

No. 3 WAP 2024

**IN THE SUPREME COURT
OF THE COMMONWEALTH OF PENNSYLVANIA**

Commonwealth of Pennsylvania,

Respondent,

v.

Derek Lee,

Petitioner.

On appeal from a decision of the Superior Court, No. 1008 WDA
2021, entered June 13, 2023, affirming a judgment of sentence
imposed by the Court of Common Pleas of Allegheny County,
CP-02-CR-16878-2014, dated Dec. 19, 2016

**BRIEF OF THE PHILADELPHIA DISTRICT
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INTERESTS OF THE AMICUS CURIAE

The Philadelphia District Attorney's Office is the largest prosecutor's office in Pennsylvania and the seventh-largest in the country. The office charged and prosecuted over 27,000 cases in 2023, including charges of felony murder.

The impact of Pennsylvania's felony murder rule on Philadelphia is outsized. Within Pennsylvania, over half of all life without parole sentences for felony murder originate from Philadelphia. *See* PHILADELPHIA LAWYERS FOR SOCIAL EQUITY, SENTENCING FELONY MURDER: NEW DATA AND THEIR IMPLICATIONS FOR LIFE WITHOUT PAROLE IN PENNSYLVANIA (June 1, 2021).¹ As of this writing there are 502 Philadelphians serving mandatory life sentences for felony murder ranging in age from 24 to 87.

Lawrence S. Krasner is the duly elected Philadelphia District Attorney. He was first elected in November 2017 and re-elected in November 2021. His service as District Attorney follows more than three decades of work in the criminal justice system in Philadelphia as both a defense attorney and a civil rights attorney.

¹ Available at <https://plsephilly.org/lwop-townhall/>.

INTRODUCTION

This Court should hold that mandatory sentences of life imprisonment without the possibility of parole for non-shooters who had no intent to kill violate the Pennsylvania Constitution. Given that this Court may consider policy factors pursuant to *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), in assessing whether state constitutional rights exceed their federal counterparts, Amicus offers its unique perspective as the largest prosecutor's office in Pennsylvania.

Mandatory life without parole sentences for felony murder negatively affect prosecutors in at least two ways. First, depriving judges of discretion to consider culpability in sentencing a non-shooter convicted of felony murder is contrary to public policy because it can lead to both over- and under-charging. Second, this scheme is disfavored by the public, which sees it as unjust, thereby reducing respect for the rule of law and making it less likely the public will cooperate with prosecutors charged with administering and enforcing the law. Amicus urges the Court consider these effects when analyzing the *Edmunds* factors in this case.

ARGUMENT

I. **Mandatory life without parole sentences for felony murder impact prosecutorial and judicial discretion in a way that leads to both over- and under-charging.**

If a defendant's actions support such a charge, prosecutors should be able to charge felony murder with the knowledge that, if the defendant is convicted, the sentencing judge will have the discretion to consider individual culpability and so fashion an appropriate sentence. This might mean life without parole, but also might mean a lower minimum sentence.

Indeed, generally prosecutors and judges are granted wide discretion to take into account "a constellation of appropriate considerations," such as individual culpability, when making decisions on charging, litigation strategy, and sentencing. Charles E. MacLean & Stephen Wilkins, Keeping Arrows in the Quiver: Mapping the Contours of Prosecutorial Discretion, 52 WASHBURN L.J. 59, 61 (2012). Discretion to consider an offender's characteristics and culpability in fashioning an individualized sentence is a significant principle that is "[d]eeply ingrained in our legal tradition." *Tison v. Arizona*, 481 U.S. 137, 156 (1987). Among other

things to generally be considered in sentencing, in addition to culpability, are the rehabilitative needs of the defendant. *See* 42 Pa. C.S. § 9721(b); *see also Graham v. Florida*, 560 U.S. 48, 74 (2010) (noting that mandatory life without parole sentences “forswear[] altogether the rehabilitative ideal”).

However, Pennsylvania’s current treatment of felony murder runs contrary to these important principles. Specifically, it eliminates discretion by mandating the same sentence for intentional and unintentional killings. Indeed, an offender who participated in a felony but neither intended nor foresaw a death may be capable of rehabilitation and may not need to be removed from society forever in order to protect public safety. Many people currently serving such sentences would likely pose little to no risk to public safety if released.

By comparison, in Philadelphia, after the United States Supreme Court struck down mandatory life sentences for juveniles convicted of murder in *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 577 U.S. 190 (2016), nearly 200 former juvenile lifers reentered the community after gaining parole eligibility for the first time. The recidivism rate among that group was measured at just 1.42% in 2022, and with no convictions for violent crime. Tarika Daftary-Kapur et al., [A First Look at the Reentry Experiences](#)

of Juvenile Lifers Released in Philadelphia, 28 PSYCHOL. PUB. POL'Y & L. 400, 401 (2022). As of the end of March 2024, statewide, the recidivism rate among former juvenile lifers is 1.65%. See PENNSYLVANIA PAROLE BOARD, JUVENILE LIFER STATISTICS AS OF MARCH 31, 2024 (Mar. 31, 2024).²

Prosecutors should be able to charge felony murder when the facts support it, knowing that judges may consider any reduced culpability and, if appropriate, issue a non-life without parole sentence for offenders who did not intend to kill. Without such sentencing discretion, prosecutors are left with a Hobson's choice between overcharging and undercharging offenders who unintentionally contributed to a death.

² Available at <https://prdparole.pwpca.pa.gov/About%20PBPP/juvenilelifers/Pages/Statistics.aspx>.

II. Treating all offenders the same regardless of culpability erodes the public's respect for the law and makes it more difficult for prosecutors, who rely on the public's assistance, to enforce and administer those laws.

When the law punishes all offenders maximally regardless of culpability, respect for the law is diminished. Allowing consideration of individual culpability, by contrast, promotes such respect by reducing results the public perceives to be unjust and even absurd. This, in turn, helps prosecutors and law enforcement who rely on the public's assistance in enforcing and administering the law.

People generally are less likely to respect laws they perceive as unjust and are less likely to assist law enforcement when the law produces unjust punishments. *See* Paul H. Robinson et al., The Disutility of Justice, 85 N.Y.U. L. REV. 1940, 1995–97 (2010). Pennsylvanians largely find it unjust that individual culpability cannot be considered for offenders charged with felony murder who did not intend to kill. Indeed, just last year Susquehanna Polling and Research found that 79% of Pennsylvania respondents opposed mandatory life without parole sentences for all offenders convicted of felony murder and favored judicial discretion to allow for consideration of culpability. *See* SUSQUEHANNA

POLLING AND RESEARCH, PENNSYLVANIA STATEWIDE OMNIBUS TELEPHONE POLL (conducted Feb. 2023).³ Specifically, those respondents agreed that judges should be able to “weigh circumstances so those who did not intend to kill/injure can be sentenced less harshly.” *Id.*

Pennsylvanians’ views make sense considering that the current scheme can and does lead to unjust and absurd results. For example, it is not uncommon for a killer to be convicted of third-degree murder and given a term-of-years sentence whereas an accomplice may be convicted of felony murder and die in prison for the same incident. *See* Dolly Prabhu, A Lifetime for Someone Else’s Crime, 81 U. PITT. L. REV. 439, 464–68 (2019) (discussing cases). Indeed, in a case in which two Philadelphia men were involved in a brawl that resulted in a death, the killer was convicted of third-degree murder and given a term-of-years sentence, whereas his co-defendant was convicted of felony murder as an accomplice and given the mandatory sentence of life without parole. *See id.* at 467 (discussing *Commonwealth v. Trudel*, CP-51-CR-822991-1987). Such results, perceived as unjust by most Pennsylvanians, reduce respect for the law and make it less likely the public will assist prosecutors in enforcing those

³ Available at [Toplines-PAStatewide-Omnibus-FAMM-Feb2023.pdf](#).

laws, assistance that prosecutors rely on. *See, e.g., The Disutility of Justice, supra*; Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 67 (2010) (reporting that mandatory sentences generally make it less likely that people will cooperate with law enforcement for fear that their cooperation will lead to an unjust result).

This reality may be why only Pennsylvania and Louisiana mandate life without parole sentences for felony murder without exception. For example, in our neighboring states, felony murder sentences are discretionary and range anywhere from a minimum of 15 years (Delaware, Ohio, and New York), to 20 years (Maryland), to 30 years with an available affirmative defense (New Jersey), to discretionary life without parole (West Virginia). *See* R.C. §§ 2903.02, 2929.02; 11 Del. C. §§ 4205, 4209; N.Y.P.L. § 70.00; MD Code § 2-201; N.J.S.A. 2C:11-3; W. Va. Code §§ 61-2-2, 62-3-15.

Bringing the law in line with the public's perceptions of justice and fairness will benefit prosecutors specifically by making it more likely that the public will have respect for the law and cooperate with law enforcement, which will aid prosecutors charged with administering and enforcing those laws. *See Disutility of Justice, supra*. Indeed, it is the prosecutor's responsibility to see that justice is done, *see* Rule

of Professional Conduct 3.8, which remains difficult under Pennsylvania's current felony murder scheme.

CONCLUSION

For all of the foregoing reasons, this Court should accept Lee's invitation to hold mandatory life without parole sentences for non-killers convicted of felony murder contrary to the Pennsylvania Constitution.

Respectfully submitted,

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Date: 4/25/2024

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the word count limitation of Rule 2135 of the Pennsylvania Rules of Appellate Procedure. This brief contains 2,051 words. In preparing this certificate, I relied on the word count feature of Microsoft Word.

I further certify that this brief complies with rules that require confidential or non-public information to be filed differently than non- confidential or public information.

Dated: 4/25/2024

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CERTIFICATE OF SERVICE

I hereby certify that on this, a true and correct copy of the forgoing Brief of Amicus Curiae was served on the parties via PACfile.

Dated: 4/25/2024

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