

In The

Supreme Court of Pennsylvania

3 WAP 2024

COMMONWEALTH OF PENNSYLVANIA

Respondent

v.

DEREK LEE

Petitioner

**AMICI CURIAE BRIEF OF THE SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF
RACISM AND EXPERT MECHANISM TO ADVANCE RACIAL JUSTICE AND EQUALITY IN
LAW ENFORCEMENT (EMLER) IN SUPPORT OF PETITIONER**

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

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STATEMENT OF INTEREST OF *AMICI CURIAE*¹

Amici curiae are Ashwini K.P., the sixth Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, and Judge Akua Kuenyehia (Chair), Dr. Tracie Keese, and Professor Juan Méndez, members of the Expert Mechanism to Advance Racial Justice and Equality in Law Enforcement (EMLER). *Amici curiae* are experts appointed by the United Nations Human Rights Council, of which the United States is a member, and can provide the Court with relevant analysis based on their expertise in human right standards with respect to cruel, inhuman, or degrading treatment and racial justice. *Amici* have a strong interest in ensuring that Member States respect human rights and that their judicial interpretations are consistent with international human rights law.

Amici curiae are experts appointed by the U.N. Human Rights Council with mandates to report and advise on human rights from a thematic or country-specific perspective. The Special Rapporteur is part of “[t]he system of Special Procedures” that “is a central element of the United Nations human rights machinery and covers all human rights: civil, cultural, economic, political, and social.”² As mandate-holders, *amici* are independent human rights experts selected for their “(a) expertise; (b) experience in the field of the mandate; (c) independence; (d) impartiality; (e) personal integrity; and (f) objectivity.”³ The mandate-holders “undertake to uphold

¹ Pursuant to Rule 531(b)(2), no person or entity was paid in whole or in part to prepare this brief.

² Office of the High Commissioner for Human Rights (“OHCHR”), *Special Procedures of the Human Rights Council*, <https://www.ohchr.org/en/hrbodies/sp/pages/introduction.aspx> (last visited April 26, 2024).

³ Human Rights Council, Institution-building of the United Nations Human Rights Council, A/HRC/RES/5/1 (June 18,

independence, efficiency, competence and integrity through probity, impartiality, honesty and good faith” and “do not receive financial remuneration.”⁴ EMLER was established by the Human Rights Council through resolution A/HRC/RES/47/21 on 13 July 2021. The Human Rights Council decided to establish an international independent expert mechanism, comprising three experts with law enforcement and human rights expertise, to be appointed by the President of the Human Rights Council.⁵

In the performance of their mandates, Special Rapporteur and members of EMLER are accorded certain privileges and immunities as experts on mission for the United Nations pursuant to the Convention on the Privileges and Immunities of the United Nations, adopted by the United Nations General Assembly on February 13, 1946, to which the United States is a party since April 29, 1970. This submission is provided on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations. Authorization for the positions and views expressed by the mandate-holders, in full accordance with the independence afforded to their mandates, was neither sought nor given by the United Nations, the Human Rights Council, the Office of the High Commissioner

2007), https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/5/1 (last visited April 26, 2024)

⁴ OHCHR, *Special Procedures of the Human Rights Council*.

⁵ Human Rights Council, “Resolution A/HRC/RES/47/21: Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers through transformative change for racial justice and equality” 13 July 2021

for Human Rights, or any of the officials associated with those bodies.

Amici share their expertise to explain why Pennsylvania’s mandatory imposition of life without parole (“LWOP”) sentences for people convicted of second-degree murder violates international human rights law as well as why this jurisprudence is relevant to analyses under the Eighth Amendment and Article I § 13 of the Pennsylvania Constitution, which is, at a minimum, co-extensive with the U.S. Constitution.⁶

SUMMARY OF ARGUMENT

Petitioner, Derek Lee, is one of over 1,000 people, who have been sentenced to life-without-parole for a felony-murder conviction in Pennsylvania, which is one of only two U.S. states that mandate life-without-parole sentences for people convicted of felony-murder irrespective of whether they killed or intended to kill.

First, *Amici curiae* demonstrate why Pennsylvania is not just an outlier in the United States, but globally, both in terms of the number of people serving this punishment and the manner in which it is imposed. In addition, because a life without parole sentence in Pennsylvania effectively guarantees a person will die in prison, this sentence amounts to “death by incarceration” and contravenes international human rights law, to which the United States is bound. As *Amici* set further below,

⁶ The Pennsylvania Constitution provides that “Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.” Pa. Const., art. I, § 13. This Court has often observed that this provision of the PA Constitution is at least as protective of individuals’ rights as the Eighth Amendment. *See Commonwealth v. Edmunds*, 586 A.2d 887, 894 (Pa. 1991).

U.S. courts have looked to the international human rights analogue of “cruel, inhuman, or degrading treatment” (CIDT) as well as similar standards of other jurisdictions worldwide in evaluating what amounts to “cruel and usual punishment” under the Eighth Amendment of the U.S. Constitution.

Second, drawing from past statements and relevant empirical evidence, *Amici* also conclude that Pennsylvania’s racially disparate sentencing of Black and Brown Pennsylvanians to life without parole violates the prohibition against racial discrimination under international human rights law. We express alarm that this punishment falls unevenly across racial lines: at last count, approximately 80 percent of these 1,100 individuals currently serving life-without-parole sentences for felony murder in this Commonwealth are people of color.

As we have concluded in our prior evaluations of the United States’ human rights record cited herein, such forms of racial discriminatory and extreme sentencing that exceed life expectancy amount to CIDT and should be abolished.

ARGUMENT

I. GLOBAL STANDARDS ARE EVIDENCE OF AN EVOLVING STANDARD OF DECENCY CRUCIAL TO “CRUEL AND UNUSUAL PUNISHMENT” ASSESSMENTS UNDER THE EIGHTH AMENDMENT.

Understandings of what constitutes cruel and unusual punishment under the Eighth Amendment are not fixed in time; they draw from the “evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958). When evaluating the “evolving standards of decency,” the U.S. Supreme Court has often looked to the laws and practices of international and foreign jurisdictions as persuasive authority.⁷ As the U.S. Supreme Court explained in *Graham v. Florida*, 560 U.S. 48, 80 (2010), there is a “longstanding practice in noting the global consensus against the sentencing practice in question.” State courts have followed suit, looking to comparative and international law sources when reviewing challenges to the constitutionality of punishment, either under the Eighth Amendment of the U.S. Constitution or the analogous provision under their state constitutions.⁸ If Pennsylvania were to consider global trends, as it has done in the

⁷ *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (“[A]t least from the time of the Court’s decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments.’”); *see also* *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (“[W]ithin the world community, the imposition of the death penalty for crimes committed by [intellectually disabled] offenders is overwhelmingly disapproved.”); *Trop*, 356 U.S. at 102 (“The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.”). For a comprehensive review of the citations of international and foreign sources in U.S. Supreme Court decisions, see Sarah H. Cleveland, *Our International Constitution*, 31 *YALE J. INT’L L.* 1, 2–3 (2006).

⁸ MARTHA F. DAVIS ET AL., *HUMAN RIGHTS ADVOCACY IN THE UNITED STATES* 278 (2d ed. 2018). For a comprehensive survey of state courts looking to international human rights law to inform their decision-making, see Martha F. Davis et al., *Human Rights in State Courts 2014*, THE OPPORTUNITY AGENDA & THE PROGRAM ON HUMAN RIGHTS IN THE GLOBAL ECONOMY OF NORTHEASTERN UNIVERSITY SCHOOL OF LAW, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2394019.

past,⁹ it would conclude that LWOP sentences for felony-murder are cruel and unusual.

II. THE INHUMAN AND DISCRIMINATORY PRACTICE OF DEATH BY INCARCERATION, PARTICULARLY FOR FELONY MURDER, SHOULD BE ABOLISHED IN PENNSYLVANIA.

A. Pennsylvania is Egregiously Out of Step with the Global Consensus against Death by Incarceration.

Pennsylvania's use of LWOP sentences is grossly out of line with the rest of the world. In most regions of the world, LWOP sentences are exceedingly rare. Because so few countries in Latin America employ life sentences (even with parole), Latin America has been referred to as a "life imprisonment almost-free zone."¹⁰ Life sentences that lack the possibility of parole are rarer still, only existing as a possible sanction in four Latin American countries.¹¹ Similarly, in Europe, only ten countries permit LWOP sentences.¹² In those rare European countries that employ LWOP, the European Court of Human Rights (ECtHR), the court mandated to interpret and enforce the European Convention on Human Rights, has held that such sentences amount to CIDT if they lack any possibility of review and release.¹³ Pointedly, the

⁹ See *Commonwealth v. Foust*, 2018 PA Super 39, 180 A.3d 416, 425 (2018)

(noting that the U.S. Supreme Court has concluded that "international consensus could not be ignored in today's global society" in the context of an Eighth Amendment analysis).

¹⁰ Francisco Javier de Leon Villalba, *Imprisonment and Human Rights in Latin America: An Introduction*, 98 PRISON J. 17, 26 (2018).

¹¹ Beatriz López Lorca, *Life Imprisonment in Latin America*, in LIFE IMPRISONMENT AND HUMAN RIGHTS 52 (Dirk van Zyl Smit & Catherine Appleton eds., 2016) (documenting how LWOP sentences are only used in Argentina, Cuba, Peru, and four states in Mexico).

¹² 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) ("These countries are Bulgaria, Hungary, Lithuania, Malta, the Netherlands, Slovakia, Sweden, Turkey, Ukraine, and the United Kingdom.").

¹³ *Vinter v. United Kingdom*, App. Nos. 6609/09, 130/10, & 3896/10, ¶ 119 (July 9, 2013), <https://hudoc.echr.coe.int/eng?i=001-122664> (finding 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

ECtHR concluded that it is “incompatible with . . . human dignity . . . to deprive a person of his freedom forcefully without at least providing him with the chance to regain that freedom one day.”¹⁴ Countries across Latin America, Asia, and Africa have come to the same conclusion, finding that LWOP sentences are incompatible with human dignity and thus illegal, if they cannot be reviewed and reduced.¹⁵ Since human dignity is a concept that also underlies the Eighth Amendment, this reasoning should hold considerable weight here.¹⁶ Indeed, on this basis, some advocates have argued that a right to redemption could be read into the Eighth Amendment, thereby intertwining conceptions of human dignity worldwide.¹⁷ Even countries that allow LWOP sentences generally use them sparingly.¹⁸ Thus, the fact that the United States is one of the rare countries that employ LWOP sentences, and Pennsylvania is one of only six states where all life sentences lack any possibility of parole, should throw its use into question.¹⁹

B. Pennsylvania’s Mandatory LWOP Sentences Violate International Human Rights Law.

Not only is Pennsylvania’s employment of LWOP out of line with the rest of

of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds).

¹⁴ *Id.* at 347.

¹⁵ Center for Law and Global Justice, University of San Francisco, School of Law, *Cruel and Unusual: U.S. Sentencing Practices in a Global Context*, May, 2012, at 25 [hereinafter U.S. Sentencing in Global Context]; Lorca, *supra* note 7, at 54 (documenting how jurisdictions across Latin America have found life sentences, including LWOP sentences, that forbore the prospect of release are incompatible with human dignity and thus cruel and unusual.) For a summary of all jurisdictions that follow this precedent, see Terrell Carter, Rachel Lopez & Kempis Songster, *Redeeming Justice*, 116 *Nw. U. L. REV.* 315, 373-80 (2021).

¹⁶ See, e.g., Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 *U. ILL. L. REV.* 2129, 2140–42 (2016) (noting that the Court has described human dignity as “the touchstone of the Amendment’s prohibition”).

¹⁷ Carter et al., *supra* note 11, at 367-80.

¹⁸ See U.S. Sentencing in Global Context, *supra* note 11, at 25.

¹⁹ *Id.* at 22.

the world, it is also at odds with the United States' international obligation to ensure humane, restorative treatment of all detained individuals, including those sentenced to life imprisonment.²⁰ Namely, several treaties that are binding on the United States protect individuals' rights to dignity and prohibit torture, and cruel, inhuman, and degrading punishment including the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).²¹

Like the ECtHR, the United Nations Human Rights Committee, which monitors the implementation of the ICCPR by its State parties, including the United States which ratified the ICCPR on 8 Jun 1992, has concluded that those serving life sentences are entitled to more than just a theoretical possibility of review and release on the basis of their progress toward rehabilitation.²² The Human Rights Committee grounded its decision in Articles 7 and 10 (3) ICCPR, which provide protection from CIDT and enshrine that treatment of people incarcerated in the penitentiary system should fulfill the essential aim of reformation and social rehabilitation respectively.²³ More recently, after concluding its periodic review of this country, the Human

²⁰ The International Covenant on Civil and Political Rights (ICCPR, which has been binding on the United States since it ratified this treaty on June 8, 1992, ensures humane, restorative treatment of individuals sentenced to life imprisonment. *See* The International Covenant on Civil and Political Rights art. 10(3), Mar. 23, 1976, 999 U.N.T.S. 171. The United States has also signed the American Convention on Human Rights, which provides that “[p]unishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners,” and accordingly must not undermine the object and purpose of this treaty. *See* Pact of San José, Costa Rica, American Convention on Human Rights art. 5.6, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143.

²¹ International Covenant on Civil and Political Rights, *supra* note 20, at art. 7, 10; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, 1465 U.N.T.S. 85.

²² United Nations Human Rights Committee, Communication No. 1968/2010, ¶¶ 7.7, 7.8 (Nov. 3, 2014).

²³ *Id.* at ¶ 8.

Rights Committee recommended that the United States establish “a moratorium on the imposition of sentences to life imprisonment without parole.”²⁴ In addition to Articles 7 and 10 of the ICCPR, it cited Article 2, which provide protection from discrimination, including on the basis of race and color, and establishes equality before the law, and Article 26, which establishes the right to equal protection of the law, free from discrimination.²⁵

Similarly, EMLER has concluded that “disproportionate, 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.”²⁶ Accordingly, in order to comply with international human rights law, EMLER has recommended that “[a]ll prison sentences in the United States should include parole eligibility within a reasonable number of years, and always below life expectancy.”²⁷

Furthermore, the clemency process in Pennsylvania is not enough to bring it in line with these international human rights standards.²⁸ Specifically, the ECtHR, whose jurisprudence informs evolving international human rights norms, has found

²⁴ United Nations Human Rights Committee, *Concluding Observations on the Fifth Periodic Report of the United States of America*, ¶ 47 CCPR/C/USA/CO/5 (Nov. 3, 2023).

²⁵ *Id.* at ¶ 46.

²⁶ International Independent Expert Mechanism to Advance Racial Justice and Equality in the Context of Law Enforcement - Visit to the United States of America, ¶97, U.N. Doc. A/HRC/54/CRP.7 (Sept. 26, 2023).

²⁷ *Id.*

²⁸ As the Pennsylvania Board of Pardons’s website clarifies, those individuals “serving life sentences must apply for commutation of their life sentence as their only means of release since there is no such thing as parole for lifers in Pennsylvania.” *Clemency Applications*, PA. BD. OF PARDONS, <https://www.bop.pa.gov/application-process/Pages/clemency.aspx> [<https://perma.cc/X454-ZHEN>].

that clemency procedures in which there is no “legal obligation for the executive to give reasons for its decisions” or no “objective, pre-established criteria” fall short of this standard.²⁹ Similarly, Pennsylvania’s clemency procedure does not satisfy these international human rights standards, as it does not require the Board of Pardons to explain its reasons for denying an application, nor have fixed criteria that guide its decision-making.³⁰ It is also a very politicized process that lacks any mechanism for review.³¹ In light of its unpredictability, the clemency process in Pennsylvania falls short of the guarantees to a certain and predictable process described in ECtHR jurisprudence.³²

C. Pennsylvania is a Global Outlier in its Use of Felony Murder.

Additionally, those countries that do have LWOP sentences generally reserve them for the most extreme cases.³³ In stark contrast, not only does Pennsylvania mandate LWOP sentences for intentional homicides, it also mandates them for individuals convicted under the antiquated doctrine of felony murder.³⁴ This doctrine

²⁹ *Hutchinson v. United Kingdom*, App. No. 57592/08, ¶ 59 (Jan. 17, 2017), <http://hudoc.echr.coe.int/eng?i=001-170347> [<https://perma.cc/TZ2Z-PX4U>].

³⁰ See Carter et al., *supra* note 11, at 365-66; *The Demise of Clemency for Lifers in Pennsylvania*, NYU CTR. ON ADMIN. OF CRIM. L., STATE CLEMENCY PROJECT 3 (2020), [https://www.law.nyu.edu/sites/default/files/CACL%20Clemency-PA_Final%20\(1\).pdf](https://www.law.nyu.edu/sites/default/files/CACL%20Clemency-PA_Final%20(1).pdf) [<https://perma.cc/L7ZW-2752>]; *Former Pennsylvania Governors*, NAT’L GOVERNORS ASS’N, <https://www.nga.org/former-governors/pennsylvania/> [<https://perma.cc/7D6C-X9U2>] (“An unfavorable vote ends the process without formal written explanation and triggers a one- or two-year waiting period before a subsequent application may start the process anew.”).

³¹ NYU CTR. ON ADMIN. OF CRIM. L., *supra* note 26, at 1 (noting that the clemency process is extremely political since two of the five members of the Board of Pardons are elected officials, and the Governor must approve every commutation. Since 1995, only one commutation has been granted by a republican governor in comparison to two democratic governors who granted twenty-seven commutation of life sentences).

³² See *Vinter*, App. Nos. 6609/09, 130/10, & 3896/10 at ¶¶ 124, 125; see also *Murray v. Netherlands*, App. No. 10511/10, ¶ 100 (Apr. 26, 2016), <http://hudoc.echr.coe.int/fre?i=001-138893> [<https://perma.cc/VGB6-EBVD>].

³³ See U.S. Sentencing in Global Context, *supra* note 11, at 26.

³⁴ 18 Pa. Const. Stat. § 2502(b) (2019) (defining felony-murder as second degree murder), 18 Pa. Const. Stat. § 1102(b) (2019) (mandating life sentences for second degree murder), 61 Pa. Const. Stat. § 6137 (2019) (removing eligibility for parole for those serving life sentences).

has over the past century been increasingly recognized by foreign jurisdictions as violating the fundamental principles of justice and of proportionality,³⁵ a concept that in the United States is “central to the Eighth Amendment.”³⁶ The United Kingdom, where the felony murder rule originated and subsequently spread to other Commonwealth countries and the United States, abolished felony murder starting as early as 1957.³⁷ Other countries followed suit, including the Republic of Ireland, Antigua and Barbuda, Barbados, Kiribati, and Tuvalu, each abolishing the doctrine in the 1960s.³⁸ In 1990, the Canadian Supreme Court also eliminated felony murder 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

³⁵ See *Enmund v. Florida*, 458 U.S. 782, 797 n. 22 (1982) (“It is thus worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of Commonwealth countries, and is unknown in continental Europe.”); *R. v Martineau*, [1990] 2 S.C.R. 633, 645 (Can.). See also, Melvin F. Wingersky, *Report of the Royal Commission on Capital Punishment (1949-1953): A Review*, 44 J. OF CRIM. L., CRIMINOLOGY, & POLICE SCI. 695, 702 (1954) (describing the Royal Commission that recommended the rejection of the felony murder doctrine in the UK, which stated unequivocally that “[w]e have no doubt that, as a matter of general principle [*sic*], 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.”).

³⁶ *Graham*, 560 U.S. at 59.

³⁷ Homicide Act of 1957, 5 & 6 Eliz.2 c.11, § 1 (Gr. Brit.); Criminal Justice Act of 1966, c. 20, § 8 (N. Ir.). In both of these contexts, the doctrine of felony murder is known as “constructive malice.”

³⁸ The Republic of Ireland abolished felony murder in 1964. Criminal Justice Act 1964 (Act No. 5/1964), § 4 (Ir.), <http://www.irishstatutebook.ie/eli/1964/act/5/section/4/enacted/en/html#sec4>. Antigua and Barbuda, Barbados, Kiribati, and Tuvalu all passed provisions identical to § 1 of the United Kingdom’s Homicide Act of 1957, which abolished felony murder in the United Kingdom. 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). Additionally, several Commonwealth countries, including India, Malaysia, Pakistan, Singapore, and Sri Lanka, have never recognized felony murder. 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; Muthucumaraswamy Sornarajah, *The Definition of Murder under the Penal Code*, SING. J. LEGAL STUD., July 1994, at 1 n.2; John Li. J. Edwards, *Constructive Murder in Canadian and English Law*, 1 UNIV. OF MALAYA L. REV. 17, 33-34 (1959) (noting that penal codes of India, Pakistan, Ceylon, Federation of Malaya, and Singapore do not contain the doctrine of felony murder). All of these provisions are identical to the Indian provision on murder, and in all of them, the minimum required mental state to convict someone of murder is knowledge.

the stigma and punishment attached to a murder conviction and the moral blameworthiness of the offender.”³⁹

LWOP sentences under these circumstances are particularly suspect under international human rights law too. The ECtHR concluded as much, reasoning that LWOP sentences for felony-murder require closer scrutiny because they are more likely to be grossly disproportionate due to the lessened culpability in such cases.⁴⁰ Moreover, in accordance with international human rights law standards, after a recent visit to the United States, the UN Special Rapporteur on contemporary forms of racism, one of the *Amici curiae* on this brief, expressed deep concern that states like Pennsylvania allows LWOP sentences for felony murder.⁴¹

D. Pennsylvania’s Disproportionate Sentencing of Black and Brown Pennsylvanians to Death by Incarceration Violates the International Prohibition on Racial Discrimination.

In contravention of international human rights law, Pennsylvania disproportionately sentences people from racially and ethnically marginalized groups, in particular Black and Latinx people, to death by incarceration.⁴² Such racially disparate sentencing practices likely violate the international prohibition on racial

³⁹ *Martineau*, 2 S.C.R. at 644-45 (Can.).

⁴⁰ *Harkins and Edwards v. United Kingdom*, App. Nos. 9146/07 & 32650/07, ¶ 138–39 (Jan. 17, 2012 (Jan. 17, 2012)), <https://hudoc.echr.coe.int/fre?i=001-108599>.

⁴¹ 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> [hereinafter SR on Racism Statement].

⁴² Andrea Lindsay & Clara Rawlings, *Life Without Parole for Second-Degree Murder in Pennsylvania: An Objective Assessment of Race*, PHILADELPHIA LAW. SOC. EQUITY 3–4, April, 2021, https://www.plsephilly.org/wp-content/uploads/2021/04/PLSE_SecondDegreeMurder_and_Race_Apr2021.pdf [hereinafter, “Lindsay & Rawlings, *Objective Assessment*”], https://www.plsephilly.org/wpcontent/uploads/2021/04/PLSE_SecondDegreeMurder_and_Race_Apr2021.pdf.

discrimination, codified in several treaties that are binding on the United States.⁴³

The most comprehensive prohibition of racial discrimination can be found in the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), which the United States ratified on October 21, 1994. As Article 1(1) reflects, States drafted ICERD to incorporate a broad definition of racial discrimination:

“In this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”⁴⁴

In addition, other international human rights treaties enshrine the prohibition of racial discrimination, including Article 2(1) of the ICCPR, which makes clear that the rights recognized in that treaty are to be recognized without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁴⁵ The prohibition of racial discrimination in international law requires that in order to facilitate the substantive realization of racial equality, States parties to relevant international human rights law treaties, including the ICERD and the ICCPR, must ensure that they neither take part in any act of racial

⁴³ G.A. Res. 217 (III) A, art. 2, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 26, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Convention on the Elimination of All Forms of Racial Discrimination, pmbl. and art. 1, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD]; American Convention on Human Rights art. 24, Nov. 22, 1969, 1144 U.N.T.S. 123.

⁴⁴ CERD, supra note 39, at art. 1(1).

⁴⁵ ICCPR, supra note 39, at art. 2(1).

discrimination nor further programs that lead to racial inequality. Furthermore, where racism, racial inequality, or racial discrimination exist, they have an obligation to take effective and immediate action. This obligation to act is absolute. State parties' obligations to prevent racial inequality and racial discrimination require them not only to undertake remedial action, but also preventive action.

Furthermore, Article 5(a) of ICERD requires States parties to guarantee the right of all people, without distinction as to race, color, or national or ethnic origin, to equality before the law, to equal treatment before the tribunals and all other organs administering justice.⁴⁶ In General Recommendation No. 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system, United Nations Committee on the Elimination of Racial Discrimination (CERD Committee), which monitors compliance with ICERD, concluded that the imposition of harsher or inappropriate sentences against persons belonging to racial and ethnic groups was an indicator of racial discrimination within the criminal justice system.⁴⁷

Guided by these standards, the UN human rights bodies that monitor Member States compliance with their obligations under international law have previously expressed alarm about the United States racialized sentencing, pointing to LWOP sentences as particularly problematic. First in 2014, and most recently in 2022, the

⁴⁶ CERD, *supra* note 39, at art. 5(1).

⁴⁷ Committee on the Elimination of Racial Discrimination, *General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*, ¶1(f), U.N. Doc. CERD/C/GC/31/Rev.4 (2005).

CERD Committee has raised particular concern over the racism that pervades the United States’ criminal legal system, including its sentences of life imprisonment.⁴⁸ Likewise, the Special Rapporteur on contemporary forms of racism Ashwini K.P, one of the *Amici curiae* on this brief, expressed deep concern about the “disproportionate use of ‘death by incarceration sentences’ amongst Black and Latino individuals” in the United States.⁴⁹ Special Rapporteur Ashwini K.P. explained that “[w]ithout the chance of parole, the rehabilitative function of the prison system is negated, reducing it to a tool of segregation and exploitation.”⁵⁰ In addition, the U.N. Human Rights Committee, within their 2023 concluding observations on the United States’ compliance with the ICCPR, expressed concern at “reports indicating that persons of African descent are disproportionately sentenced to life imprisonment without parole.”⁵¹

Pennsylvania’s practice of LWOP sentencing evince racially disparate outcomes far worse than the U.S. national averages, which were the basis of concern for these U.N. human rights mechanisms. For instance, EMLER previously expressed concern that “People of African descent make up 46% of the prison population serving life sentences nationwide even though they comprise only 12% of the general population.”⁵² Yet, data from Pennsylvania reveal even starker racial disparities among those convicted

⁴⁸ Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Comm.: United States* ¶¶ 26, 27, U.N. Doc. CERD/C/USA/CO/10-12 (Aug. 22, 2022); Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Comm.: United States* ¶¶ 20-21, U.N. Doc. CERD/C/USA/CO/7-9 (Sept. 15, 2014).

⁴⁹ SR on Racism Statement, *supra* note 37.

⁵⁰ *Id.*

⁵¹ United Nations Human Rights Committee, *Concluding Observations on the Fifth Periodic Report of the United States of America*, U.N. Doc. CCPR/C/USA/CO/5 (Dec. 7, 2023).

⁵² International Independent Expert Mechanism to Advance Racial Justice and Equality in the Context of Law Enforcement - Visit to the United States of America, ¶94, U.N. Doc. A/HRC/54/CRP.7 (Sept. 26, 2023).

of felony murder and sentenced to die in prison. In Pennsylvania, four of every five imprisoned individuals with a felony-murder conviction were people of color as of 2019; nearly 70 percent were Black, though Black people make up only eleven percent of our population.⁵³ Moreover, Black Pennsylvanians were 18 times more likely to be sentenced to LWOP than white Pennsylvanians and 21.2 more likely to be sentenced to LWOP for felony murder.⁵⁴ Such racial disparities run afoul of the United States' international human rights obligations to ensure that its criminal legal system is not administered in racially discriminatory manner.

CONCLUSION

In sum, *Amici* respectfully submit that Pennsylvania's practice of automatically sentencing people convicted of felony murder to LWOP violates international human rights law standards that provide protection from CIDT—the international human rights analogue which has been used to determine what constitutes cruel and unusual punishment within the United States. Furthermore, LWOP sentences in Pennsylvania disproportionately impact Black people and communities of color in Pennsylvania, and violate their right to be free from racial discrimination under international law. Accordingly, we respectfully submit that this assessment be given due consideration and weight in the Court's assessment of their constitutionality, based upon death by incarceration being grossly out of line with evolving standards of decency.

⁵³ Lindsay & Rawlings, *Objective Assessment*, *supra* note 38.

⁵⁴ *Id.*

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CERTIFICATE OF TYPE-VOLUME COMPLIANCE

I hereby certify that this brief contains 6306 words, as determined by the word-count feature of Microsoft Word processing system used to prepare this brief, and excluding the portions of the brief exempted by Pa.R.A.P. 2135(d).

Dated: April 26, 2024

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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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