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In The

Supreme Court of Pennsylvania

No. 16 WAP 2021

MARIE SCOTT, NORMITA JACKSON, MARSHA SCAGGS, TYREEM RIVERS
Petitioners-Appellants

v.

PENNSYLVANIA BOARD OF PROBATION AND PAROLE
Respondent-Appellee

AMICUS CURIAE BRIEF OF THE SENTENCING PROJECT

On Appeal from the May 28, 2021 decision of the Commonwealth Court, No. 397 M.D. 2020, Sustaining Preliminary Objections.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

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.

[1] 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.

I.

INTRODUCTION

In Pennsylvania, some 1,100 people are serving life-without-parole sentences despite never having intended to take a life.[2] 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. That precedent, along with the near-universal rejection of mandatory life-without-parole sentences for felony-murder convictions 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 out of hand. It is no

[2] As Appellants' Brief explains, 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. Appellants' Br. at 20-21; *see* 18 Pa.C.S. §§ 2502(b), 1102(b). By contrast, Appellants' permanent, categorical disqualification from parole consideration is not part of their 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 their actual, court-imposed "sentence" of life imprisonment.

answer to say that Section 6137(a) deters killings committed during the commission of a felony; even assuming a defendant is fluent in the Commonwealth's sentencing statutes, the threat of death-by-incarceration can have little effect on a person who did not kill or intend to kill.

The decision below, however, denies to Appellants and all others convicted of felony murder any meaningful opportunity to raise such a challenge. Reversing that decision is critically important, not only because (as Appellants persuasively show) it is the correct interpretation of Pennsylvania law, but also because any other outcome will relegate over a thousand individuals to permanent incarceration in violation of their constitutional right to be free of wantonly cruel punishments at the hands of the State.

For the reasons that follow, the decision of the Commonwealth Court should be reversed and the case remanded with instructions to consider the merits of Appellants' claims.

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."[3] Proportionality is central to the analysis of sentencing practices under that proscription. *Montgomery v. Louisiana*, 577 U.S. 190, 206 (2016). Cases addressing the proportionality of sentences "fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the [challenged] penalty." *Graham v. Florida*, 560 U.S. 48, 59 (2010). This case falls into the latter class, in that it seeks a determination that a class of individuals (namely, those convicted of felony murder but who neither killed nor intended to kill) is categorically ineligible for a particular punishment (a lifetime ban on parole eligibility).

When addressing a categorical challenge, the U.S. Supreme Court employs a two-pronged approach. It first assesses "objective indicia of society's standards, as

[3] 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. Although 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, this Court has never conclusively decided whether and to what extent the Pennsylvania Constitution's protections extend beyond those of its federal counterpart. *See Commonwealth v. Edmunds*, 586 A.2d 887, 894 (Pa. 1991). The Court need not resolve that question here, because the constitutionality of Pennsylvania's blanket disentitlement to parole consideration for all those convicted of felony murder is not yet squarely before this Court. Instead, the *raison d'être* for this brief's constitutional analysis is to show that Appellants have lodged a strong constitutional challenge—and therefore that it is of critical importance that this Court recognize the existence of a viable procedural path for them to pursue (and the courts to resolve) that challenge.

expressed in legislative enactments and state practice" to determine whether there is a "national consensus against" the practice. *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*, 560 U.S. at 61. 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.

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 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). To secure a conviction for felony murder, the only criminal intent the State needs to prove is specific intent to commit the felony. *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 executive clemency) remain in prison from the moment of their conviction until the moment of their death.

III.

ARGUMENT

Under 42 Pa.C.S. § 761(a)(1)(i), the Commonwealth Court has original jurisdiction over all civil actions or proceedings against "the Commonwealth government, including any officer thereof, acting in his official capacity" except for "actions or proceedings in the nature of applications for a writ of habeas corpus or post-conviction relief not ancillary to proceedings within the appellate jurisdiction of the court."

As Appellants' brief explains, Appellants' challenge to the constitutionality of 61 Pa.C.S. § 6137 does not qualify as a post-conviction relief petition under Pennsylvania law. To those arguments, *amicus* respectfully adds two further points. *First*, holding that Appellants' challenge does not arise under the Post Conviction Relief Act, 42 Pa.C.S. §§ 9541 *et seq.*, ("PCRA") would accord with the U.S. Supreme Court's demarcation between federal habeas claims, on the one hand, and Section 1983 actions, on the other.

Second, the Commonwealth Court's decision strips individuals in Appellants' circumstances of any meaningful opportunity to challenge the constitutionality of their permanent disqualification from parole eligibility—an opportunity that is critically important because of the very high probability that that disqualification violates the Eighth Amendment. *Amicus* addresses these points in turn below.

A. Permitting Appellants' Challenges to Proceed in Commonwealth Court Would Align Pennsylvania Jurisprudence with the U.S. Supreme Court's Treatment of Federal Habeas and Section 1983 Claims.

A ruling in Appellants' favor would align Pennsylvania jurisprudence with the U.S. Supreme Court's treatment of similar questions under federal law. At the federal level, convicted individuals seeking to challenge unconstitutional conduct that transpired during their prosecution or in the course of their confinement have two avenues of relief: one is a challenge under the federal habeas corpus statute[4] and the other is an action via 42 U.S.C. § 1983. Because both statutes provide remedies for constitutional challenges to convictions or sentences, litigants could theoretically circumvent the more restrictive federal habeas requirements and obtain the same relief through a § 1983 action. The U.S. Supreme Court addressed this issue in *Heck v. Humphrey*, holding that where "establishing the basis for the damages claim necessarily demonstrates the invalidity of the conviction" a § 1983 action will not lie "unless…the conviction or sentence has already been invalidated."

[4] 28 U.S.C. § 2254(a).

512 U.S. 477, 481-82, 487 (1994). But, where the § 1983 action, "even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment" then the action should be allowed to proceed under a § 1983 action. *Id.*

The U.S. Supreme Court has since refined the rule espoused in *Heck*. In *Wilkinson v. Dotson*, the U.S. Supreme Court held that incarcerated persons held in state custody may bring a § 1983 action for declaratory and injunctive relief challenging the constitutionality of state parole procedures—instead of bringing a federal habeas corpus suit or similar state-court action—because the remedies petitioners sought would not require their "immediate or speedier release into the community." 544 U.S. 74, 82 (2005). Rather, "success" for one plaintiff would mean "at most new eligibility review, which at most will speed *consideration* of a new parole application"; for the other plaintiff, "success" would mean "at most a new parole hearing at which [state] parole authorities may, in their discretion, decline to shorten his prison term." *Id.* at 82. "Because neither prisoner's claim would necessarily spell speedier release, neither lies at 'the core of habeas corpus.'" *Id.* (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973)). Accordingly, in constitutional, as-applied challenges to parole procedures, the U.S. Supreme Court has found that these claims are not required to be adjudicated under a post-conviction

framework because plaintiffs do not seek an immediate release or a shorter sentence.[5]

There is no reason to read different limitations into Pennsylvania's dichotomy between PCRA actions and those for declaratory relief under Pennsylvania law. As with the plaintiffs in *Wilkinson*, Appellants' stated relief seeks *parole eligibility*, not an invalidation of their underlying convictions or sentences. Indeed, if the Commonwealth Court were to grant Appellants' request for relief, there would be no immediate change either to Appellants' sentences or their status as incarcerated persons in the custody of the Department of Corrections. Just as the federal habeas statute is not undermined by § 1983 suits challenging parole procedures, neither is the analogous PCRA circumvented by a direct challenge to the constitutionality of the Parole Board's application of 61 Pa.C.S. § 6137.

B. If the Commonwealth Court Declines to Exercise Jurisdiction, Appellants Have No Mechanism For Challenging Their Unconstitutional Disqualification from Parole Consideration.

If Appellants are unable to bring their constitutional claims before the Commonwealth Court, then § 6137 would be effectively immunized from review,

[5] The Sixth Circuit has recently reinforced this position. In *Hill v. Snyder*, plaintiffs challenged the constitutionality of state parole eligibility procedures. 878 F.3d 193 (6th Cir. 2017). Following the U.S. Supreme Court in *Wilkinson*, the *Hill* court held that the plaintiffs' claims did not implicate habeas review because the plaintiffs did "not seek direct release from prison or a shorter sentence, but instead an examination of the Defendants' policies and procedures governing access to…parole eligibility, consideration, and release." *Id.* at 210. Rather, the court held that the plaintiffs' claims were cognizable under § 1983. *Id.*

because neither Appellants nor any similarly situated person convicted of felony murder would have a viable forum to litigate such a claim. As Judge Leadbetter explained in her dissent below, Appellants' "claims plainly cannot be raised in petitions filed pursuant to the [PCRA] because such petitions have been time barred for many years and when they were timely, the pled circumstances which now give rise to potential Eighth Amendment claims did not exist." *Scott v. Pennsylvania Board of Probation and Parole*, —— A.3d ——, (Pa. Cmwlth., No. 397 M.D. 2020, filed May 28, 2021) (Leadbetter, J., dissenting). The law does not countenance such heads-I-win-tails-you-lose scenarios—particularly where, as here, the challengers seek to assert a palpable, ongoing violation of their constitutional rights. *See Flagiello v. Pa. Hosp.*, 208 A.2d 193, 194-95 (Pa. 1965) ("[I]n law there is no wrong without a remedy.").

And the constitutional violation alleged by Appellants here is indeed a palpable one, highly likely to succeed on the merits for the reasons set forth below.

C. Life Without Parole for Individuals Convicted of Felony Murder Constitutes Cruel and Unusual Punishment.

For two related reasons, the Eighth Amendment categorically prohibits an individual convicted of felony murder—*i.e.*, someone who did not intend to kill—from a sentence of life in prison without the possibility of parole. *First*, such a sentence runs contrary to 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 all but 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.

1. The Imposition of Life Without Parole For Someone Who Did Not Intend to Kill Is Contrary to Evolving Standards of Decency As Measured by the Legal Systems of Other American States, Evolving Attitudes in Pennsylvania, and the Criminal Laws of Other Nations.

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

A survey of other American jurisdictions reveals that Pennsylvania stands virtually alone in its punishment of individuals who did not take, or did not intend to take, the life of another. Indeed, eight States have effectively abolished the felony murder rule, which transfers intent to commit the underlying felony to that of an unintentional killing. Two (Hawaii and Kentucky) have done so expressly,[6] while another six (Michigan, Vermont, New Mexico, Delaware, New Hampshire, and Massachusetts) have done so *de facto*, by requiring proof that the defendant possessed a culpable mental state vis-à-vis the *killing* specifically, not merely the underlying felony.[7] Michigan, for example, requires evidence of a wanton and

[6] Ky. Rev. Stat. Ann. § 507.020 (West 1984); Haw. Rev. Stat. § 707-701 (1972).

[7] *People v. Aaron*, 299 N.W.2d 304, 329 (Mich. 1980); *State v. Baird*, 175 A.3d 493, 496 (Vt. 2017); *State v. Griffin*, 866 P.2d 1156, 1162 (N.M. 1993); 11 DE Code § 635(2) (2021); N.H. Rev. Stat. Ann. § 630:1 (West 2021); *Commonwealth v. Brown*, 811 N.E.3d 1173 (Mass. 2017).

willful disregard of a known risk of death, and New Hampshire requires proof of extreme indifference to human life. In Pennsylvania, by contrast, the mere act of supporting or undertaking a felony that is temporally associated with a homicide can support a felony murder conviction.

Still other States afford defendants an affirmative defense to a felony-murder prosecution where the defendant (1) did not commit the killing; (2) was not armed with a dangerous weapon; (3) reasonably believed that no other participant was armed; and (4) reasonably believed that no other participant intended to engage in conduct likely to result in death or serious bodily harm. *See* Me. Stat. tit. 17-A § 202 (2019); *State v. Rice*, 683 P. 2d 199, 123-24 (Wash. 1984); *see also* Colo. Rev. Stat. § 18-3-103(1.5) (2021) (similar); Conn. Gen. Stat. § 53a-54c (2015); Fla. Stat. § 782.04(3) (2019); N.D. Cent. Code. § 12.1-16.01 (2019). Louisiana law punishes people for felony-murder only if they "perform the direct act of killing"—thereby excluding those who participated only in the underlying felony. *State v. Small*, No. 2011-K-2796, 2012 WL 4881413, at *13 (La. Oct. 16, 2012).

Plus, of the States that punish for felony murder individuals who did not kill, intend to kill, or foresee a killing, 17 *never* mandate the imposition of a life-without-

parole sentence.[8] In fact, only *six* States,[9] which together comprise less than 10 percent of the U.S. population, mandate a life-without-parole sentence for *all* individuals convicted of felony murder (as traditionally conceived). *See 2020 Census Results Data Profiles*, U.S. Census Bureau, https://data.census.gov/cedsci/profile?q=United%20States&g=0100000US. Yet even among this small minority, Pennsylvania's felony-murder sentencing regime is particularly draconian. In West Virginia, for example, an individual convicted of felony murder can (if the jury so decides) be eligible for mercy after a minimum of fifteen years. *See* W. Va. Code § 62–3–15 (2021).

Put simply, it is highly doubtful that individuals like Appellants Scott and Jackson (whose co-defendants committed the homicides underlying their convictions), and like Appellant Scaggs (who did not intend to kill), would have received a death-by-incarceration sentence had their crimes occurred virtually anywhere else in the United States. That fact weighs heavily in favor of a finding

[8] These States are California, Colorado, Idaho, Indiana, Kansas, Maine, Missouri, New Jersey, New York, Oklahoma, Oregon, South Carolina, Texas, Utah, Virginia, Washington, and Wisconsin.

[9] Those six States are Iowa, Nebraska, North Carolina, South Dakota, West Virginia, and Pennsylvania. Louisiana also mandates a life-without-parole sentence for those convicted of felony murder, but it is excluded from this total because (as noted above) it excludes from the scope of "felony murder" those individuals who did not perform the direct act of killing. *See supra*.

that Pennsylvania's felony-murder sentencing regime is unconstitutionally cruel and unusual.

b. Even within Pennsylvania, public attitudes on sentencing issues are evolving rapidly.

Pennsylvanians' views on such issues are evolving, as well. Indeed, the march of public opinion in recent years has been a steady one in favor of rehabilitative sentences rather than retributivist ones. In polls taken over the last two years, for example, supermajorities of Commonwealth voters favored, *inter alia*, probation reforms aimed at enhancing the system's focus on rehabilitation and the prevention of future criminality rather than monitoring and punishment.[10]

Pennsylvania voters' balloting choices reflect these views, sweeping into office in recent years a wave of officials—including district attorneys,[11] mayors,[12]

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[10] *See* John L. Micek, *Exclusive: Two-Thirds of Pa. Voters Favor Bipartisan Probation Reform Bill, Poll*, PA. CAP.-STAR (Jan. 20, 2020 7:25 AM), https://www.penncapital-star.com/commentary/exclusive-two-thirds-of-pa-voters-favor-bipartisan-probation-reform-bill-poll-monday-morning-coffee/; *New Poll Shows Support for Criminal Justice Reform*, CONNECT FM (Oct. 1, 2019), https://www.connectradio.fm/2019/10/01/new-poll-shows-support-for-criminal-justice-reform/. Majorities likewise support sentence reductions for incarcerated persons who demonstrate meaningful self-improvement during incarceration. *See* Molly Greene & Sean McElwee, *Poll: In Run-Up To District Attorney Primaries, Pennsylvania Voters Support Criminal Justice Reforms*, THE APPEAL (May 13, 2021), https://theappeal.org/the-lab/polling-memos/poll-pennsylvania-voters-support-criminal-justice-reforms/.

[11] 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.

[12] Joshua Vaughn, *How Policing is Shaping the Pittsburgh Mayoral Race,* THE APPEAL (Apr. 27, 2021), https://theappeal.org/how-policing-is-shaping-the-pittsburgh-mayoral-race/;

and judges[13]—who favor a rehabilitative, rather than a punitive, approach to criminal justice. Similar trends can be seen in appointed cabinet-level officers.[14]

These developments underscore that the arc of history is bending further and further away from Pennsylvania's practice of mandating perpetual incarceration for those convicted of felony murder.

c. 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.

State courts have followed suit, looking to comparative and international law sources when reviewing challenges to the constitutionality of punishment, either

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Joshua Vaughn, *Ed Gainey Wins Democratic Nomination for Pittsburgh Mayor*, THE APPEAL (May 18, 2021), https://theappeal.org/ed-gainey-wins-democratic-nomination-for-pittsburgh-mayor/.

[13] *Unofficial 2021 Municipal Election Results*, OFF. OF THE PHILA. CITY COMM'RS, https://results.philadelphiavotes.com/ResultsSW.aspx?type=JUD&map=CTY (July 6, 2021 11:45 AM) (electing seven of eight judges endorsed by the City's progressive political organization).

[14] *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 in the felony murder context).

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).[15]

If Pennsylvania were to follow global norms, as other state courts have done, it would inevitably conclude that life-without-parole sentences for felony-murder are cruel and unusual. *First*, 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*

[15] For a comprehensive survey of state courts looking to international human rights law to inform their decision-making, see The Opportunity Agenda & PHRGE, *Human Rights in State Courts* (2014).

America: An Introduction, 98 Prison J. 17, 26 (2018). Life-without-parole sentences are rarer still, existing in only four Latin American countries.[16]

Similarly, in Europe, only ten countries permit life-without-parole sentences.[17] 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 (holding that 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 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.

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[16] 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).

[17] 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).

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. *See U.S. Sentencing in Global Context* 22, 25-27 (noting that countries allow life-without-parole sentences for murder of two or more persons or of a child involving "high levels of premeditation, abduction, or sadistic conduct," individuals sentenced to two life sentences, murdering for political, religious, or ideological reasons, or commission of a violent crime from an enumerated list or repeated offenses). Pennsylvania, of course, is not so selective in its use of life-without-parole sentences, meting them out even to individuals who did not kill and/or did not intend to kill. *See* Section II.B, *supra*.

Second, the Pennsylvania rule is 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 of proportionality,[18] a concept that in the United States is "central to the Eighth Amendment." *Graham*, 560 U.S. at 59. Indeed, the doctrine has even been abandoned in the United Kingdom, where the rule first originated and from which it subsequently spread to other Commonwealth countries and the 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.[19] 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 the stigma and punishment attached to a murder conviction and the moral blameworthiness of the offender."[20] Additionally, several Commonwealth

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[18] *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.").

[19] *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).

[20] *R. v Martineau*, [1990] 2 S.C.R. 633, 644-45 (Can.).

countries, including India, Malaysia, Pakistan, Singapore, and Sri Lanka, have never recognized felony murder.[21]

Were that not enough, 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).

Considered against this backdrop, Pennsylvania's blanket diktat that all felony murder convictions carry a life-without-parole sentence cannot be squared with the Eighth Amendment's prohibition on cruel and unusual punishment.

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

Although the national and international consensus against the challenged sentencing practice are "entitled to great weight," community consensus alone "is not itself determinative of whether a punishment is cruel and unusual." *Graham*,

[21] *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).

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, both questions must be answered in the negative.

a. 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 defendant'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.

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 a defendant 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.[22]

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

[22] 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.

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: 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 v. Alabama*, 567 U.S. 460, 471 (2012).

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 with equal force here. 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 lesser 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.

b. 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.

i. 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 individuals like Appellants, who could not foresee that life would be taken, are 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. Rather, four out of five individuals convicted of second-degree murder in Pennsylvania are people of color, with 70 percent being African American.[23]

ii. 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

[23] Andrea Lindsay & Clara Rawlings, *Life Without Parole for Second-Degree Murder in Pennsylvania: An Objective Assessment of Race* (2021) [hereinafter, "Lindsay & Rawlings, *Objective Assessment*"], https://www.plsephilly.org/wp-content/uploads/2021/04/PLSE_SecondDegreeMurder_and_Race_Apr2021.pdf.

evidence to suggest that individuals convicted of *felony* murder 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.[24]

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 age twenty-five years or younger at the time of their offense. Lindsay & Rawlings, *Objective Assessment*. As the U.S. Supreme Court has explained, "[f]or juvenile offenders, who are most in need of and receptive to rehabilitation,…the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident." *Graham*, 560 U.S. at 72-73.

[24] 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 (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).

To be sure, the specific holdings of *Roper*, *Graham*, and *Miller* apply only to minors, yet their analyses of the relationship between age and culpability extend to emerging adults who are also especially likely to engage in crime, and to be responsive to rehabilitative interventions. As those decisions suggest—and as various studies confirm—the mere passage of one's eighteenth birthday does not, *ipso facto*, alter the cognitive and other characteristics that contribute to a young person's failure to appreciate risks and consequences and, as a result, temper society's assessment of that person's culpability. To the contrary, studies show that crime rates peak around the late teenage years and begin a gradual decline in the early twenties.[25]

Particularly given that nearly half of those serving life-without-parole sentences for second-degree murder in Pennsylvania are age 50 or older and that nearly 60 percent have already served over 20 years, Lindsay & Rawlings, *Objective Assessment*, these studies deeply undercut any argument that continued, indefinite parole ineligibility is justified by a need for incapacitation. *Cf.* 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

[25] *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.

("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.").

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. That judgment is particularly inappropriate in the context of felony murder. The irrebuttable presumption that someone who did not intend to commit murder is incapable of rehabilitation is, almost by definition, unconscionably cruel.[26]

iii. Deterrence

Finally, it is doubtful Pennsylvania's felony-murder rule has the deterrent effect its proponents assert. For one thing, the threat of 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. Indeed, "capital punishment can serve as a deterrent only when murder is the result of premeditation

[26] 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).

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 the foregoing reasons, the judgment should be vacated and the case remanded to the Commonwealth Court with instructions to overrule the preliminary objections.

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Respectfully submitted,

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CERTIFICATE OF TYPE-VOLUME COMPLIANCE

I hereby certify that this brief contains 6,992 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: October 22, 2021

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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.

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