

SUPREME COURT OF PENNSYLVANIA

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No. 3 WAP 2024

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**Commonwealth of Pennsylvania, Appellee,**

**v.**

**Derek Lee, Appellant**

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BRIEF OF *AMICUS CURIAE* THE PENNSYLVANIA INNOCENCE PROJECT

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**Appeal from June 13, 2023 Order of the Superior Court,  
1008 WDA 2021,  
Affirming the December 19, 2016 Order of the Allegheny County Court of  
Common Pleas, Docket No. CP-02-CR-0016878-2014**

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*<sup>1</sup>

The Pennsylvania Innocence Project (the “Project”) is a nonprofit legal clinic and resource center with offices at Temple University’s Beasley School of Law and the Thomas R. Kline Law School of Duquesne University. Its board of directors includes, among others, practicing lawyers, law professors, former state and federal prosecutors, and wrongly-convicted individuals who have been exonerated. Collaborating with *pro bono* private counsel, the Project provides investigative and legal services to indigent prisoners throughout Pennsylvania. These individuals have claims of actual innocence that are supported by the results of DNA testing or other powerful exculpatory evidence or have claims that, after a preliminary investigation, evince a substantial potential for discovery of such evidence. Additionally, the Project works to remedy the underlying causes of wrongful convictions to ensure that no one will be convicted and imprisoned for a crime they did not commit. The Project seeks to prevent punishment of innocent people and to prevent wrongdoers from escaping justice because an innocent person was convicted instead.

This case is of particular importance to the Project because, as explained below, the Commonwealth’s mandatory sentence of life without parole for

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<sup>1</sup> Pursuant to Rule of Appellate Procedure 531(b)(2), amicus certifies that no person or entity was paid in whole or in part to prepare this brief. Only *pro bono* counsel authored this brief.

second-degree/felony murder is particularly cruel to innocent individuals. The Project has a significant interest in the outcome of this litigation and in seeing the Commonwealth's second-degree murder regime brought into line with the Pennsylvania Constitution's ban against cruel punishment. Accordingly, the Project files this *amicus* brief to request that the Court find Pennsylvania's second-degree murder statute to be in violation of Section 13 of the Pennsylvania Constitution.

## SUMMARY OF ARGUMENT

Under Pennsylvania law, “when considering a claim that specifically implicates a distinct provision of the Pennsylvania Constitution, [the Pennsylvania Supreme Court] will consider the textual distinctions between the state and federal provisions, the historical interpretation of the provision as elucidated in legislation and case law, related decisions of our sister states, and policy considerations unique to this Commonwealth.” *Commonwealth v. Means*, 773 A.2d 143, 147 (Pa. 2001) (citing *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991)). Indeed, “as a general rule it is important that litigants [seeking review under a distinct provision of the Pennsylvania Constitution] brief and analyze ... policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.” *Edmunds*, 586 A.2d at 895.

Here, the Court should consider that jurors who are struggling with weighing the evidence, as often happens in cases where the defendant is innocent, may reach a second-degree/felony murder verdict thinking that it is a compromise verdict without appreciating that it is certainly not a compromise and that there is a mandatory sentence of life without the possibility of parole. Thus, the present life without parole punishment for felony murder is particularly cruel in that jurors may believe they are reaching a mitigated result but instead reach one that leads to

the imposition of the most severe punishment short of the death penalty. In addition, the Court should also consider that parole provides a safety valve for innocent people who are wrongly convicted of felony murder and have little recourse to challenge their convictions due to the restrictive nature of Pennsylvania's Post Conviction Relief Act and of federal habeas review of state court convictions under the Antiterrorism and Effective Death Penalty Act of 1996.

## **ARGUMENT**

### **I. Jurors May Misuse Second-Degree Murder as a Means to Soften Verdicts Where the Evidence is Weak and Unwittingly Impose the Commonwealth's Harshest Sentence Other than Death.**

Pennsylvania jurors are left completely in the dark as to the criminal punishment associated with their verdicts. Indeed, at least twenty-five states, including Pennsylvania, “have pattern jury instructions telling jurors, in effect, that punishment is none of their business.” *See* Daniel Epps & William Ortman, *The Informed Jury*, 75 Vand. L. Rev. 823, 831–32, 832 n. 42 (2022) (citing Pennsylvania Suggested Standard Criminal Jury Instructions, § 2.07); *see also* *Commonwealth v. Lucier*, 225 A.2d 890 (Pa. 1967) (trial court erred in instructing the jury as to the penalties for voluntary manslaughter, second degree murder and first degree murder); *Commonwealth v. Mills*, 39 A.2d 572 (Pa. 1944) (instructions to a jury concerning defendant's eligibility for parole or pardon

constituted reversible error); *Commonwealth v. White*, 504 A.2d 930 (Pa. Super. 1986) (trial court was correct in refusing to instruct the jury that a mandatory sentence would be imposed if appellant were found guilty); *Commonwealth v. Waters*, 483 A.2d 855 (Pa. Super. 1984) (trial court was correct in prohibiting defense counsel from discussing the penalties of the offense in his closing arguments). However, in the Project's experience, jurors can, and at times do, erroneously use the degrees of murder by employing second-degree murder as a presumed compromise or mitigated verdict where first-degree murder is the maximum degree of murder charged. The Project has seen jurors in homicide cases struggle significantly with the court's instructions on murder where the defendant is actually innocent and the evidence is therefore weak. Jurors do not know how to navigate these situations, so they attempt to issue what they believe to be lesser verdicts while unwittingly delivering a verdict that guarantees the Commonwealth's harshest sentence besides death. Indeed, jurors will often deliberate for an extended period time, ask questions about either the degrees of guilt or the definition of reasonable doubt, and then arrive at a verdict that appears to be, at least nominally, lesser than the maximum charge—i.e., second-degree as opposed to first-degree murder. This makes the mandatory sentence of life without parole associated with second-degree murder ironically and especially cruel.



### A. The Case of *Commonwealth v. Veasy*

For example, in the case of *Commonwealth v. Veasy*, the Commonwealth tried Willie Veasy for first-degree murder relating to an armed robbery where the robbery victim was shot and a second individual, apparently an innocent bystander, was also shot nearby. The robbery victim survived, but the innocent bystander died. The only evidence presented implicating Willie Veasy was unreliable eyewitness testimony and an inculpatory statement Veasy signed only after being interrogated by several homicide detectives. The confession was later determined to have been coerced and false, and the Commonwealth has conceded that the detectives involved had a pattern and practice of eliciting false statements. At trial, Veasy presented strong, un rebutted alibi evidence demonstrating that, at the time of the crime, he was working as a dishwasher at a restaurant approximately 8 miles away.

Despite this, the prosecutor made Veasy out to be the shooter. He charged Veasy with first-degree murder and sought the death penalty. He also told the jury to ignore the alibi evidence and believe the signed statement because, “no one confesses to a murder that they did not commit, no one.”

The *Veasy* jury ultimately rejected the alibi evidence and asked numerous questions during their lengthy deliberations, including questions about the eyewitness testimony and the meaning of reasonable doubt. Following four days

of deliberations, the jury convicted Willie Veasy of second-degree murder, criminal conspiracy, and possession of an instrument of crime. Veasy was subsequently sentenced to mandatory life without the possibility of parole on second-degree murder.

Through its questions, the *Veasy* jury sought a better understanding of the meaning of reasonable doubt and a re-reading of testimony regarding whether Veasy was even present at the scene. The questions did not concern Veasy's actual role in the crime or his intent. This demonstrates that the jury likely used second-degree murder in an attempt to reflect its uncertainty about Veasy's overall guilt. The jury likely thought it was delivering a lesser verdict than first-degree murder, but, of course, unbeknownst to the jurors, the punishment was no less severe. Knowing that jurors employ second-degree murder in this way, right or wrong, makes the punishment associated with second-degree murder especially cruel.

### **B. The Case of *Commonwealth v. Ramirez***

The case of *Commonwealth v. Ramirez* presents another example of this harsh phenomenon. In that case, the Commonwealth prosecuted Eddie Ramirez – another innocent man – for first-degree murder, robbery, and conspiracy. The Commonwealth again sought the death penalty. Ramirez was tried for a robbery at an all-night laundromat where the robbery victim was beaten to death with a metal

pipe. The only evidence presented implicating Ramirez was unreliable testimony from fellow teenagers, including testimony by a convicted drug dealer who had several charges dropped in exchange for her testimony and the inculpatory statement of an alleged co-conspirator that the co-conspirator signed after dramatically pleading down his charges and punishment for the crime. The drug dealer's and co-conspirator's testimony directly conflicted with other undisputed facts tending to exonerate Ramirez. Specifically, the laundromat's door was almost certainly locked when the co-conspirator and Commonwealth asserted Ramirez simply walked in. Additionally, the laundromat did not keep large quantities of loose change on-site. Despite this, the Commonwealth asserted that Ramirez's possession of loose change following the crime was evidence of his guilt.

Ramirez presented strong evidence demonstrating that he was not at the laundromat during the time of the incident, that he had no blood on him and thus did not participate in this brutal crime, and that the laundromat did not keep large amounts of loose change and was not missing any loose change. Despite this, the prosecutor told the jurors to ignore the discrepancies in the evidence and to "use their common sense" that laundromats have coins and that Ramirez had coins that were proceeds of the crime.

The *Ramirez* jury ultimately convicted Ramirez on this evidence but only after deliberating for two and a half days. The jury found Ramirez guilty of second-degree murder, robbery, and conspiracy, and Ramirez was sentenced to mandatory life without parole. Much like the *Veasy* jury, during its deliberations, the *Ramirez* jury asked to re-hear testimony of an individual who allegedly overheard Ramirez confess at a party and for a re-definition of third-degree murder and accomplice liability. The jury's questions – about what a witness had allegedly overheard Ramirez say at a party about committing the crime at all and about a lesser degree of murder – demonstrate that it likely also used second-degree murder in an attempt to reflect its uncertainty about Ramirez's overall participation in the crime at all and not Ramirez's intent or role.

The jury then delivered what it thought was a lower degree of verdict. Of course, that is not what occurred, and the jury again unwittingly sentenced an innocent man to mandatory life without parole as opposed to softening the effect of its verdict. Again, as in *Veasy*, knowing that second-degree murder can be used in this way makes the mandatory life without parole sentence associated with it especially cruel and cuts in favor of finding that the law violates the Pennsylvania Constitution's ban on cruel punishment.

## **II. The Time Delays and Strictures associated with Pennsylvania’s Post-Conviction Relief Act and Federal Habeas Review Compound the Cruelty.**

The cruelty of jurors intending but failing to impose lesser punishment through second-degree murder is further compounded by the time delays and strictures associated with seeking relief under the Pennsylvania’s Post Conviction Relief Act and federal habeas review under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254.

Indeed, “[s]tate court post-conviction delays have been the object of much dismay . . . .” Donald J. Harris, Kim Nieves & Thomas M. Place, *Dispatch & Delay: Post Conviction Relief Act Litigation in Non-Capital Cases*, 41 Duq. L. Rev. 467, 467 (2003). “For the innocent or illegally sentenced defendant, delays exacerbate the miscarriage of justice.” *Id.* Yet, as this Court has noted that “few, if any, initial PCRA petitions proceed to final judgment (including appeal) within a year of sentence . . . .” See Thomas M. Place, *Commonwealth v. Holmes and the Rule of Deferral: Short Sentences, Long Sentences and the Illusory Nature of the Good Cause Exception*, 25 Widener L.J. 49, 52 n.20 (2016) (quoting *Commonwealth v. Holmes*, 79 A.3d 562, 579 (Pa. 2013)). In fact, “[a] study published in 2003 noted that [across the Commonwealth] it was ‘not unusual to find PCRA cases . . . pending for two, three or even four years.’” *Id.* (quoting Harris, Nieves & Place, *supra*, at 492). Experience has taught the Project that this

remains true, and litigation can take much, much longer in many instances, making second-degree murder and life without parole particularly severe where that punishment was unwittingly mandated by a jury seeking to reflect doubts about guilt and where the defendant is ultimately proven to be innocent. In addition to the delays, strict legal and procedural hurdles also bar many from bringing their post-conviction claims to court in the first place, including the PCRA's presumption that one is barred from filing a successive petition except in limited circumstances. *See Harris, Nieves & Place, supra*, at 469–74 (citations omitted) (discussing the many legal and procedural hurdles under the Pennsylvania PCRA).

**A. Eddie Ramirez versus Rusty Brensinger**

Eddie Ramirez, whose case is discussed above, serves as an example of the cruelty associated with both having a jury impose a “compromise” verdict for second-degree murder *and* contending with the time delays and restrictions associated with collateral review. Ramirez was sentenced for second-degree murder in March of 1998 and had appeal and post-conviction proceedings continuously since that time, but he remained incarcerated until that litigation was finally resolved with his exoneration in the late fall of 2023. That is to say, including his time in jail pre-conviction, Eddie Ramirez spent 27 years wrongly incarcerated without any possibility of parole. The round of post-conviction

proceedings that finally led to his exoneration lasted a full 8 years. An overview of those proceedings highlights the difficulty of obtaining post-conviction relief.

In the early 2000's, post-conviction DNA testing of new evidence – nail clippings taken from the female victim – excluded Eddie Ramirez as the source of male DNA found in the clippings. However, even though the Medical Examiner testified at trial that the victim had struggled with her attacker, the court found that these results were not exculpatory. It denied Ramirez post-conviction relief.

Ramirez then sought post-conviction relief in federal court, and attorneys from the Federal Community Defender Office began to represent him, re-investigating the case. During that investigation, all of the teenage witnesses who had once implicated Ramirez recanted except for his alleged co-conspirator. All of them consistently cited police pressure and threats as the reason they made statements against Eddie. In 2015, Ramirez filed another state post-conviction petition based on these recantations.

In 2016, after conducting a thorough review of Ramirez's case, the Project joined his legal team and sought additional post-conviction DNA testing.

Although the Commonwealth initially opposed that testing, it later reversed its position, and the testing went forward. In 2019, DNA testing results excluded Ramirez from DNA on multiple items of crime scene evidence, including the handle of a wooden broom the trial prosecutor said had been used to beat the

victim. In addition, DNA of another man – not Ramirez – was found on a metal pipe used to beat the victim and on a fleece vest found in the laundromat that the trial prosecutor said the perpetrator had used to wipe off blood after the beating. Around the same time that the exculpatory DNA results were revealed, the Philadelphia District Attorney’s Office conceded that one of the detectives involved in Ramirez’s case had a pattern of eliciting false witness statements. This concession was consistent with the witnesses’ accounts of coercion and misconduct during this investigation. The District Attorney’s Office then allowed the Project to review its files in this case. Those files contained multiple items of suppressed favorable evidence that would have bolstered every aspect of Ramirez’s trial defense – that the perpetrator would have been covered in blood, that only cash, not coins, was stolen, and that the witnesses against him were unreliable – and contained information about other suspects that would have allowed him to mount an alternate perpetrator defense.

In 2023, after decades of asking courts to affirm Ramirez’s conviction, the District Attorney’s Office reversed course and joined the Project in asking that Ramirez’s conviction be vacated, highlighting 12 pieces of hidden evidence, the new DNA evidence, and the consistent allegations of police misconduct. After vacating Ramirez’s conviction on November 2, 2023, the Court granted the Commonwealth’s motion to dismiss on November 30th and issued orders calling



for Ramirez's immediate release. In sum, despite such weak trial evidence and strong and voluminous exculpatory evidence uncovered in the post-conviction process, it still took Eddie Ramirez and a large team of legal counsel and experts 8 long years of hard-fought legal wrangling to obtain PCRA relief. During a significant portion of that time, Ramirez could have been home on parole living with his family and being a productive member of society while fighting to clear his name. Instead, Ramirez spent that time in prison.

Ramirez's experience and the experiences of other innocent people convicted of felony murder stand in stark contrast to the experience of those whose sentences allow them to seek release on parole while their very lengthy court proceedings continue to unfold with no certainty of the outcome. Contrast Eddie Ramirez with another of the Project's clients, Rusty Brensinger. Brensinger also has had a PCRA petition pending since 2015. The Project and Brensinger are still litigating that petition as the Commonwealth is currently appealing the court's 2023 decision granting Brensinger a new trial. Unlike Ramirez, Brensinger was convicted of third-degree murder and was therefore eligible for parole. He was released at his 20-year minimum and has been a productive member of society since 2018 – having gotten married and remaining consistently employed in that time – while the litigation continues. Individuals who are innocent but receive second-degree murder convictions suffer immensely more than do innocent

individuals who happen to be convicted of third-degree murder or lesser charges and therefore have a pathway to parole, highlighting the cruelty of the mandatory life without parole sentencing scheme for felony murder.

### **B. Montrell Oliver versus Dennis Johnson**

Of course, the delay and strictures are not limited to Pennsylvania PCRA proceedings; rather, they also pertain to federal habeas review of state convictions. “First, [The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)] 28 U.S.C. § 2254(d) imposes the substantive limit on relief, restricting federal merits review only to cases in which no fairminded jurist could endorse a state disposition against the claim.” Lee Kovarsky, *Structural Change in State Post Conviction Review*, 93 Notre Dame L. Rev. 443, 460-461 (2018). “Second, federal lawmakers have created an interlocking web of procedural barriers to relief, which have the cumulative effect of making federal merits review largely inaccessible for state inmates.” *Id.*

An example of the issues with federal habeas review can be seen through a comparison of the cases of Montrell Oliver and Dennis Johnson. Montrell Oliver was released on parole as a juvenile lifer in February of 2022. He therefore was free while the federal courts considered his habeas petition, which a magistrate judge first recommended be granted in August of 2021, but which was not ultimately resolved by the district court judge until January of 2024 (in a favorable

ruling). Due to his parole eligibility, Oliver has been home while those proceedings unfolded and remains home while the Commonwealth decides whether to retry him. By contrast, Dennis Johnson remains incarcerated on a second-degree life without parole sentence while his habeas proceedings continue. The magistrate judge recommended in February of 2023 that his petition be granted and his conviction vacated, but the United States District Court has yet to rule on the Report & Recommendation. In sum, a chance for parole for those wrongly convicted of second-degree murder would provide a safety valve to protect against the delays and strictures associated not only with state post-conviction review but also with federal habeas review.

### **C. Hundreds of Other Innocent Individuals**

An additional point not reflected by the anecdotal evidence reviewed above is that, due to these restrictions, some innocent people may just never obtain relief at all. Parole eligibility would therefore serve as a critical safety valve for the many individuals who are wrongly convicted of second-degree murder but are stymied by the delays and strictures associated with either PCRA or federal habeas review. The Project knows that this would affect many innocent individuals across the Commonwealth.

Of the more than 1,000 people in the Commonwealth convicted of second-degree murder, there are approximately 200 of those people in various stages of

the Project's review process. A review of the Pennsylvania exonerations tracked in the National Registry of Exonerations reveals more than 25 of Pennsylvania exonerees who had been convicted of second-degree murder.<sup>2</sup> There have been 96 exonerations in Pennsylvania involving homicide convictions since 1989, so second-degree murder convictions represent almost 26% of those. While all of the 200 people in the Project's review process may ultimately not be exonerated, the 26% of exonerees who had been convicted of second-degree murder suggests that a significant number of those currently serving life without parole sentences in the Commonwealth may very well be innocent.

### CONCLUSION

In conclusion, the Project offers this *amicus* brief to highlight the unique issues that the mandatory life without parole sentencing regime for felony murder poses for innocent people. Even the limited data available suggest that these issues likely affect a significant percentage of Pennsylvanians. For these reasons, the Project respectfully requests that the Court sustain Mr. Lee's appeal and find Pennsylvania's felony murder sentence to be unconstitutional.

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<sup>2</sup> It is impossible to determine this number with absolute certainty given the lack of available data for some of the Pennsylvania exonerations.

April 26, 2024

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**CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY**

I 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 non-confidential information and documents.

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**CERTIFICATE OF COMPLIANCE WITH PA.R.A.P. 531**

I certify that the foregoing Brief of *Amicus Curiae* complies with Pa.R.A.P. 531, because it is filed during merits briefing and contains 3,615 words.

April 26, 2024

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