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180 WAL 2023

IN THE SUPREME COURT OF PENNSYLVANIA
No. 180 WAL 2023

COMMONWEALTH OF PENNSYLANIA,
v.

DEREK LEE,

Petitioner.

MOTION TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR ALLOWANCE OF APPEAL

TO THE HONORABLE CHIEF JUSTICE AND JUDGES OF THE SUPREME COURT:

Susan M. Lin, counsel for Amici Curiae Scholars of Eighth Amendment Law, respectfully requests that the attached Brief of Amici Curiae in Support of Petition for Allowance of Appeal be filed and, in support thereof states:

1. Derek Lee was convicted of felony murder and sentenced to the mandatory term of imprisonment of life without the possibility of parole.

2. Mr. Lee's conviction and sentence was affirmed by the Superior Court on June 13, 2023. *Commonwealth v. Lee*, Pa. Super. No. 1008 WDA 2021.

3. Mr. Lee's Petition for Allowance of Appeal with this Court is due on or before July 13, 2023, and, as of the time of the filing of the instant motion, has already been docketed with this Court.

4. Pursuant to Rule 531(b)(1)(iii) of the Pennsylvania Rules of Appellate Procedure, an amicus curiae may file a brief by leave of the Court.

5. The issue presented in Mr. Lee's appeal involves the applicability of the Eighth Amendment to the U.S. Constitution and Article I § 13 of the Pennsylvania Constitution.

6. *Amici Curiae* are Eighth Amendment scholars with expertise in the law, policy, and theory of punishment. *Amici* have a strong interest in the development of Eighth Amendment protections and related, often more expansive, state constitutional doctrines. *Amici* share their expertise to explain why Pennsylvania's mandatory imposition of life without parole ("LWOP") for people convicted of second-degree murder violates the Eighth Amendment and Article I § 13 of the Pennsylvania Constitution, which is, at a minimum, co-extensive with the U.S. Constitution.

7. *Amici Curiae* respectfully request permission to file the attached Brief in Support of the Mr. Lee's Petition for Allowance of Appeal. (Brief attached.)

8. *Amici Curiae* believe that the attached brief could be helpful to the Court's decision regarding Mr. Lee's Petition for Allowance of Appeal.

WHEREFORE, for the reasons described above, *Amici Curiae* Eighth Amendment Scholars respectfully request that this motion be granted and that the Brief in Support of Petition for Allowance of Appeal, attached hereto, be filed.

Dated: July 13, 2023

Respectfully submitted,

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VERIFICATION AND CERTIFICATION

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

I, Susan M. Lin, am aware of the penalties for perjury and/or false statements, and verify that the factual averments above are true.

Dated: July 13, 2023

/s/ Susan M. Lin
Susan M. Lin
Pa. Atty ID No. 94184

ATTACHMENTS

IN THE SUPREME COURT OF PENNSYLVANIA
No. 180 WAL 2023

COMMONWEALTH OF PENNSYLANIA,
v.

DEREK LEE,

Petitioner.

BRIEF OF *AMICI CURIAE* SCHOLARS OF EIGHTH AMENDMENT LAW IN SUPPORT OF PETITIONER

On Petition for Allowance of 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 Eighth Amendment scholars with expertise in the law, policy, and theory of punishment. *Amici* have a strong interest in the development of Eighth Amendment protections and related, often more expansive, state constitutional doctrines. *Amici* share their expertise to explain why Pennsylvania's mandatory imposition of life without parole ("LWOP") for people convicted of second-degree murder violates the Eighth Amendment and Article I § 13 of the Pennsylvania Constitution, which is, at a minimum, co-extensive with the U.S. Constitution.

RULE 531(B)(2) CERTIFICATION

Pursuant to Rule 531(b)(2), *amici* certify that no person or entity was paid in whole or in part to prepare this brief. Only *pro bono* counsel authored this brief.

SUMMARY OF ARGUMENT

Amici submit this brief in support of Petitioner, Derek Lee, a man convicted at age 26 of felony murder and condemned to die in prison even though he never killed anyone and did not intend to take a life. Pennsylvania law mandates life sentences for second degree murder, 18 Pa. C.S. § 1102 (b), and permanently bars parole for people serving life sentences, 61 Pa. C.S. § 6137(a)(1). For people who

[1] Each *amicus curiae* is listed at the end of this brief.

did not kill or intend to kill, this severe, mandatory punishment is categorically disproportionate and violates the Eighth Amendment.

Specifically, the Eighth Amendment prohibits severe punishments that are disproportionate as applied to crimes that do not reflect the worst offenses and when imposed upon categories of offenders who are not the most culpable. This categorical approach has led to constitutional bars on the execution of children, people with intellectual disability and people who have not killed or intended to kill, including those convicted of felony murder.

Significantly, the Supreme Court has recently applied these principles to severe noncapital punishments too in the context of juvenile LWOP. Two longstanding principles undergird those decisions and are equally applicable to adults. *First*, severe punishments, which the Court now recognizes includes LWOP, must be proportionate to the offense and the culpability of the class of offenders punished. *Second*, people who do not kill or intend to kill are categorically less deserving of the most extreme punishments.

The categorical approach applies here where Petitioner challenges a sentencing practice applied to an entire class of people condemned to die in prison even though they did not kill or intend to take a life. *Amici* show that this excessive punishment is inconsistent with evolving standards of decency. Indeed, Pennsylvania is an outlier: an overwhelming majority of states and the international

community reject this extreme punishment, which does not serve valid penological objectives. Accordingly, the Court should grant Mr. Lee's Petition for Allocator, and ultimately, vacate Mr. Lee's sentence.

ARGUMENT

I. THE EIGHTH AMENDMENT BARS SEVERE PUNISHMENTS THAT ARE DISPROPORTIONATE TO THE CRIME OR THE CULPABILITY OF THE CLASS OF PERSONS PUNISHED.

"The concept of proportionality is central to the Eighth Amendment." *Graham v. Florida*, 560 U.S. 48, 61 (2010). The Court first recognized this over a century ago in *Weems v. United States*, 217 U.S. 349, 367 (1910), stating "that punishment for crime should be graduated and proportioned to [the] offense." Today, the Court recognizes that "protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment." *Montgomery v. Louisiana*, 577 U.S. 190, 206 (2016). As explained next, enforcing that guarantee requires disentangling two strands of Eighth Amendment analysis.

A. The Categorical Approach to Proportionality Governs Challenges to Punishment Practices That Apply to Entire Classes of Offenders.

The Eighth Amendment's proportionality requirement splintered into two methods for assessing excessive punishments. *See Graham*, 560 U.S. at 59. The first balances factors to assess whether a sentence is grossly disproportionate to the

specific crime committed. *Id.* The second assesses whether a punishment is excessive as applied to a category of offenses or offenders. *Graham*, 560 U.S. at 60.

Within the first "gross proportionality" approach, which does not resolve Mr. Lee's challenge, the Court compares the "gravity of the offense and the severity of the sentence." *Id.* If that results in an "'inference of gross disproportionality'" the Court compares the sentence to others within and outside the jurisdiction. *Id.* (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991)). It is "the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality." *See Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring). Commentators have long criticized this case-by-case balancing approach as a weak form of Eighth Amendment enforcement. *See* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1156–57 (2009) (noting the Court has only once inferred gross proportionality, more than 40 years ago); Alison Siegler & Barry Sullivan, *"'Death Is Different' No Longer": Graham v. Florida and the Future of Eighth Amendment Challenges to Noncapital Sentences*, 2010 Sup. Ct. Rev. 327, 331-32 (noting case-by-case balancing overvalues "the nature and specifics of the offense").

Within the second form of proportionality analysis, implicated here, the Court has recognized categorical restrictions on disproportionate punishment. *Graham*,

560 U.S. at 60. This approach considers whether a punishment is excessive based upon "the nature of the offense" or "the characteristics" of a class of offenders. *Id.* For example, the Court has held that capital punishment is categorically excessive when applied to nonhomicide offenses, including rape, *see Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Coker v. Georgia*, 433 U.S. 584 (1977), and felony murder where the defendant did not kill or intend to kill, *see Enmund v. Florida*, 458 U.S. 782 (1982). The Court has likewise prohibited the death penalty as disproportionate based upon the characteristics of the class of people convicted. *See Roper v. Simmons*, 543 U.S. 551 (2005) (juveniles); *Atkins v. Virginia*, 536 U.S. 304 (2002) (people with intellectual disabilities).

Although the Supreme Court first recognized the categorical approach in the capital context, in the last two decades, it has followed it with respect to severe, noncapital punishments too. *See Graham*, 560 U.S. at 61; *Miller v. Alabama*, 567 U.S. 460, 470 (2012); *Montgomery*, 577 U.S. at 193. This has rightly exposed extreme sentences like LWOP, long sanctioned under the toothless gross proportionality balancing approach, to the closer scrutiny that the categorical approach demands. *See* Douglas A. Berman, Graham *and* Miller *and the Eighth Amendment's Uncertain Future*, 27-WTR CRIM. JUST. 19, 21, 23 (2013) (noting that *Graham* and *Miller* eroded the "longstanding distinction in Eighth Amendment jurisprudence between capital and noncapital sentences").

In sum, "gross proportionality" assesses "a particular defendant's sentence." *Graham*, 560 U.S. at 61–62. But where "a sentencing practice itself is in question" and it "applies to an entire class of offenders[,]" the Court has made clear that the "categorical approach" governs. *Id.* So too here where LWOP is challenged as categorically excessive for a class of adult offenders who did not kill or intend to take a life.

B. LWOP Is Now Recognized as One of the Most Severe Punishments, Subject to Categorical Proportionality Analysis.

The Court's juvenile LWOP decisions established that LWOP is one of the law's most severe punishments that can be categorically disproportionate. *Graham*, 560 U.S. at 61; *Miller*, 567 U.S. at 470; *Montgomery*, 577 U.S. at 193. While the Court first recognized the categorical approach in the capital context, neither the Eighth Amendment's text, its history, nor its "logic" limit it to capital punishment. *See* Barkow, *supra* at 1179.

Indeed, the categorical approach can no longer be explained by the notion that "death is different." *See Gregg v. Georgia*, 428 U.S. 153, 188 (1976). Although "the Eighth Amendment applies . . . with special force" to the death penalty, *Roper*, 543 U.S. at 568, because it is "'unique in its severity and irrevocability[,]'" *Enmund*, 458 U.S. at 797 (quoting *Gregg*, 428 U.S. at 187), the Court has applied the categorical approach beyond capital cases when there are "mismatches between the culpability

of a class of offenders and the severity of a penalty." *Miller*, 567 U.S. at 470; *Graham*, 560 U.S. at 61. The severity of LWOP was essential to this reasoning.

Graham noted that LWOP "share[s] some characteristics with death sentences that are shared by no other sentences." 560 U.S. at 61 (quoting *Gregg*, 428 U.S. at 187). It recognized that as "the second most severe penalty permitted by law," LWOP, like the death penalty, "alters the offender's life by a forfeiture that is irrevocable" depriving him "of the most basic liberties." *Id.* at 69–70. The Court also viewed LWOP as especially harsh because it denies all hope of redemption; future behavior does not matter. *Id.* at 70. *Miller* echoed this reasoning, concluding that LWOP, as the "lengthiest possible incarceration," is "akin to the death penalty" and should be treated "similarly to that most severe punishment." 567 U.S. at 475.

These decisions make clear that for categorical proportionality analysis "'[d]eath is different' no longer." *Graham*, 560 U.S. at 103 (Thomas, J., dissenting). *Graham* crossed "the clear and previously unquestioned divide between capital and noncapital cases." William W. Berry III, *More Different Than Life, Less Different Than Death: The Argument for According Life Without Parole Its Own Category of Heightened Review Under the Eighth Amendment After* Graham v. Florida, 71 OHIO ST. L.J. 1109, 1122–23 (2010).

Moreover, although this jurisprudence addressed juveniles, *Graham*, *Miller*, and *Montgomery* in no way limited earlier Eighth Amendment precedent

recognizing the diminished culpability of certain classes of adults based upon their characteristics or the nature of their offenses. *See, e.g.*, *Atkins*, 536 U.S. 304; *Coker*, 433 U.S. at 598; *Kennedy*, 554 U.S. 407; *Enmund*, 458 U.S. 782. Those decisions remain central to proportionality analysis irrespective of which severe punishment is at issue. The juvenile LWOP cases are not to the contrary.

To be sure, *Graham*, *Miller*, and *Montgomery* were partly based upon the Court's recognition that juvenile offenders are less culpable than adult offenders due to their "lack of maturity," susceptibility "to negative influences" and because they are still developing. *See Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 569–70). But the decisions never suggested that this was the singular basis for finding diminished culpability when comparing a class of offenders to the harshness of LWOP. *See* Michael M. O'Hear, *Not Just Kid Stuff? Extending* Graham *and* Miller *to Adults*, 78 MO. L. REV. 1087, 1087 (2013).

More to the point, diminished culpability based upon youth was not the sole basis for *Graham*'s finding of disproportionate punishment. 560 U.S. at 69. *Graham* held that LWOP's severity was constitutionally disproportionate as compared to *both* the nature of the offense (a nonhomicide crime), and the characteristics of the juveniles sentenced. 560 U.S. at 69. The Court reasoned that "a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." *Id.*

Because both the "age of the offender and the nature of the crime" were relevant to *Graham*'s proportionality analysis, it would profoundly misread the Court's juvenile LWOP cases to conclude that they foreclose categorical proportionality review of LWOP for groups of offenders other than children. Rather, they establish that the Court now considers LWOP one of the law's most severe penalties such that courts must evaluate whether a "mismatch" exists between that harsh punishment and "the culpability of a class of offenders" subjected to it. *See Miller*, 567 U.S. at 470.

C. Longstanding Precedent Recognizes That People Who Do Not Kill or Intend to Kill Are Categorically Less Deserving of the Most Extreme Punishments.

The Supreme Court's reaffirmation in *Graham* that people who do not kill or intend to kill are categorically less deserving of the most severe punishments was not a new principle specific to juveniles. 560 U.S. at 69 (citing *Kennedy*, 554 U.S. 407; *Enmund*, 458 U.S. 782; *Tison v. Arizona*, 481 U.S. 137, 158 (1987); *Coker*, 433 U.S. 584). The Court established this long before in a line of decisions recognizing "diminished culpability, not as a function of the defendant's class or status, but rather his offense." *See* Perry L. Moriearty, *Implementing Proportionality*, 50 U.C. DAVIS L. REV. 961, 979 (2012); *Graham*, 560 U.S. at 60 (categorical rules fall into two subsets: the "nature of the offense" and "the characteristics of the offender").

Indeed, the Supreme Court has long held that the Eighth Amendment prohibits the death penalty for nonhomicide crimes because the most severe punishments must be reserved for the worst offenses, which involve killing. *See Kennedy*, 554 U.S. at 446–47; *Coker*, 433 U.S. at 598 (plurality opinion); *Enmund*, 458 U.S. at 797. In *Kennedy v. Louisiana*, the Court explained that this line exists "between homicide and other serious violent offenses" because though serious nonhomicide crimes "may be devastating in their harm," they differ from murder "'in terms of moral depravity and of the injury to the person and to the public.'" 554 U.S. at 438 (quoting *Coker*, 433 U.S. at 598 (plurality opinion)); *Enmund*, 458 U.S. at 797. In *Graham*, the Court applied this rationale to LWOP, stating that though offenses like robbery and rape are serious crimes, they "differ from homicide crimes in a moral sense." 560 U.S. at 69.

The Court's 1982 decision in *Enmund v. Florida*, 458 U.S. 782, further explained why people who do not kill or intend to kill are categorically less deserving of the most extreme punishments. In *Enmund*, a man convicted of felony murder drove the getaway car for friends who robbed and killed two victims. *Id.* at 784. Finding death a categorically disproportionate punishment, the Court emphasized that the "focus must be on *his* culpability, not that of those who committed the robbery and shot the victims." *Id.* at 798 (emphasis in original). The Court reasoned that the Eighth Amendment bars the most severe punishments for

someone who, though involved in a felony resulting in death, "does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Id.* at 797.

Graham relied upon *Enmund* to reaffirm in the context of LWOP 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." 560 U.S. at 69 (citing *Enmund*, 458 U.S. 782 and other decisions). *Graham* thus makes clear that the diminished culpability of people who do not kill or intend to kill is central to the proportionality analysis under the Eighth Amendment whether the penalty is death or LWOP. *Id.*

II. PENNSYLVANIA'S MANDATORY LWOP FOR PEOPLE CONVICTED OF FELONY MURDER WHO DID NOT KILL OR INTEND TO KILL IS CATEGORICALLY DISPROPORTIONATE UNDER THE EIGHTH AMENDMENT.

For all the reasons set forth above, the Supreme Court's categorical approach to proportional punishment governs the assessment of the extreme punishment at issue here: mandatory LWOP for people convicted of second-degree murder. 18 Pa. C.S. § 1102 (b); 61 Pa. C.S. § 6137. To assess "mismatches between the culpability of a class of offenders and the severity of a penalty[,]" *Miller*, 567 U.S. at 470, courts must first consider whether there are "objective indicia of national consensus" against the punishment. *Graham*, 560 U.S. at 62. Then they must exercise "independent judgment" to determine whether the punishment is categorically

disproportionate in light of the culpability of the class of offenders as compared with "the severity of the punishment in question." *Id*. at 67. And finally, they ask "whether the challenged sentencing practice serves legitimate penological goals." *Id.* Applying this framework, it is clear that Pennsylvania's mandatory LWOP for people like Petitioner who did not kill or intend to kill is unconstitutionally disproportionate. *See Graham*, 560 U.S. at 68.

A. A National Consensus Rejects LWOP for People Convicted of Felony Murder Who Did Not Kill or Intend to Take a Life.

The overwhelming majority of states do not impose mandatory LWOP on those convicted of felony murder in the circumstances at issue here, demonstrating a clear national consensus against such severe punishments. *See* ANDREA LINDSAY, PHILADELPHIA LAWYERS FOR SOCIAL EQUITY, LIFE WITHOUT PAROLE FOR SECOND-DEGREE MURDER IN PENNSYLVANIA: AN OBJECTIVE ASSESSMENT OF SENTENCING 42 (2021) (noting that "Pennsylvania is a national exception") [hereinafter *PLSE Report*]. The Court looks beyond historical views of prohibited punishments because the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). "Evolving standards of decency" are reflected in objective indicia of society's standards, including laws, recent legislation, trends in legislation, the frequency with which an authorized penalty is used, and broader social and professional consensus. *See Graham*, 560 U.S. at 62–67; *Atkins*, 536 U.S.

at 313–17. Other countries' practices are also relevant. *See id.* Evaluating those metrics here, a national consensus rejects mandatory LWOP for felony murder where the person has not killed, intended to kill, or acted with reckless disregard to the risk that a life will be taken. *See PLSE Report*, *supra* at 5.

In nearly all other states, LWOP is not mandated for felony murder where a person has not killed or intended to kill, and notwithstanding their level of involvement in the felony. In total, thirty states reject LWOP for felony murder where the person has not killed, intended to kill, or acted with reckless disregard to the risk that a life will be taken. This breaks down as follows: in nineteen states LWOP is not an authorized sentence for felony murder.[2] Seven more states have abolished felony murder altogether. *See* PAUL H. ROBINSON & TYLER SCOT WILLIAMS, MAPPING AMERICAN CRIMINAL LAW: CH. 5 FELONY-MURDER RULE 2 (2017)[3] (listing Arkansas, Hawaii, Kentucky, Michigan, New Hampshire, New Mexico, and Vermont as states that have "effectively rejected the felony-murder rule"). Three states, Illinois, North Dakota, and California authorize LWOP for felony murder only when there is proof of "at least recklessness as to causing the

[2] Ala. Code §§ 13A-6-2; 13A-5-6; Alaska Stat. §§ 12.55.125; 11.41.110; Colo. Rev. Stat. Ann. §§ 18-3-103 & 18-1.3-40; Conn. Gen. Stat. § 53a-35a; Ind. Code Ann. § 35-42-1-1; Kan. Stat. Ann. §§ 21-5402; 21-6620; Me. Stat. tit. 17-A, §§ 202 & 1604; Minn. Stat. § 609.19; Miss. Code Ann. §§ 97-3-19 & 97-3-21; Mo. Ann. Stat. § 565.021; N.J. Stat. Ann. § 2C:11-3; N.Y. Penal Law §§ 125.25 & 70.00; Ohio Rev. Code Ann. § 2903.02 & 2929.02; Or. Rev. Stat. Ann. § 163.115; 11 R.I. Gen. Laws Ann. §§ 11-23-1 & 11-23-2; Tex. Penal Code Ann. §§ 19.02 & 12.32; Utah Code Ann. § 76-5-203; Va. Code Ann. § 18.2-10 & 18.2-32–18.2-33; Wis. Stat. Ann. § 940.03.

[3] *available at* https://scholarship.law.upenn.edu/faculty_scholarship/1719.

death of another human being." ROBINSON & WILLIAMS, *supra* at 3–4 (listing Illinois and North Dakota); *see also* Cal. Penal Code § 189(e) (2021). Earlier this year, Minnesota legislators proposed legislation that would similarly limit use of felony murder. Peter Callaghan, *Noting Disparities, Minnesota Lawmakers Look to Limit Use of Felony Murder Rule*, MINNESOTA POST, Mar. 7, 2023.[4] Iowa limits LWOP for felony murder to where the "person kills another person while participating in a forcible felony." *See* Iowa Code § 707.2(1)(b) and *id.* § 902.1(1).

Only one other state—Louisiana—mandates LWOP for felony murder like Pennsylvania does. There, people are also condemned to die in prison irrespective of whether they killed or intended to kill and notwithstanding their level of participation in the crime nor proof of recklessness as to causing death. La. Stat. Ann. § 14:30.1 (2021).

The "consistency of the direction of change" also helps demonstrate a consensus against LWOP for felony murder. Of the seven states that have abolished felony murder altogether, six of them have done so in the last forty years, showing a trend away from this punishment. *See* ROBINSON & WILLIAMS, *supra* at 2 n.3. Even among states that retain felony murder, some have recently reduced the mandatory

[4] *available at* https://www.minnpost.com/state-government/2023/03/noting-disparities-minnesota-lawmakers-look-to-limit-use-of-felony-murder-rule/#:~:text=State%20Government-,Noting%20disparities%2C%20Minnesota%20lawmakers%20look%20to%20limit%20use%20of%20felony,on%20the%20periphery%20of%20crimes.

sentence for it from LWOP to a maximum term of years. *See, e.g.*, Colo. Rev. Stat. § 18-3-103 (2021); S.B. 21-124, 73rd Gen. Assemb., Reg. Sess. (Colo. 2021);[5] Alex Burness, *Colorado Is Changing How It Sentences People Found Guilty of Felony Murder*, DENVER POST (Apr. 27, 2021, 11:45 AM) (citing 2021 Colorado law that eliminates automatic LWOP for felony murder in favor of sentences "between 16 and 48 years").[6] Other states like California have recently added intent elements to their felony murder rules. Jazmine Ulloa, *California Sets New Limits on Who Can Be Charged with Felony Murder*, L.A. TIMES (Sept. 30, 2018, 9:40 PM).[7] These measures indicate growing recognition that the harshest sentences for felony murder should be reserved for the worst crimes, rather than when someone does not kill or intend to kill. *See* Jamiles Lartey, *New Scrutiny on Murder Charges Against People Who Don't Actually Kill*, THE MARSHALL PROJECT, Mar. 18, 2023.[8]

In contrast to this trend, Pennsylvania is an outlier with respect to its aggressive and extensive use of LWOP. It has one of the highest populations of people serving LWOP sentences, second only to Florida, whose general and incarcerated populations double those of Pennsylvania. ABOLITIONIST LAW CENTER,

[5] *available at* https://leg.colorado.gov/sites/default/files/2021a_124_signed.pdf.
[6] *available at* https://www.denverpost.com/2021/04/26/colorado-felony-murder-prison-changes-bill-signed/.
[7] *available at* https://www.latimes.com/politics/la-pol-ca-felony-murder-signed-jerry-brown-20180930-story.html.
[8] https://www.themarshallproject.org/2023/03/18/felony-murder-law-alabama-pennsylvania-arizona

A WAY OUT: ABOLISHING DEATH BY INCARCERATION IN PENNSYLVANIA 16 (2018). Pennsylvania alone houses 10% of the country's LWOP population. *PLSE Report*, *supra* at 4. As of 2019, of the 5,436 people serving LWOP sentences in Pennsylvania, 1,166 (roughly 21%) were serving it for felony murder. *Id.* Pennsylvania's mandatory LWOP for felony murder thus imposes one of the law's harshest punishments at a uniquely staggering scale.

The international consensus likewise rejects LWOP for felony murder. Other countries have increasingly recognized felony murder as unjust and disproportionate. *See Enmund*, 458 U.S. at 796 n.22 (showing that in 1982 the felony murder doctrine was "abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe"). LWOP sentences "are virtually unheard of" outside of the U.S. THE SENTENCING PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT 5 (2021).[9]

In sum, there is a national and international consensus against mandatory LWOP for felony murder where a person does not kill or intend to kill. These objective indicia of society's standards demonstrate that Pennsylvania's mandatory LWOP for people convicted of felony murder who did not kill or intend to kill is

[9] *available at* https://www.sentencingproject.org/publications/no-end-in-sight-americas-enduring-reliance-on-life-imprisonment/.

categorically disproportionate under the Eighth Amendment. *See Graham*, 560 U.S. at 62–67; *Atkins*, 536 U.S. at 313–17.

B. Pennsylvania's Mandatory LWOP for People Convicted of Felony Murder Who Did Not Kill or Intend to Kill Does Not Serve Legitimate Penological Interests.

The Court also must exercise its independent judgment to consider whether mandatory LWOP for felony murder is categorically disproportionate and whether the challenged sentencing practice serves legitimate penological interests. *Graham*, 560 U.S. at 67. Both inquiries show that for people who did not kill or intend to kill Pennsylvania's mandatory LWOP for felony murder violates the Eighth Amendment.

As set forth in Part IC, *supra*, a long line of precedents establish 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." *Graham*, 560 U. S. at 69 (citing *Kennedy*, 554 U.S. 407; *Enmund*, 458 U.S. 782; *Tison*, 481 U.S. 137; *Coker*, 433 U.S. 584). And as set forth in Part IB, the Court has already recognized that LWOP is one of the most severe penalties, "akin to the death penalty" which should be treated "similarly to that most severe punishment." *Miller*, 567 U.S. at 475. Indeed, because only three men have been

executed by the Commonwealth since 1976,[10] LWOP is *de facto* the most severe punishment in Pennsylvania today. This precedent and the exercise of the Court's independent judgment should lead this Court to conclude that there is a profound "mismatch" between LWOP's severity and the diminished culpability of people convicted of felony murder who have not killed or intended to kill. *See Miller*, 567 U.S. at 470.

Moreover, as applied to this class of offenders, Pennsylvania's mandatory LWOP for felony murder does not further legitimate penological interests. As *Graham* recognized, when a person does not kill or intend to kill "retribution does not justify imposing the second most severe penalty" on that less culpable person. 560 U.S. at 72; *Enmund*, 458 U.S. at 801 ("Putting [defendant] to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts."). Mandatory LWOP for felony murder also does not serve the goal of deterrence because no one is likely to be deterred from committing harms that they never intended or directly caused in the first place. *See Graham*, 560 U.S. at 72; *Enmund*, 458 U.S. at 799. Incapacitation also fails as a justification given that most people subjected to felony murder in Pennsylvania, like Petitioner who was 26,

[10] *Execution Database*, DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/executions/execution-database.

have been imprisoned for crimes committed in their mid-twenties or younger. THE SENTENCING PROJECT, FELONY MURDER: AN ON-RAMP FOR EXTREME SENTENCING 2 (2022) (noting that in Pennsylvania "three-quarters of people serving LWOP for felony murder in 2019 were age 25 or younger at the time of their offense").[11] *Graham* rejected incapacitation as a justification for LWOP, refusing to assume that young offenders "forever [would] be a danger to society." *Graham*, 560 U.S. at 72. Rehabilitation also does not justify LWOP for felony murder here given that this punishment "forswears" rehabilitation altogether. *Graham*, 560 U.S. at 74. Indeed, the concept of rehabilitation is a "moot concern" in the context of LWOP. Berry, *supra* at 1135.

Because no penological purpose justifies Pennsylvania's mandate of imprisonment until death for a class of people convicted of felony murder whose culpability is diminished because they did not kill or intend to kill, the sentencing practice challenged here is categorically disproportionate. As such, it violates the Eighth Amendment and Article I § 13 of the Pennsylvania Constitution.

CONCLUSION

For all these reasons, Pennsylvania's mandatory LWOP for felony murder as applied to Petitioner and others who did not kill or intend to kill violates the Eighth Amendment and Article I § 13 of the Pennsylvania Constitution. This Court should

[11] *available at* https://www.sentencingproject.org/app/uploads/2022/10/Felony-Murder-An-On-Ramp-for-Extreme-Sentencing.pdf

grant the Petition for Allocatur and ultimately vacate Mr. Lee's sentence, remanding for resentencing consistent with the U.S. and Pennsylvania Constitutions.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the length of the foregoing brief complies with the 4,500-word limit set forth in Pa.R.A.P. 531(b)(3) for an *amicus curiae* brief and the typeface requirements of Pa.R.A.P. 124(a)(4). The word count as identified in the Microsoft Word processing system is 4,417.

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