

In The  
**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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**AMICI CURIAE BRIEF OF THE SENTENCING PROJECT,  
FAIR AND JUST PROSECUTION, A PROJECT OF THE TIDES CENTER, & FAMM**

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By Allowance of Appeal from the Judgment of the Superior Court of Pennsylvania entered June 13, 2023 at No. 1008 WDA 2021, Affirming the Judgment of Sentence of the Court of Common Pleas of Allegheny County entered December 29, 2016 at No. CP-02-CR-0016878-2014

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## **IDENTITY AND INTEREST OF *AMICI CURIAE*<sup>1</sup>**

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

Fair and Just Prosecution, a project of the Tides Center, is a nonprofit that brings together elected prosecutors from around the nation as part of a network of leaders committed to a justice system grounded in fairness, equity, compassion, and fiscal responsibility. The elected prosecutors we work with hail from urban and rural areas alike, and they collectively represent nearly 20% of our nation's population. Prosecutors depend upon the public's trust in the legitimacy of law enforcement and the entire justice system in order to carry out their responsibilities to promote public safety. Extreme sentences divorced from culpability are

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

inherently unfair and erode trust in the legitimacy of the criminal legal system; as such, this starting point also undermines the ability to keep communities safe.

FAMM, previously known as Families Against Mandatory Minimums, is a national, nonprofit, nonpartisan organization whose primary mission is to promote fair, rational sentencing policies and to challenge mandatory sentencing laws and the inflexible, excessive penalties they require. Founded in 1991, FAMM currently has more than 75,000 members around the country. By mobilizing prisoners and their families who have been adversely affected by unjust sentences, FAMM illustrates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its purposes in part through select amicus participation.

## I.

### INTRODUCTION

In Pennsylvania, some 1,100 people are serving life-without-parole sentences for second-degree murder, including many who did not take a life, did not intend to take a life, and had no expectation that a life would be taken.<sup>2</sup> That lifetime ban on parole eligibility, which effectively guarantees a person will die in prison, categorically violates the Cruel and Unusual Punishments Clause of the Eighth Amendment and the Cruel Punishments Clause of the Pennsylvania Constitution.

As the U.S. Supreme Court has repeatedly observed, subjecting individuals with diminished culpability to the law's harshest penalties cannot be reconciled with the Eighth Amendment's animating principle that punishment be proportional to the crime for which it is imposed. That precedent, along with the broad rejection of mandatory life-without-parole sentences for felony-murder convictions

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<sup>2</sup> An individual's *sentence* is the period of time—here, the duration of his or her natural life—for which an individual is remanded to the Commonwealth's custody. *See* 18 Pa.C.S. §§ 2502(b), 1102(b). By contrast, Appellant's permanent, categorical disqualification from parole consideration is not part of his actual, formal sentence; it is, instead, the result of a different statute, 61 Pa.C.S. § 6137(a), which governs parole eligibility and prohibits the Parole Board from even considering a grant of parole for anyone serving a sentence of life imprisonment. *Id.* § 6137(a)(1). Nevertheless, for simplicity's sake, this brief will sometimes describe Section 6137(a)(1)'s disqualification from parole eligibility as a "life-without-parole sentence." That term is intended to refer to § 6137(a)'s permanent ban on parole eligibility rather than Appellant's actual, court-imposed "sentence" of life imprisonment.

in other U.S. States and foreign nations, compels the conclusion that 61 Pa.C.S. § 6137(a) cannot stand.

Nor does Section 6137(a) serve any legitimate penological purpose. Like the death penalty, permanent incarceration rejects rehabilitation. And no one can possibly argue that Section 6137(a) deters killings committed during the commission of a felony: even assuming the accused is fluent in the Commonwealth's sentencing statutes, the threat of death by incarceration can have little effect on a person who did not intend to take a life.

For the reasons that follow, this Court should reverse the decision below and hold that Section 6137(a)'s mandatory, automatic prohibition on parole consideration for those convicted of felony murder violates both the Eighth Amendment to the U.S. Constitution and the Cruel Punishments Clause of the Pennsylvania Constitution.

## **II.**

### **LEGAL FRAMEWORK**

#### **A. The Eighth Amendment**

The Eighth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments

inflicted.”<sup>3</sup> Proportionality is central to the analysis of sentencing practices under that proscription. *Montgomery v. Louisiana*, 577 U.S. 190, 206 (2016).

When addressing a categorical challenge to the proportionality of a sentence, like the one lodged by Appellant, the U.S. Supreme Court employs a two-pronged approach. It first assesses “objective indicia of society’s standards, as expressed in legislative enactments and state practice” to determine whether there is a “national consensus against” the practice.<sup>4</sup> *Roper v. Simmons*, 543 U.S. 551, 563 (2005). Second, a court must consider “in the exercise of its own independent judgment whether the punishment in question violates the Constitution.” *Graham v. Florida*, 560 U.S. 48, 61 (2010). In exercising its own judgment, a court weighs the culpability of the convicted individual against the severity of the crime in question and determines whether the challenged punishment serves legitimate penological goals. *Roper*, 543 U.S. at 568, 571-72.

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<sup>3</sup> Similarly, the Pennsylvania Constitution provides that “Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.” Pa. Const. art. I, § 13. As Appellant aptly shows, the Pennsylvania Constitution’s protections extend beyond those of its federal counterpart and prohibit the permanent disqualification from parole consideration for those convicted of felony murder. Even if that were not the case, it has frequently been observed that the cruel-punishments prohibition of the Pennsylvania Constitution is at least as protective of individuals’ rights as are the provisions of the Eighth Amendment. *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991).

<sup>4</sup> Though *amici* address only the U.S. Constitution, this Court similarly considers related case law from other States when determining whether Pennsylvania’s constitution provides greater protections than its federal counterpart, as explained in Appellant’s brief. *Edmunds*, 586 A.2d at 895.

## **B. Parole Eligibility and Felony-Murder Convictions**

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

Because 61 Pa.C.S. 6137(a)(1) makes all those serving a sentence of life imprisonment categorically ineligible for parole consideration, every individual convicted of felony murder in this Commonwealth—including those who did not themselves take a life, did not intend to take a life, and had no understanding, expectation, or belief that a life would be taken—will (absent the success of a long-shot bid for executive clemency) remain in prison from the moment of their conviction until the moment of their death.



### III.

#### ARGUMENT

For two related reasons, the Eighth Amendment should be deemed to categorically prohibit an individual convicted of felony murder—i.e., someone who did not necessarily intend to kill—from receiving a sentence of life in prison without the possibility of parole. *First*, such a sentence is at odds with evolving standards of decency as measured by developments in other American States, within Pennsylvania itself, and in the broader community of nations. *Second*, imposing a sentence that guarantees a person will die in prison is neither proportionate, given the lesser culpability of someone who commits felony murder, nor justified by the legitimate penological goals of retribution, rehabilitation, incapacitation, and deterrence.

**A. The Imposition of Life Without Parole for Someone Who Did Not Intend to Kill Is Contrary to Evolving Standards of Decency.**

**1. Pennsylvania is nearly unique among the States in the harshness with which it treats felony-murder convictions.**

The constitutional problems in this case stem from a sentencing structure that is rare among States in its punishment of individuals who did not take, or did not intend to take, a life. Indeed, only ten other States mandate life-without-parole

sentences for all people convicted of felony murder.<sup>5</sup> One of those States, Michigan, requires proof that the defendant possessed a culpable mental state vis-à-vis the *killing* specifically, not merely the underlying felony.<sup>6</sup> As a result, only nine other States (which, with Pennsylvania, account for just twenty-three percent of the total U.S. population<sup>7</sup>) possess a sentencing regime for felony murder as harsh as Pennsylvania's. Most strikingly, 28 States and the District of Columbia *never* mandate the imposition of a life-without-parole sentence for felony-murder defendants who did not kill, intend to kill, or foresee a killing.<sup>8</sup>

The practice at issue is rarer than other punishments invalidated by the Supreme Court on Eighth Amendment grounds. *Compare, e.g., Miller v. Alabama*, 567 U.S. 460, 483-84 (2012) (invalidating mandatory life-without-parole sentences for juveniles convicted of homicide offenses even though 29 jurisdictions allowed the practice); *Graham*, 560 U.S. at 62-64 (rejecting argument that there was no

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<sup>5</sup> They are Arizona, Florida, Iowa, Louisiana, Michigan, Mississippi, Nebraska, North Carolina, South Dakota, and Wyoming.

<sup>6</sup> *People v. Aaron*, 299 N.W.2d 304, 329 (Mich. 1980).

<sup>7</sup> See *2020 Census Results Data Profiles*, U.S. Census Bureau, <https://data.census.gov/cedsci/profile?q=United%20States&g=0100000US>.

<sup>8</sup> These States are Alabama, Alaska, Colorado, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Maine, Maryland, Missouri, Minnesota, Montana, Nevada, New Hampshire, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

national consensus against imposing the death penalty for children simply because only 13 States banned the practice).

Moreover, recent trends in state sentencing regimes evidences a shift *away* from Pennsylvania’s approach. For example, in 2018, California passed SB 1437, dramatically redefining felony murder for accomplices. Now, to be convicted as an accomplice for felony murder (i.e., someone who was involved in the offense but did not kill), an individual must have either intended to kill or been both a “major participant” in the underlying felony and acted with “reckless indifference to human life” in connection with the killing.<sup>9</sup> In 2021, Colorado eliminated its mandatory life-without-parole sentence for felony murder, substituting it with a sentence of 16 to 48 years in prison.<sup>10</sup> At the same time, Colorado also removed two of the conditions required for an affirmative defense to felony murder, permitting more individuals to meet the defense’s requirements.<sup>11</sup> And in May 2023, Minnesota passed a law that prosecutors cannot seek a conviction for felony murder unless a person was a major participant in the underlying felony and acted with extreme indifference to human life.<sup>12</sup>

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<sup>9</sup> Cal. S.B. 1437 (2018).

<sup>10</sup> Colo. Rev. Stat. § 18-3-102.

<sup>11</sup> S.B. 21-124, 73rd Gen. Ass., 2021 Reg. Sess. (Colo. 2021).

<sup>12</sup> MN SF2909,  
<https://www.revisor.mn.gov/bills/bill.php?b=Senate&f=SF2909&ssn=0&y=2023>.

The atypicality of Pennsylvania’s approach is also apparent when measured against the nationwide approach to felony murder generally. Two States, Hawaii and Kentucky, have no felony murder law at all.<sup>13</sup> Six States other than Michigan, discussed *supra*, require a culpable mental state for all felony-murder convictions; New Hampshire, for example, requires proof of extreme indifference to human life.<sup>14</sup>

Still other States afford an affirmative defense to a felony-murder prosecution where the accused (1) did not commit the killing; (2) was not armed with a dangerous weapon; (3) reasonably believed that no other participant was armed; or (4) reasonably believed that no other participant intended to engage in conduct likely to result in death or serious bodily harm.<sup>15</sup> Pennsylvania provides no such defenses.

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

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<sup>13</sup> Ky. Rev. Stat. Ann. § 507.020; Haw. Rev. Stat. § 707-701.

<sup>14</sup> N.H. Rev. Stat. Ann. § 630:1-b. Apart from Michigan, the six other States with a *mens rea* requirement are: Delaware, 11 DE Code § 635(2); Massachusetts, *Commonwealth v. Brown*, 81 N.E.3d 1173, 1178 (Mass. 2017); New Hampshire, N.H. Rev. Stat. Ann. § 630:1-b; New Mexico, *State v. Griffin*, 866 P.2d 1156, 1162 (N.M. 1993); North Dakota, N.D. Cent. Code § 12.1-02-02.1; and Vermont, *State v. Baird*, 175 A.3d 493, 496 (Vt. 2017).

<sup>15</sup> *E.g.*, Me. Stat. tit. 17-A § 202; *State v. Rice*, 683 P.2d 199, 123-24 (Wash. 1984); *see also* Colo. Rev. Stat. § 18-3-103(1.5); Conn. Gen. Stat. § 53a-54c; N.D. Cent. Code § 12.1-16-01.

Supreme Judicial Court recognized this fact in *Commonwealth v. Brown*, 81 N.E.3d 1173 (Mass. 2017), in which it limited first-degree murder convictions to those in which the government can prove malice—i.e., intent to kill, intent to cause grievous bodily harm, or intent to do an act that a reasonable person would have known created a plain and strong likelihood of death. *Id.* at 1196 (Gants, C.J., concurring) (“[A] defendant who commits an armed robbery as a joint venturer will be found guilty of murder where a killing was committed in the course of that robbery if he or she ***knowingly participated in the killing with the intent required to commit it...***” (emphasis added)); *id.* at 1191 (“[W]here the defendant’s only participation in the crimes was to provide a firearm and hooded sweatshirts to his friends, knowing they intended to use them in the commission of an armed robbery, convictions of murder in the first degree on the theory of felony-murder are not consonant with justice.”).<sup>16</sup>

By contrast, in Pennsylvania, the mere act of supporting or undertaking a felony temporally associated with a homicide, even when the death is not intended or reasonably foreseeable, can support a murder conviction, eliminating the government’s obligation to prove core elements of the common-law offense of

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<sup>16</sup> That is not to say that these *mens rea* requirements are alone sufficient to protect against disproportionate punishments. See *Amici* Brief of Boston University Center for Antiracist Research *et al.*, *Commonwealth v. Fisher*, Dkt. No. SJC-13340 (Mass. Apr. 14, 2023). Still, Pennsylvania stands virtually alone in the breadth and severity of its felony-murder rule.

murder: that the accused committed the act and that he intended to do so. It is thus highly doubtful that someone like Mr. Lee (whose co-defendant committed the homicide underlying his conviction) would have received a death-by-incarceration sentence had his crime occurred in almost any other State.

These developments weigh heavily in favor of a finding that Pennsylvania's felony-murder sentencing regime is unconstitutionally cruel and unusual.

**2. Within Pennsylvania, public opinion disfavors retributive sentences.**

Equally noteworthy, public opinion in recent years has shifted in favor of rehabilitative sentences rather than retributivist ones. An overwhelming 79 percent of Pennsylvanians in 2023 supported changing the Commonwealth's mandatory life-without-the-possibility-of-parole sentence for felony-murder convictions.

*Susquehanna Polling and Research, Pennsylvania Statewide Omnibus Telephone Poll* (February 2023), <https://famm.org/wp-content/uploads/Toplines-PAStatewide-Omnibus-FAMM-Feb2023.pdf>.

Pennsylvanians' voting patterns reflect these views, as well, sweeping into office in recent years a wave of officials—including a U.S. senator,<sup>17</sup> governor,<sup>18</sup>

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<sup>17</sup> Abbie Vansickle & Cary Aspinwall, *Fetterman and Oz Battle Over Pennsylvania's Felony Murder Law*, THE MARSHALL PROJECT (Oct. 25, 2022), <https://www.themarshallproject.org/2022/10/25/fetterman-and-oz-battle-over-pennsylvania-s-felony-murder-law>.

<sup>18</sup> Peter Hall, *Pa. Gov. Shapiro signs probation reforms spurred by Philly rapper Meek Mill's imprisonment*, PENNSYLVANIA CAPITAL STAR (Dec. 15, 2023), <https://penncapital->

and district attorneys<sup>19</sup>—who favor a rehabilitative, rather than a punitive, approach to criminal justice. Similar trends can be seen in appointed cabinet-level officers.<sup>20</sup>

These developments underscore that the arc of history continues to bend further away from Pennsylvania’s practice of mandating perpetual incarceration for those convicted of felony murder.

**3. Pennsylvania’s felony-murder sentencing regime is at odds with the global consensus against mandatory life-without-parole sentences for such offenses.**

The Eighth Amendment’s requirements are not frozen in time; they draw upon “evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). When evaluating those evolving standards, the U.S. Supreme Court often looks to the laws and practices of foreign jurisdictions as persuasive authority. *Roper*, 543 U.S. at 575.

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star.com/civil-rights-social-justice/pa-gov-shapiro-signs-probation-reforms-spurred-by-philly-rapper-meek-mills-imprisonment/.

<sup>19</sup> Daniel Nichanian, *Wins for Larry Krasner and New Allies Signal Reformers’ Growing Reach*, THE APPEAL (May 20, 2021), <https://theappeal.org/politicalreport/philadelphia-results-krasner-wins-judges/> (Philadelphia); Vinny Vella, *After Historic Victories, New Democratic DAs Prepare to Take Reins in Delaware, Chester Counties*, PHILA. INQUIRER (Nov. 27, 2019), <https://www.inquirer.com/news/jack-stollsteimer-deb-ryan-new-district-attorneys-delaware-chester-county-20191127.html>.

<sup>20</sup> *Budget Hearing for Criminal Justice: Department of Corrections, Board of Probation and Parole, and Board of Pardons: Hearing Before the H.R. Appropriations Comm.*, 51–52 (Pa. 2020) (statement of John Wetzel, Sec. of Dep’t of Corrs.); *see also* Thomas J. Farrell, *A Real Second Chance*, 32 FED. SENT’G REP. 272, 272–74 (2020) (recommending discontinuing incarceration for individuals over fifty years old who served at least twenty-five years, most commonly for felony murder).

State courts have followed suit, looking to international law when reviewing challenges to the constitutionality of punishment, either under the Eighth Amendment or the analogous provisions of their state constitutions. *See* Martha F. Davis *et al.*, *Human Rights Advocacy in the United States* 278 (2d ed. 2018); *see also* *Commonwealth v. Foust*, 180 A.3d 416, 425 (Pa. Super. 2018) (noting that the U.S. Supreme Court has concluded that “international consensus could not be ignored” in the context of an Eighth Amendment analysis).

Pennsylvania should follow global norms, as other state courts have done, and conclude that life-without-parole sentences for felony murder are cruel and unusual.

**a. Life Without Parole.**

Pennsylvania’s use of life-without-parole sentences is grossly out of line with the global consensus. Life-without-parole sentences are exceedingly rare in most regions of the world. In fact, 155 of the 193 United Nations member states prohibit life-without-parole sentences. *See* Quinn Cozzens & Bret Grote, *A Way Out: Abolishing Death By Incarceration in Pennsylvania* 27 (2018).

Latin America, for example, has been dubbed a “life imprisonment almost-free zone” because so few countries there employ life sentences (even with parole). *See* Francisco Javier de Leon Villalba, *Imprisonment and Human Rights in Latin America: An Introduction*, 98 *Prison J.* 17, 26 (2018). Life-without-parole



sentences are rarer still, existing in only *four* Latin American countries.<sup>21</sup> And in Canada, the highest court ruled in 2022 that life sentences without the chance of parole are both cruel and unconstitutional, unanimously determining that sentencing individuals to death by incarceration risked bringing the “administration of justice into disrepute.”<sup>22</sup>

Similarly, in Europe, only ten countries permit life-without-parole sentences.<sup>23</sup> And even in those countries, the European Court of Human Rights has held that such sentences are cruel and unusual if they lack any possibility of review and release. *Vinter v. United Kingdom*, 2013-III Eur. Ct. H.R. 349, 358 (authorities must periodically review sentences to assess “whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds”). Pointedly, the court concluded that it is “incompatible with...human dignity...to deprive a person of

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<sup>21</sup> Namely: Argentina, Cuba, Peru, and four states in Mexico. Beatriz López Lorca, *Life Imprisonment in Latin America*, in *Life Imprisonment and Human Rights* 52 (Dirk van Zyl Smit & Catherine Appleton eds., 2016).

<sup>22</sup> *R. v. Bissonnette*, [2022] SCC 23, File No.: 39544 (Can.).

<sup>23</sup> They are Bulgaria, Hungary, Lithuania, Malta, the Netherlands, Slovakia, Sweden, Turkey, Ukraine, and the United Kingdom. William W. Berry III, *Life-with-Hope Sentencing: The Argument for Replacing Life-Without-Parole Sentences with Presumptive Life Sentences*, 76 Ohio St. L.J. 1051, 1075 n.206 (2015).

his freedom forcefully without at least providing him with the chance to regain that freedom one day.” *Id.* at 347.

Countries across Asia and Africa are in accord, finding that life-without-parole sentences are incompatible with human dignity, and thus illegal, if they cannot be reviewed and reduced as circumstances warrant. Center for L. and Glob. Just., Univ. of S.F., Sch. of L., *Cruel and Unusual: U.S. Sentencing Practices in a Global Context* 25 (2012) [hereinafter *U.S. Sentencing in Global Context*]; cf. Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 U. Ill. L. Rev. 2129, 2140-42 (noting that the Court has described human dignity as “the touchstone of the Amendment’s prohibition”).

Moreover, even countries that allow life-without-parole sentences generally use them sparingly and in only the most extreme cases. Lila Kazemian, *Long Sentences: An International Perspective* (Dec. 2022), [https://assets.foleon.com/eu-central-1/de-uploads-7e3kk3/41697/international\\_comparison\\_-\\_kazemian.e64a9058586b.pdf](https://assets.foleon.com/eu-central-1/de-uploads-7e3kk3/41697/international_comparison_-_kazemian.e64a9058586b.pdf) (noting that the United States holds the vast majority (83%) of individuals sentenced to life without the possibility of parole).

Pennsylvania, of course, is not so selective in its use of life-without-parole sentences, meting them out all individuals convicted of second-degree murder, even those who did not kill or intend to kill.

It should come as no surprise, then, that in the past year, the United Nations repeatedly condemned the continued use of death by incarceration in the United States. Indeed, in advance of a meeting of delegates to the United Nations Human Rights Council in October 2023, that body released a report condemning the use of life without parole.<sup>24</sup> Emphasizing the importance of parole eligibility for all individuals, it wrote:

[D]isproportionate, excessive and discriminatory sentencing beyond life expectancy is a cruel, inhuman and degrading treatment, in violation of international human rights standards protecting life, liberty and against torture. All prison sentences in the United States should include parole eligibility within a reasonable number of years, and always below life expectancy.

On the heels of that meeting, the U.N. special rapporteur on racism released a statement, acknowledging that the practice of sentencing people to die in prison inherently violates any stated purpose of rehabilitation. “Without the chance of parole,” the statement reads, “the rehabilitative function of the prison system is negated, reducing it to a tool of segregation and exploitation.”<sup>25</sup> And on November 3, 2023, the U.N. Human Rights Council issued conclusions and recommendations

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<sup>24</sup> United Nations Human Rights Council, *International Independent Expert Mechanism to Advance Racial Justice and Equality in the Context of Law Enforcement* (A/HRC/54/69) (Sept. 26, 2023), <https://www.ohchr.org/en/documents/country-reports/ahrc54crp7-international-independent-expert-mechanism-advance-racial>.

<sup>25</sup> *Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance: End of visit statement: United States of America*, Oct 31-Nov 14, 2023, <https://www.ohchr.org/sites/default/files/documents/issues/racism/sr/statements/2023-11-14-EOM-SR-Racism-usa-en.pdf>.

based on a review of United States compliance with international law, in which it called on the United States to “establish a moratorium on the imposition of sentences to life imprisonment without parole.”<sup>26</sup> In its conclusions, the U.N. acknowledged—for the first time—that the practice of death by incarceration violates the International Covenant on Civil and Political Rights, a treaty that the United States has ratified.

**b. Felony Murder.**

Pennsylvania’s rule is also out of step with the global community’s strong disapproval of the concept of felony murder. Over the past 100 years, felony murder has increasingly been recognized by foreign jurisdictions as violating the fundamental principles of justice and proportionality,<sup>27</sup> concepts that in the United States are “central to the Eighth Amendment.” *Graham*, 560 U.S. at 59. Indeed, the doctrine has been abandoned in the United Kingdom, where the rule originated and from which it subsequently spread to other Commonwealth countries and the

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<sup>26</sup> United Nations Human Rights Council, *Concluding observations on the fifth periodic report of the United States of America* (CCPR/C/USA/CO/5) (Nov. 3, 2023), [https://ccrjustice.org/sites/default/files/attach/2023/11/ICCPR\\_US\\_Concluding\\_Observations\\_2023.pdf](https://ccrjustice.org/sites/default/files/attach/2023/11/ICCPR_US_Concluding_Observations_2023.pdf).

<sup>27</sup> *See R. v Martineau*, [1990] 2 S.C.R. 633, 645 (Can.). *See also*, M. Wingersky, *Report of the Royal Commission on Capital Punishment (1949-1953): A Review*, 44 J. OF CRIM. L., CRIMINOLOGY, & POLICE SCI. 695, 702 (1954) (“We have no doubt that, as a matter of general principal, persons ought not to be punished for consequences of their acts which they do not intend or foresee. The doctrine of [felony murder] clearly infringes this principle.”).

United States. *See* Homicide Act of 1957, 5 & 6 Eliz.2 c.11, § 1 (Gr. Brit.); Criminal Justice Act of 1966, c. 20, § 8 (N. Ir.).

Other countries have followed suit, including the Republic of Ireland, Antigua and Barbuda, Barbados, Kiribati, and Tuvalu, each abolishing the doctrine in the 1960s.<sup>28</sup> In 1990, the Canadian Supreme Court eliminated the doctrine altogether, underscoring “the principle of fundamental justice that subjective foresight of death is required before a conviction for murder can be sustained,” which, in the court’s opinion, is necessary to “maintain a proportionality between the stigma and punishment attached to a murder conviction and the moral blameworthiness of the offender.”<sup>29</sup> Additionally, several Commonwealth countries, including India, Malaysia, Pakistan, Singapore, and Sri Lanka, have never recognized felony murder.<sup>30</sup>

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<sup>28</sup> *See* Criminal Justice Act 1964 (Act No. 5/1964), § 4 (Ir.), <http://www.irishstatutebook.ie/eli/1964/act/5/section/4/enacted/en/html#sec4>; Offenses against the Person Act, 1982 (Cap. 300), § 10 (Ant. & Barb.); Offenses against the Person Act, 1994 (Act No. 18/1994), § 3 (Barb.); Penal Code, 1965 (Cap. 67), § 194 (Kiribati); Penal Code, 1965 (Cap. 10.20), § 194 (Tuvalu).

<sup>29</sup> *R. v Martineau*, [1990] 2 S.C.R. 633, 644-45 (Can.).

<sup>30</sup> *See* Indian Penal Code, 1860 (Act No. 45/1860) §§ 299-300; Malaysian Penal Code, 1936 (F.M.S. Cap. 45), §§ 299-300; Pakistan Penal Code, 1860 (Act No. 45/1860), §§ 299-300; Singapore Penal Code, 1871 (Ord. No. 4/1871) §§ 299-300; Sri Lanka Penal Code, 1883 (Ord. No. 2/1883), §§ 293-94. *See also* Bangladesh Penal Code, 1860 (Act No. 45/1860), §§ 299-300; M. Sornarajah, *The Definition of Murder under the Penal Code*, Sing. J. Legal Stud., July 1994, at 1 n.2; J. Li. J. Edwards, *Constructive Murder in Canadian and English Law*, 1 Univ. of Malaya L. Rev. 17, 33-34 (1959).

What's more, the European Court of Human Rights has held that life-without-parole sentences for felony-murder convictions require even closer scrutiny than other life-without-parole sentences because a life-without-parole sentence in such a case is more likely to be grossly disproportionate due to the lessened culpability of the convicted individual. *Harkins v. United Kingdom*, Application nos. 9146/07 and 32650/07, ¶¶138-39 (Jan. 17, 2012).

Against that backdrop, Pennsylvania's blanket diktat that all felony-murder convictions carry a life-without-parole sentence cannot be squared with the cruel-punishment prohibitions of the U.S. and Pennsylvania Constitutions.

**B. Sentencing an Individual Convicted of Felony Murder to Life Without Parole Violates the Eighth Amendment's Proportionality Principle.**

The national and international consensus against the challenged sentencing practice are "entitled to great weight," but community consensus alone "is not itself determinative of whether a punishment is cruel and unusual." *Graham*, 560 U.S. at 67 (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 434 (2008)). Thus, courts must take the second step of assessing for themselves whether the sentencing practice at issue violates the Eighth Amendment. *Id.* That assessment involves asking both whether the severity of the punishment is warranted by the individual's culpability and whether the challenged sentence serves legitimate penological goals. Here, the answer to both questions is "no."

## 1. The Rationale Behind Felony Murder Does Not Justify a Lifetime Ban on Parole Eligibility.

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

In terms of penal severity, “life without parole is ‘the second most severe penalty permitted by law.’” *Graham*, 560 U.S. at 69 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment)). Though technically less punitive than the death penalty, life without parole shares “some characteristics with death sentences that are shared by no other sentences,” *id.*; like capital punishment, it guarantees that—absent executive clemency—the person will die in prison.<sup>31</sup>

And on the correlative question of culpability, the U.S. Supreme Court has repeatedly emphasized the principle that certain circumstances or characteristics make an individual categorically less culpable—and hence less deserving of the law’s most severe punishments. Four decisions of that Court are instructive. First, in *Enmund v. Florida*, the Court overturned the capital sentence of an individual

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<sup>31</sup> Given Pennsylvania’s longstanding gubernatorial moratorium on the death penalty, a life-without-parole sentence is, as a practical matter, the most severe penalty permitted here.

who aided and abetted a robbery during which a murder occurred, but who did not himself kill, noting that Enmund “did not commit the homicide, was not present when the killing took place, and did not participate in a plot or scheme to murder.” 458 U.S. 782, 795 (1982). In so holding, it observed that people who do not kill, intend to kill, or foresee that life could be taken are categorically less deserving of the most serious forms of punishment than are people who intentionally kill. *Id.* at 797-801.<sup>32</sup>

Building on the rationale that those with lesser culpability should not be subjected to the harshest criminal penalties, the Court in *Roper v. Simmons* declared the juvenile death penalty unconstitutional because “[c]apital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” 543 U.S. 551, 568 (2005) (citing *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). Differences between youths and adults, the Court reasoned, demonstrated that young people cannot be classified as the worst offenders:

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<sup>32</sup> The Court’s later decision in *Tison v. Arizona*, 481 U.S. 137 (1987), is not contrary. There, the Court held that the culpability requirement announced in *Enmund* is satisfied by “major participation in the felony committed, combined with reckless indifference to human life.” *Id.* at 158. Nothing in *Tison*, however, undermined *Enmund*’s fundamental recognition that the law’s harshest penalties are inappropriate for those with diminished culpability—a conclusion that is confirmed by the fact that numerous post-*Tison* decisions have relied on *Enmund* for precisely that proposition. See *Graham*, 560 U.S. at 69.



immaturity diminishes their culpability, as does their susceptibility to outside pressures and influences. *Id.* at 569-70.

Next came *Graham v. Florida*, 560 U.S. 48 (2010), in which the Court banned the use of life-without-parole sentences for minors not convicted of homicide. In *Graham*, a case which marked the first time a categorical ban was made with respect to a non-capital sentence, the Court again recognized “that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers.” *Id.* at 69. Thus, a minor convicted of felony murder “who did not kill or intend to kill has twice diminished moral culpability.” *Id.*

Just two years later, the Court struck down statutes in 29 States that mandated life-without-parole sentences for people under age 18, even those who committed homicide offenses, reasoning that “[b]ecause juveniles have diminished culpability and greater prospects for reform...they are less deserving of the most severe punishments.” *Miller*, 567 U.S. at 471.

Although much of what the Court said in *Roper*, *Graham*, and *Miller* about diminished culpability was framed in terms of juvenile defendants, the fundamental thesis of those decisions—that a person with diminished culpability should not be subject to the law’s harshest penalties—applies here with similar

force. Those convicted of *felony* murder lack the core driver of culpability for an individual convicted of murder: the intent to take a human life.

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

## **2. A Lifetime Ban on Parole Eligibility for Felony Murder Serves No Legitimate Penological Purpose.**

The U.S. Supreme Court also instructs that “[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.” *Graham*, 560 U.S. at 71. None of the penological goals of retribution, rehabilitation, incapacitation, or deterrence justifies a lifetime ban on parole eligibility for someone convicted of felony murder.

### **a. Retribution**

*First*, retribution does not justify a lifetime ban on parole consideration for a person who did not intend to kill. “American criminal law has long considered a defendant’s intention—and therefore his moral guilt—to be critical to ‘the degree of [his] criminal culpability’ and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing.” *Enmund*, 458 U.S. at 800 (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975)); *see Tison*, 481 U.S. at 149 (“The heart of the retribution rationale is that a criminal

sentence must be directly related to the personal culpability of the criminal offender.”). It follows that an individual like Mr. Lee, who could not foresee that life would be taken, is categorically less deserving of the most serious forms of punishment. *See Graham*, 560 U.S. at 69.

It also bears noting that the retributive burdens of the felony-murder statute’s sentencing and parole regime do not fall evenly across our society. Indeed, data from Pennsylvania and elsewhere demonstrate consistently stark racial disparities among those convicted of felony murder. In Pennsylvania, four of every five imprisoned individuals with a felony-murder conviction were people of color as of 2020; 70 percent were Black, though Black people make up only eleven percent of our population. Andrea Lindsay & Clara Rawlings, *Life Without Parole for Second-Degree Murder in Pennsylvania: An Objective Assessment of Race* (2021) [https://www.plsephilly.org/wpcontent/uploads/2021/04/PLSE\\_SecondDegreeMurder\\_and\\_Race\\_Apr2021.pdf](https://www.plsephilly.org/wpcontent/uploads/2021/04/PLSE_SecondDegreeMurder_and_Race_Apr2021.pdf). Studies have found similar racial disparities in other States, as well, including California, Colorado, Illinois, Massachusetts, Minnesota, and Missouri. Nazgol Ghandnoosh, *et al.*, *Felony Murder: An On-Ramp For Extreme Sentencing* (2022); *see also Fisher Amicus Br.*, *supra* note 16 at 21-33.

**b. Rehabilitation and Incapacitation**

*Second*, permanent incarceration, by its nature, rejects any goal of rehabilitating the convicted individual and instead wholly embraces the goal of

incapacitating an individual in perpetuity. Defending a life-without-parole sentence based on the rationale of incapacitation necessarily assumes that a person is irredeemable and must therefore “be isolated from society in order to protect the public safety.” *See Ewing v. California*, 538 U.S. 11, 25 (2003). But there is no evidence to suggest that individuals convicted of felony murder categorically require that degree of isolation from society. To the contrary, penal research has demonstrated that individuals with violent convictions—*i.e.*, assault, robbery, and murder—were less likely to recidivate when released from prison than those with drug or property convictions.<sup>33</sup> A powerful example stems from *Unger v. Maryland*, a landmark case centered on remedying jury instructions, which resulted in the release of nearly 200 people who had served more than 30 years and been sentenced to life terms for violent crimes, including murder. A case study released six years after the decision reports that, in that time, only five out of the

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<sup>33</sup> Mariel Alper *et al.*, *2018 update on prisoner recidivism: A 9-year follow-up period (2005-2014)* (2018), <https://bjs.ojp.gov/content/pub/pdf/18upr9yfup0514.pdf> (re-offense rates for those convicted of a violent crime were 22-percent lower than for those convicted of property offenses). *See also* Barbara Levine & Elsie Kettunen, *Paroling people who committed serious crimes: What is the actual risk?* (2014) [https://www.safeandjustmi.org/wp-content/uploads/2014/12/Paroling\\_people\\_who\\_committed\\_serious\\_crimes.pdf](https://www.safeandjustmi.org/wp-content/uploads/2014/12/Paroling_people_who_committed_serious_crimes.pdf) (finding that those paroled in Michigan with convictions for second-degree murder, manslaughter, or a sex offense were about two-thirds less likely to be reimprisoned for a new crime within three years as the total paroled population); J.J. Prescott *et al.*, *Understanding Violent-Crime Recidivism*, 95 *Notre Dame L. Rev.* 1643-1698 (2014) (reincarceration rates among people imprisoned for murder or non-negligent homicide were less than half that of the general population released from prison).

188 people (i.e., less than 3 percent of those) released under *Unger* returned to prison for violating parole or committing a new crime.<sup>34</sup>

Other examples can be found closer to home. Take Mr. Antonio Howard, for instance, who was convicted of second-degree homicide and sentenced to life-without-parole at age fifteen. He was released from prison after twenty-six years, following the U.S. Supreme Court's decision in *Montgomery*, and has since held several jobs—from janitor to Mental Health Association supervisor and now paralegal for the Federal Defender for the Western District of Pennsylvania. A staple of public and artistic life in Erie, Pennsylvania, he regularly takes part in programs aimed at sharing the experience and insight he gained during decades in prison.<sup>35</sup>

The case for permanent incapacitation is further weakened by the fact that 73 percent of those statutorily prohibited from parole consideration in Pennsylvania for felony murder were twenty-five years old or younger at the time of their offense, Lindsay & Rawlings, *Objective Assessment*, meaning that they both were likely operating with a diminished appreciation of the potential

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<sup>34</sup> *The Ungers, 5 Years and Counting: A Case Study in Safely Reducing Long Prison Terms and Saving Taxpayer Dollars*, JUSTICE POLICY INSTITUTE (Nov. 15, 2018), at 17, <https://justicepolicy.org/research/reports-2018-the-ungers-5-years-and-counting-a-case-study-in-safely-reducing-long-prison-terms-and-saving-taxpayer-dollars/>.

<sup>35</sup> *Stories: Antonio Howard*, FAMM, <https://famm.org/antonio-howard/> (accessed: April 23, 2024).

consequences of their actions at the time of their offense and are especially likely to benefit from rehabilitative intervention.

The academic literature validates this conclusion. Studies show, for example, that crime rates peak around the late teenage years and begin a gradual decline in the early twenties.<sup>36</sup> Similarly, nearly half of those serving life-without-parole sentences for second-degree murder in Pennsylvania are now age 50 or older and nearly 60 percent have already served over 20 years, Lindsay & Rawlings, *Objective Assessment*, which puts them at very low odds of recidivation. See Piquero, *et al.*, *Criminal Career Patterns in R. Loeber & D. P. Farrington (Eds.), From Juvenile Delinquency to Adult Crime: Criminal Careers, Justice Policy, and Prevention*, at 40 (“Criminal careers are of a short duration (typically under 10 years), which calls into question many of the long-term sentences that have characterized American penal policy.”); Alper *et al.*, *2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014)*, *supra* note 33 (observing that aging out of crime is a key reason why people who have been imprisoned for violent crimes—and generally serve longer sentences—are the least likely to recidivate). The extant evidence, in other words, deeply undercuts any

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<sup>36</sup> See Ashley Nellis & Breanna Bishop, *A New Lease on Life* (2021), <https://www.sentencingproject.org/wp-content/uploads/2021/06/A-New-Lease-on-Life.pdf>; Fair and Just Prosecution, Joint statement on sentencing second chances and addressing past extreme sentences (2021), <https://fairandjustprosecution.org/wp-content/uploads/2021/04/FJP-Extreme-Sentences-and-Second-Chances-Joint-Statement.pdf>.

argument that continued, indefinite parole ineligibility can be justified by a need for permanent incapacitation.

On the other side of the coin, rehabilitation is the penological goal that forms the basis of parole systems. *Graham*, 560 U.S. at 73 (citing *Solem v. Helm*, 463 U.S. 277, 300 (1983)). But a sentence that virtually guarantees a person will die in prison ignores that goal, “makes an irrevocable judgment about that person’s value and place in society,” and “forswears altogether the rehabilitative ideal.” *Id.* at 74. Inalterable judgment of the harshest kind is particularly inappropriate here. The irrebuttable presumption that someone who did not intend to commit murder is incapable of rehabilitation is, almost by definition, unconscionably cruel.<sup>37</sup>

### **c. Deterrence**

Finally, Pennsylvania’s felony-murder rule does not have the deterrent effect its proponents assert. For one thing, the threat of any harsh sentence, including death-by-incarceration, can have little effect on those who did not foresee that a life would be taken or contemplate that lethal force would be employed by another. In other words, those convicted of felony murder—who did not kill nor intended to kill—are not the ones to be deterred. Indeed, “capital punishment can serve as a

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<sup>37</sup> It warrants mention that racial disparities endemic to Pennsylvania’s sentencing scheme have the practical effect of rejecting rehabilitation for people of color—particularly African Americans—out of hand. See Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. Rev. 1103, 1118-19 (1990) (95 percent of those prosecuted for felony murder in Florida in a three-year period were Black).

deterrent only when murder is the result of premeditation and deliberation.”

*Atkins*, 536 U.S. at 320; *see also* Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 *Cornell L. Rev.* 446, 451-52 (1985) (a severe felony-murder sentence provides little to no deterrence because the act to be deterred—the killing of another—was, by definition, either unintentional or undertaken by a third party).

For another, research on mandatory penalties has long documented that, even assuming a person is familiar with a relevant legal penalty, the deterrent effect of incarceration is more a function of the *certainty* of the punishment than of its *severity*. *See* National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, 132-33 (2014); Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 *Oxford Journal of Legal Studies* 173-205 (2004) (long sentences have only a limited deterrent effect on those considering criminal conduct). Thus, lengthy periods of incarceration resulting from mandatory sentences generally provide little additional deterrence and come at the expense of more effective investments in public safety. National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 132-33.

At bottom, no penological theory justifies life without parole for individuals convicted of felony murder. That determination, coupled with the lesser



culpability of a person convicted of felony murder, compels the conclusion that Section 6137(a)(1) of the Parole Code is categorically cruel and unusual in violation of the Eighth Amendment.

#### IV.

#### CONCLUSION

For these reasons, and those set forth in Appellant's submission, this Court should reverse the Superior Court's decision and hold that Section 6137(a)'s mandatory, automatic prohibition on parole consideration for individuals convicted of felony murder violates both the Eighth Amendment to the U.S. Constitution and the Cruel Punishments Clause of the Pennsylvania Constitution.

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Respectfully submitted,

*/s/ Mark D. Taticchi*

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**CERTIFICATE OF TYPE-VOLUME COMPLIANCE**

I hereby certify that this brief contains 6,981 words, as determined by the word-count feature of Microsoft Word 2016, the word-processing program used to prepare this brief, and excluding the portions of the brief exempted by Pa.R.A.P. 2135(d).

Dated: April 26, 2024

*/s/ Mark D. Taticchi*  
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**CERTIFICATE OF COMPLIANCE WITH PA.R.A.P. 127**

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

Dated: April 26, 2024

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