional protection was originally understood to permit only deterrence and rehabilitative justifications for criminal punishment, and to prohibit “any severity unnecessary for achieving those circumscribed aims,” as understood by contemporary science. Kevin Bendesky, *The Key-Stone To The Arch: Unlocking Section 13’s Original Meaning*, 26 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 201, 245, 254 (2023).

The goal of retribution is to seek justice by imposing a sentence on an offender as punishment commensurate with the severity of the crime. The other three purposes focus primarily on promoting public safety through the imposition of the sentence. Rehabilitation seeks to rehabilitate the offender so that they no longer are driven to commit crime. Deterrence seeks to use the sentence as a means of convincing the offender (specific deterrence) and others (general deterrence) not to commit crime. Finally, incapacitation seeks to prevent crime by isolating the offender from society, thereby preventing them from committing further crimes.

We have analyzed whether Pennsylvania’s felony murder rule accords with each of these purposes in light of the best available normative and empirical research in criminology. As discussed below, we find that Pennsylvania’s felony murder rule serves none of these four purposes of sentencing, and instead undermines them.

a. Pennsylvania’s felony murder rule is not justified by retribution.

The goal of retribution—also referred to as “just deserts”—is to impose a punishment that fits the crime and the offender. van Zyl Smith & Appleton (2019), *supra*, at 4; Paul H. Robinson, *Life Without Parole* (Charles J. Ogletree, Jr. & Austin Sarat, eds. 2012), *Chapter 4: Life Without Parole under Modern Theories of Punishment* 156 (“The central demand of

desert is that greater punishment be imposed on an offender of greater blameworthiness.”). Retribution, therefore, requires that the punishment imposed by a sentence is commensurate with the moral culpability of the offender. Retribution is the most widely accepted justification of incarceration, both in the field of criminology and in modern sentencing practices. Michael Tonry, *Punishment and Human Dignity*, 47 CRIME & JUSTICE 119, 129–130 (2018); Robinson (2012), *supra*, at 151.

Mandatory imposition of life without parole for all persons convicted of felony murder is inconsistent with retributive theory. It categorically imposes the most severe sentence⁵ available to a population of offenders with a wide range of culpability, including individuals like Petitioner who did not kill nor intend to kill the decedent. This necessarily divorces the punishment from each offender’s moral culpability. Under Pennsylvania law, a person who intentionally shoots (without the intent to kill) and kills a victim in the course of a robbery can be charged with felony murder and sentenced to life without parole. See *Commonwealth v. Derrickson*, 242

⁵ While capital punishment is still legal in Pennsylvania, there is a formal moratorium on executions and there have been no executions in Pennsylvania since 1999. See Press Release, *Governor Shapiro Announces He Will Not Issue Any Execution Warrants During His Term, Calls on General Assembly to Abolish the Death Penalty* (Feb. 16., 2023), available at <https://www.governor.pa.gov/newsroom/governor-shapiro-announces-he-will-not-issue-any-execution-warrants-during-his-term-calls-on-general-assembly-to-abolish-the-death-penalty/>.

A.3d 667, 671 (Pa. Super. Ct. 2020). But so can someone who intentionally robs a victim and unintentionally causes the victim to suffer a fatal heart attack. *Commonwealth v. Johnson*, 272 A.3d 497 (Pa. Super. Ct.), appeal denied, 286 A.3d 213 (Pa. 2022). And so too can a getaway driver who drove an accomplice to the scene of the crime, even if that driver had no knowledge of any weapons and intended no harm to anyone. See *Commonwealth v. Lambert*, 795 A.2d 1010, 1023 (Pa. Super. Ct. 2002) (“[N]ot only the killer, but all participants in a felony, including the getaway driver, are equally guilty of felony murder when a killing by a felon occurs. The statute defining second-degree murder does not require that a homicide be foreseeable.”). Sentencing each of these offenders equally defies the retributive principle that punishment should be proportionate to culpability. An individual who intentionally brings a gun to a robbery and fatally shoots a victim—even without the intent to kill—has more culpability for the death than an individual who unintentionally induces a heart attack or drives a co-conspirator to the scene of a crime, unaware of the potential killing.

Mandatory life without parole for felony murder (which, again, is also known as second-degree murder) creates similar retributive inconsistencies when compared to sentences for first-degree and third-degree murder.

Unlike felony murder, which does not require any intent to kill, first-degree murder applies where an individual kills with the intent to kill. However, first-degree murder effectively comes with the same sentence as felony murder: life without parole. 42 Pa. C.S. § 9711; 18 Pa. C.S. § 1102(a).⁶ This outcome is antithetical to retributive principles, which assign higher culpability—and therefore would require sterner punishment—to persons who act with the *intent to kill* as compared to those who would do not.

Otherwise, “to treat the two cases the same is to trivialize the greater blameworthiness of the more serious offense.” Robinson (2012), *supra*, at 146.

This inconsistency is further illustrated in the different sentences under Pennsylvania law given to individuals convicted of felony murder and third-degree murder. Like felony murder, third-degree murder does not require intent to kill. However, whereas felony murder applies to any accomplices to the underlying felony, third-degree murder only applies to accomplices who aid or facilitate the killing. 18 Pa. C.S. §§ 306, 2502(c). Further, third degree murder requires “a malicious killing,” *Commonwealth v. Fisher*, 80 A.3d 1186, 1195 (Pa. 2013), whereas the malice in felony murder can derive solely from the underlying felony “regardless of whether

⁶ As noted above, Pennsylvania has a moratorium on the death penalty.

the defendant actually intended to physically harm the victim.”

Commonwealth v. Rivera, 238 A.3d 482, 500 (Pa. Super. 2020).

Therefore, felony murder captures a broader range of conduct and accomplices with a lower level of culpability. Yet, inexplicably, individuals convicted of murder in the third-degree can *at most* be sentenced to forty years’ incarceration, 18 Pa. C.S. § 1102(d), and have the opportunity for parole, whereas individuals convicted of felony murder are required to be given a life sentence without any possibility of release.

In sum, Pennsylvania’s felony murder rule punishes individuals with the maximum period of incarceration available without regard to their culpability in the crime. The result is a rule that is inconsistent with retributive principles and any semblance of proportionality. In contrast, providing parole eligibility for felony murder offenders would allow the Commonwealth to calibrate the severity of the offenders’ punishments in accordance with their relative culpability for the offense, including the decedent’s death. See 61 Pa. C.S. § 6135(a)(1) (parole board is required to consider the “nature and circumstances of the offense committed” when determining parole eligibility).

b. Rehabilitation does not justify Pennsylvania's felony murder rule.

Rehabilitation justifies a sentence of incarceration when it is used as a means through which offenders can engage in self-improvement in order to lead crime-free lives after incarceration. Pennsylvania's felony murder rule cannot be justified by rehabilitation. As the Supreme Court has noted, life without parole "forfeits altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about the person's value and place in society."

Graham, 560 U.S. at 74.

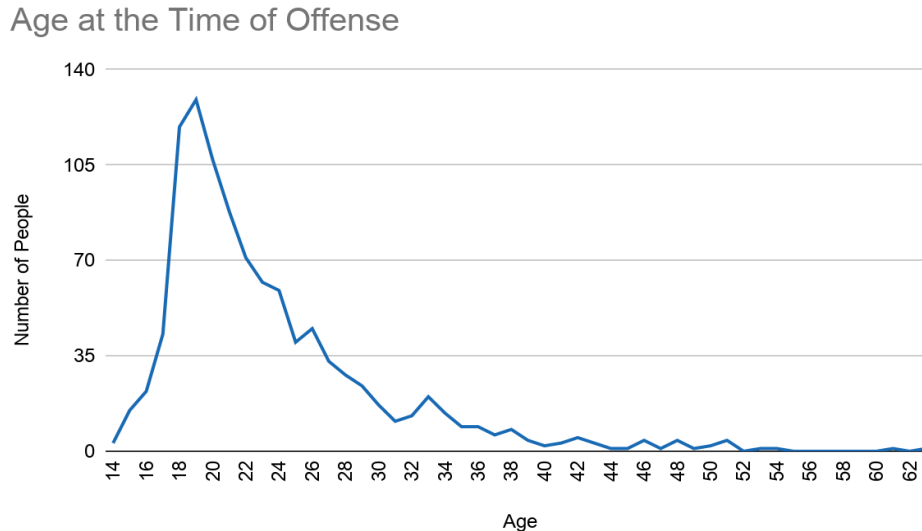
Pennsylvania's felony murder rule denies offenders a meaningful opportunity to demonstrate their rehabilitation and—more fundamentally—the practical hope for their release.⁷ The rule cannot be justified under a theory of rehabilitation: it contravenes conclusive research that individuals maintain the capacity to change and mature as they age. And it ignores the reality that many offenders serving life without parole actively pursue rehabilitation and self-improvement, even in the face of a system that denies their capacity to do so.

⁷ Many international jurisdictions have outlawed life without parole sentences precisely because they deny offenders the hope of release and rejects their capacity for rehabilitation. Mauer & Nellis, *supra*, at 86–88.

i. The vast majority of felony murder offenders will “age out” of their criminal behavior.

Decades of research shows that people “age out” of criminal behavior. See Gary Sweeten, Alex R. Piquero, & Laurence Steinberg, *Age and the explanation of crime, revisited*, 42 JOURNAL OF YOUTH AND ADOLESCENCE, 921-938 (June 2013). This phenomenon, revealed by the so-called “age-crime curve” is robust and ubiquitous; it has been documented across social classes and nationalities, whether measured by arrest data or self-reported data. *Id.* And it holds true even for older offenders and so-called “career criminals.” Robert J. Sampson & John H. Laub, *Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70*, 41(3) CRIMINOLOGY (2003). The likelihood of committing crime peaks in the late teens or early twenties, generally drops by over half by age 30, and continues to decrease significantly with age. Mauer & Nellis (2018), *supra*, at 133–34. The age-crime curve also manifests in consistently decreasing rates of recidivism with age, across all types of crime. JJ Prescott, Benjamin Pyle, & Sonja B. Starr, *Understanding Violent Crime Recidivism*, 95 NOTRE DAME LAW REVIEW 1643, 1688 (2020); see also Kim S. Hunt & Billy Easley II, *The Effects of Aging on Recidivism Among Federal Offenders*, UNITED STATES SENTENCING COMMISSION (2017). A distribution of Pennsylvania’s population of second-

degree murder offenders by age (Figure 1, below) illustrates the age-crime curve in practice.



Lindsay (2019), *supra*, Figure 1: Age at the Time of Offense, at 13.

Brain development and emotional maturation help to explain why young people are more likely to engage in criminal behavior at higher rates than older people. See Catherine Insel *et al.*, *White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys, and Policy Makers*, CENTER FOR LAW, BRAIN & BEHAVIOR, MASSACHUSETTS GENERAL HOSPITAL 2 (2022) (“Maturation of brain structure, brain function, and brain connectivity continues throughout the early twenties. This ongoing brain development has profound implications for decision-making, self-control and emotional processing.”). Neurobiology research shows that, into an individual’s mid-twenties, the individual’s likelihood to engage in risky or sensation-seeking

behavior and to respond to immediate outcomes continue to materially decrease, while their ability to resist peer influence or coercion materially increases. *Id.* at 2; see also Nat'l Acad. Sci., Eng'g & Med., *The Promise of Adolescence: Realizing Opportunity for All Youth* (2019); Margo Gardner & Laurence Steinberg, *Peer influence on risk taking, risk preference, and risky decision making in adolescence and adulthood: an experimental study*, 41 DEVELOPMENTAL PSYCHOLOGY 625 (2005).

Echoing these principles, in finding that life without parole cannot be imposed on juvenile nonhomicide offenders, the Supreme Court recognized that young people—including young violent offenders—undergo psychological development as they age, becoming less impulsive and more mature. *Graham*, 560 U.S. at 79. The Court determined that denying the vast majority of juvenile offenders a meaningful opportunity to demonstrate rehabilitation violated the U.S. Constitution. *Id.*

Although aging impacts rehabilitation irrespective of the age at offense, this is especially true for younger offenders. The vast majority of offenders incarcerated under Pennsylvania's felony murder statute were young adults at the time of their offense. A study of felony murder offenders in Pennsylvania found that 51% of offenders were age 21 or younger at the time of offense, and 73% were aged 25 or younger. Lindsay

(2019), *supra*, at 12. The population of offenders who, like Petitioner, acted with a co-defendant—and therefore may have been only an accessory or accomplice to the offense—were even younger at the time of offense: 60% of offenders with at least one co-defendant were aged 21 or younger at the time of offense; 82% were aged 25 or younger at the time of offense. *Id.* at 16. As such, these offenders have a strong capacity for rehabilitation by the mere process of maturation and continued cognitive development.

ii. Lifers often undergo significant rehabilitation during incarceration.

Above and beyond even the general maturation process documented by the age-crime curve, many lifers accept responsibility for their offenses and actively pursue efforts to improve themselves, becoming positive forces within their prison communities. Leigey (2015), *supra* at 24. As collected and recounted in Christopher Seeds’s book *Death by Prison*, substantial research of prison communities has shown that lifers tend to be a positive and constructive influence on the prison community, serving as mentors to younger prisoners and contributing to the overall prison morale. See Seeds (2022), *supra*, at 162 and notes 16–19. Indeed, faced with what may appear to be bleak life prospects and minimal chance of release, many lifers “doggedly seek purpose in their lives” through the cultivation of an “optimistic sense of personal efficacy” aimed at improving their own

lives, often becoming a “stabilizing force” for community management. Marie Gottschalk, *Life Without Parole* (Charles J. Ogletree, Jr. & Austin Sarat, eds. 2012), *Chapter 7: No Way Out? Life Sentences and the Politics of Prison Reform* 234. See also Mark D. Cunningham & Jon R. Sorensen, *Nothing to Lose? A Comparative Examination of Prison Misconduct Rates Among Life-Without-Parole and Other Long-Term High-Security Inmates*, 33 CRIMINAL JUSTICE AND BEHAVIOR 683, 683 (Dec. 2006) (“data show that the likelihood and pattern of disciplinary infractions and potentially violent rule infractions among [inmates serving life without parole] during 1998 to 2003 is broadly similar to that of other long-term inmates, supporting a conclusion that [these] inmates act as a stabilizing rather than disruptive force in the prison environment”); Ben Crewe, Susie Hulley, and Serena Wright. *Swimming with the tide: Adapting to long-term imprisonment*. 34 JUSTICE QUARTERLY 517–41 (2017) (“Participants who were further into their sentences had generally come to accept their predicament, worked out which areas of their lives they could and could not control, and begun to find purpose and meaning in their lives. Their focus was less on the past than the future, and their use of the present was constructive rather than merely depletive.”).

An analysis of Pennsylvania’s recently resentenced “juvenile lifers” bears this out. Approximately 90% of Philadelphia’s resentenced juvenile lifers surveyed in 2020 reported that they had engaged in rehabilitative programming, such as violence prevention, self-help, drug and alcohol education, vocational training, and anger management, completing four such programs on average. Daftary Kapur & Tina M. Zottoli, *Resentencing Juvenile Lifers: The Philadelphia Experience*, MONTCLAIR STATE UNIVERSITY 9 (2020). And 99% of recently paroled juvenile lifers surveyed in 2022 reported that they participated in prison programming during their incarceration, even though 53% reported that they were restricted from participating in some programs in which they wanted to participate.⁸ Daftary Kapur & Tina M. Zottoli, *Reentry Experiences of Released Juvenile Lifers in Philadelphia*, MONTCLAIR STATE UNIVERSITY 4 (2022).

⁸ The Pennsylvania Department of Corrections places categorical limits on lifers’ participation in rehabilitative, educational, and vocational programs. For example, Pennsylvania Department of Corrections Policy 07.04.01, “Substance Use Disorder (SUD) Treatment Programs” limits lifers’ access to Therapeutic Community (TC) programs. Where “generally, a non-life sentence inmate shall be admitted to the TC,” there is a strict maximum of three inmates serving life sentences that may be admitted at a time. Department of Corrections, *Policy 07.04.01.G.7.b*, COMMONWEALTH OF PENNSYLVANIA (eff. Dec. 13, 2019). Department of Corrections Policy 07.06.01, “Delivery of Educational Services,” permits lifers to attend post-secondary education course offered to inmates, “space permitting,” but lifers are required to cover their own costs, and imposes a cap of enrollment in vocational programs for lifers at ten percent. Department of Corrections, *Policies 07.06.01.L.2, 07.06.01.M.1*, COMMONWEALTH OF PENNSYLVANIA (eff. Dec. 29, 2011)

Pennsylvania's felony murder rule denies individuals any meaningful opportunity to demonstrate growth, maturation, or rehabilitation. It is therefore not justified under a theory of rehabilitation. Providing parole eligibility for felony murder would provide an opportunity for offenders to demonstrate they have matured and atoned, and therefore would better align Pennsylvania's statute with rehabilitative justifications. See, e.g., Pennsylvania Parole Board, *Understand the Process: Your Parole Handbook* 12 (Feb. 2022) ("The Parole Board . . . bases its decision on what you have done to rehabilitate yourself so that you will not re-offend in the future.").

c. Deterrence does not justify Pennsylvania's felony murder rule.

The deterrence justification of punishment is "predicated on the idea that if state-imposed sanction costs are sufficiently severe, criminal activity will be discouraged," thereby improving public safety. Daniel Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUSTICE 199, 207 (2013). Deterrence justifications are divided into two categories: general and specific (also referred to as special) deterrence. The general deterrence effect of a sentence is the impact that sentence has on the incidence of that crime in general. The specific deterrence effect of a sentence is the impact that sentence has on the likelihood that the specific

sentenced individual will reoffend. The imposition of mandatory life without parole for felony murder cannot be justified under either theory of deterrence.

General deterrence justifications for punishment are premised on the idea that the threat of punishment will deter potential offenders from engaging in crime, thereby controlling crime in the general population. Empirical studies of crime rates across jurisdictions show that imposing life without parole for felony murder does not have a meaningfully higher deterrent effect on violent crime relative to other, less punitive sentences. Ross Kleinstuber & Jeremiah Coldsmith, *Is life without parole an effective way to reduce violent crime? An empirical assessment*, 19 CRIMINOLOGY & PUBLIC POLICY 617, 638 (2020). Specifically, Kleinstuber and Coldsmith's study analyzed whether jurisdictions which regularly imposed life without parole experienced reduced levels of violent crime compared to jurisdictions which imposed life with parole or determinate sentences. *Id.* They concluded that life without parole "does not seem to have any marginal crime-reducing power beyond that which is accomplished by parole-eligible life sentences." *Id.* at 638. These results align with a consistent and widely accepted finding across criminal law—above a threshold level, increasing the severity of a sanction does not produce a

marginal deterrence effect. See, e.g., Nagin (2013), *supra*, at 200, 253; see also Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUSTICE 143, 187 (2003); Tonry (2006), *supra*, at 29.

These findings are supported by research and scholarship analyzing the measures that do and do not produce meaningful changes in potential offenders' behavior. Research has shown that the perceived *likelihood* of a sentence for a specific criminal act has a measurable deterrent effect, but increases to the marginal *severity* of the punishment does not. See, e.g., Nagin (2013), *supra*, at 200. This finding is not surprising. Criminal theorists have suggested that for punishments to be effective in deterring crime, potential offenders must know about and consider the punishment, and must be capable of acting in a manner consistent with that knowledge and with their best interests in mind. Robinson (2012), *supra*, at 140; Leigey (2015), *supra*, at 19. But there is little to suggest that potential offenders are likely to consider mandatory life without parole as a potential consequence of participating in any felony.

Research indicates that, generally, offenders are not aware of the legal penalties they will face for their actions. See, e.g., John M. Darley, Kevin M. Carlsmith and Paul H. Robinson, *The Ex Ante Function of the*

Criminal Law, 35 LAW & SOCIETY REVIEW 165 (2001) (surveying individuals in four states regarding their knowledge of certain atypical laws and finding that in three of the states, participants were unaware of their content).

Rather, studies have found that most people assume that the criminal law tracks their intuition of justice. See John M. Darley, Catherine Sanderson and Peter LaMantia, *Community Standards for Defining Attempt: Inconsistencies With the Model Penal Code*, 39 AMERICAN BEHAVIORAL SCIENTIST 405 (1996) (study of New Jersey citizens shows that citizens were generally unaware of the severe punishment for attempt, irrespective of the length of time they lived in New Jersey). Therefore, insofar as they contemplate the legal consequences of their actions at all, potential offenders are unlikely to anticipate sentences that deviate in punitiveness from the public's intuition of justice—such as Pennsylvania's felony murder statute—meaning such sentences confer little or no incremental deterrent value. Robinson (2012), *supra*, at 140. This is particularly true for offenders like Petitioner, who did not kill nor intend to kill the decedent. For those individuals, Pennsylvania's felony murder rule imposes mandatory life without parole on them for the actions of their co-defendants, outside of their direct contemplation or control.

Further, the vast majority of individuals who commit violent crimes—including the predicate felonies for felony murder under Pennsylvania’s felony murder statute—do so without full capacity to appreciate or act in their best interests. As noted above, *supra* at 14–15, an individual’s neurological development continues into the mid-20’s, with predictable impacts on impulsivity, decision-making, and ability to resist the influence of others. This continuing development calls into question the theoretical justification for a general deterrence effect of punishment on young offenders—the majority of felony murder offenders. See Jeffrey Fagan & Alex R. Piquero, *Rational Choice and Developmental Influences on Recidivism Among Adolescent Felony Offenders*, 4 JOURNAL OF EMPIRICAL LEGAL STUDIES, 715–48 (Dec. 2007) (showing “that both mental health and developmental maturity moderate the effects of perceived crime risks and costs on criminal offending”). In sum, the conditions necessary for a sentence to create a general deterrence effect do not exist for Pennsylvania’s felony murder rule, particularly as applied to offenders like Petitioner, who did not kill nor intend to kill the decedent.

The specific deterrent effect of a sentence is measured by the behavior of the offender *after their release*, but a life without parole sentence permanently denies an offender the opportunity for release, so it

is difficult to quantify the specific deterrent effect of such a sentence.

However, any theoretical specific deterrence value of a life without parole sentence for felony murder offenders is diminished by the extremely low risk of recidivism posed by this group of offenders, as demonstrated in the rehabilitation section, *supra* at 13. See also James W. Marquat & Jonathan R. Sorensen, *Institutional and Post-release Behavior of Furman-Commuted Inmates in Texas*, 26 CRIMINOLOGY (1988) (review of recidivism data for individuals originally sentenced to death, but released on parole in Texas following the Supreme Court's decision in *Furman v. Georgia*, "seriously call[s] into question" the validity of "life-without-parole statutes, specifically designed to protect society."). Further, research suggests that marginal increases in sentence length do not significantly impact an offender's likelihood of recidivism. Marco T. C. Stam, Hilde T. Wermink, Arjan A. J. Blokland, & Jim Been, *The effects of imprisonment length on recidivism: a judge stringency instrumental variable approach*, JOURNAL OF EXPERIMENTAL CRIMINOLOGY (2023), see also Nagin (2013), *supra*, at 200. This suggests that at a certain point, a lengthy sentence provides diminishing returns with respect to specific deterrence. Further, surveys of lifers recently released on parole, discussed in greater depth in section e, *infra*, demonstrate that

the parole assessment is an effective means of mitigating the risk of recidivism.

d. Incapacitation does not justify mandatory life without parole for felony murder.

Incapacitation, like deterrence and rehabilitation, is a utilitarian justification for sentencing premised on public safety benefits. Whereas deterrence seeks to modify behavior through a fear of punishment and rehabilitation seeks to modify behavior by bettering the individual so they are not driven to commit crime, incapacitation seeks to decrease crime by removing an individual from the community so that the individual cannot commit further crime (or indeed, participate in society at all). See van Zyl Smith & Appleton (2019), *supra*, at 6–7. Therefore, permanently incarcerating an individual for felony murder under a theory of incapacitation necessarily presupposes that the individual cannot be rehabilitated or deterred; in other words, it requires determining that the individual is incorrigible. See *Graham*, 560 U.S. at 72 (noting that “while incapacitation may be a legitimate penological goal” it does not justify life without parole for juveniles who did not commit homicide because any justification would be premised “on the assumption that the juvenile offender forever will be a danger to society [which] requires the sentencer to make a judgment that the juvenile is incorrigible.”).

However, decades of research show that individuals convicted of felony murder are capable of contributing to society and that reviewing entities like parole boards can adequately determine which individuals are at low risk of recidivism. Furthermore, insofar as life without parole confers any benefits to public safety, the high financial cost of permanently incarcerating these individuals far outweighs them. See Michael Tonry, *Predictions of Dangerousness in Sentencing: Déjà Vu All Over Again*, 48 CRIME & JUSTICE 439, 444 (2019).

- i. Pennsylvania's felony murder rule does not comport with the goal of incapacitation because punishment is not based on predictions of incorrigibility.*

Incapacitation only justifies mandatory life without parole for individuals who are incorrigible. But empirical evidence consistently shows that many offenders sentenced to life without parole are at low risk of recidivism, suggesting that many can return to society without presenting any risk to public safety. Further, empirical evidence also shows that reviewing entities, such as parole boards, are effective in determining which offenders are suitable for release, thereby vitiating the argument for categorical punishment. See, e.g., Robert Weisberg, Debbie A. Mukamal & Jordan D. Segall, *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California*,

STANFORD CRIMINAL JUSTICE CENTER 4 (2011) (“While data is limited, interim information suggests that the incidence of commission of serious crimes by recently released lifers has been minuscule, and as compared to the larger inmate population, recidivism risk—at least among those deemed suitable for release by both the Board and the Governor—is minimal.”).

For example, following the Supreme Court’s decision in *Miller v. Alabama*, which held mandatory life without parole sentences unconstitutional for juvenile offenders, many juvenile lifers in Pennsylvania were resentenced, and some were released. A committee charged with making resentencing offers to eligible juvenile lifers acted essentially as a parole board, taking into account “information on the facts of the original case, demographic information on the victim and offender, mitigating information, the offender’s prison adjustment (e.g., misconducts, rehabilitative programming), information on acceptance of responsibility and remorse, the victim’s family’s perspective on release, and reentry plans.” Daftary & Zottoli (2020), *supra*, at 3. As of 2020, 459 juvenile lifers had been resentenced, 323 of which had become parole eligible, and 230 of which were paroled. *Id.* at 4.

A study that followed 174 juvenile lifers who were released found that, after an average of 21 months, their rearrest rate was less than 4%

and their reconviction rate was only 1%, corresponding to just two non-homicide convictions. Daftary & Zottoli (2022), *supra*, at 10. These numbers were far below the national two-year rearrest rate of 30% for individuals convicted of homicide generally. *Id.* This study suggests that many individuals sentenced to life without parole are capable of rehabilitation, and that a reviewing entity is capable of determining which can be returned to society without endangering public safety. *See also* Barbara Levine & Elise Kettunen, *Paroling people who committed serious crimes: What is the actual risk?*, CITIZENS ALLIANCE ON PRISONS & PUBLIC SPENDING (2014) (a study of individuals granted parole after Michigan made efforts to reduce its prisoner population by increasing grants of parole to individuals previously denied parole showed that “few people paroled on very serious crimes return with convictions for similar offenses.”).

These studies’ findings are consistent with studies examined in the sections analyzing rehabilitation and deterrence above. The age-crime curve demonstrates that the aging process alone tends to rehabilitate offenders, a fact that is especially pertinent here, where most individuals serving life without parole for felony murder committed their crimes at a young age. *See* Hunt & Easley II, (2017), *supra*, at 3. Further, the low risk of recidivism of lifers shows that, regardless of age at offense, it is illogical

to categorically deem this group categorically incorrigible. *See supra*, at 13.

Further, these findings demonstrate the ability of parole to accurately predict future recidivism. This is not surprising, as parole entities often look to the purposes of sentencing in making their decisions. Pennsylvania's parole guidelines incorporate many of the purposes of punishment. 42 Pa. C.S. § 2154.5, which empowers the Pennsylvania Commission on Sentencing to create parole guidelines, requires that the guidelines be designed to encourage participation in rehabilitative programs, prioritize incapacitation of individuals who pose the greatest risk to public safety, and use evidence to consider the risk of recidivism.

ii. The cost and inefficiency of incarcerating an elderly life without parole population is disproportionate to any gains accrued through incapacitation.

Any theoretical public safety benefits accrued by incapacitation are offset by the cost of incarcerating Pennsylvania's elderly lifer population. The considerable resources required to incarcerate a person for life—particularly one who has neither demonstrated an intent to kill nor participated in a killing—would be better utilized if diverted to other, more effective efforts to promote public safety.

Pennsylvania pays an average of roughly \$50,000 per year to incarcerate an individual, but the geriatric and chronically ill prison population costs the Commonwealth far more. Lindsay (2019), *supra*, at 7. Pennsylvania is projected to pay approximately \$2.6 million to incarcerate *each individual* convicted of felony murder for life. *Id.* at 7, 32. Since that burden increases as an individual ages, allowing the opportunity for release can result in considerable cost savings that can be diverted to protecting public safety via other mechanisms. For example, one calculation suggests that releasing all individuals convicted of felony murder at age 70 would save Pennsylvania \$520 million. *Id.* at 33. While parole eligibility certainly does not guarantee release, this number is informative as to the scale of the cost of the felony murder rule. And considering the enormity of the cost (which could be allocated to other, more efficient public safety uses) in conjunction with the low risk of recidivism and the adequacy of parole review, Pennsylvania's categorical incapacitation of all offenders convicted of felony murder cannot be justified by a financial cost-benefit analysis.

CONCLUSION

For all of the foregoing reasons, this Court should find that Pennsylvania's felony murder rule unconstitutional under both the

Pennsylvania and United States Constitutions. Pennsylvania’s felony murder rule is not justified by any valid penological purpose—retribution, rehabilitation, deterrence, or incarceration. Therefore, it is a “cruel punishment” under the Pennsylvania Constitution, Pa. Const. Art. I § 13, and a “cruel and unusual punishment” under the United States Constitution, U.S. Const. Amend. XIII.

Respectfully Submitted,

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Certificate of Compliance

I certify that the foregoing brief complies with the word count limitation of Rule 531 of the Pennsylvania Rules of Appellate Procedure. Using the word processor used to prepare this document, the word count is 6,338 words.

I further certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than nonconfidential information and documents.

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