

No. 180 WAL 2023

**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, 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 FORMER DEPARTMENT OF CORRECTIONS
SECRETARIES JOHN WETZEL AND GEORGE LITTLE
AS AMICI CURIAE SUPPORTING PETITIONER**

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INTERESTS OF THE AMICI CURIAE

John Wetzel was the Secretary of the Pennsylvania Department of Corrections from 2011-2021, under Governors of both political parties. His service as Secretary followed more than two decades of work in a variety of positions in the correctional system, from a line correctional officer to the warden of a county jail. Secretary Wetzel has also served on the Pennsylvania Board of Pardons as a correctional expert. Secretary Wetzel now runs Phronema Justice Strategies, where he consults with and advises prison and jail systems on staffing, security, training, tactics, programming, and other aspects of correctional management.

George Little was the Acting Secretary of the Pennsylvania Department of Corrections from 2021-2023. Prior to that role, he served the DOC as the Executive Deputy Secretary of Community Corrections and Reentry and as the Director of Community Corrections. In his more than three-decade career in corrections and public service, he has also been Commissioner of the Tennessee Department of Corrections. Acting Secretary Little is now a board member of the National Policing Institute.

Both Secretaries Wetzel and Little have spent several decades working directly with incarcerated people and considering the needs of the system as a whole, including particularly the needs of lifers and the practical effects of their long-term incarceration on budgets, public safety, and the functioning of the correctional system.

INTRODUCTION

This Court should accept Petitioner Lee's invitation to consider whether life sentences without the possibility of parole for people convicted of felony murder violate the Pennsylvania constitution. While *Amici* profess no particular expertise in interpreting the text of the state constitution, *Amici* understand that this Court considers policy factors under *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), in determining whether state constitutional rights exceed analogous federal constitutional rights. Accordingly, *Amici* offer their perspective on those factors as former heads of the Commonwealth's Department of Corrections who have worked closely with and around life-sentenced people, and done that work while prioritizing and protecting public safety and the functioning of the correctional system. And in *Amici's* experience, life without parole sentences for people convicted of felony murders make little sense.

Amici conclude this for several reasons based on their experience as correctional leaders. First, keeping people—including often people convicted at very young ages—incarcerated for their entire lives imposes enormous and unnecessary costs on the correctional system. It does this without much corresponding benefit, either, as life-sentenced people do not need to be permanently incarcerated to serve public safety. Second, and relatedly, forcing the system to expend enormous shares of finite resources on people who may not need it inhibits correctional leaders'

ability to direct resources and reinvest in people who need and could benefit from rehabilitation efforts. Third, *Amici* remind this Court that because of the Commonwealth's parole process—including robust victim rights and careful consideration by stakeholders with varied perspectives—making a class of people *eligible* for parole does not guarantee that anyone will *receive* parole. If they pose a public safety danger, they will not. In sum, *Amici* observe that life without parole sentences for felony murder put unnecessary financial and other pressure on the correctional system while failing to improve—and often even impeding—public safety. This Court should hear the appeal, and account for the effect of these sentences on the correctional system when it considers the *Edmunds* factors in its analysis of the legal questions involved.

ARGUMENT

I. Life without parole sentences for felony murders are financially insensible.

Life without parole sentences, including for offenses like felony murder, place enormous and unnecessary strain on correctional budgets. This reflects a simple math problem: people on life sentences serve more years than people with term-limited sentences, and they serve a portion of those years at advanced ages when they impose the greatest cost on the prison system. And on the other side of the ledger, much of that cost makes little sense from the perspective of public safety—in *Amici's*

experience and reflected in substantial research, paying to keep older people incarcerated serves little public safety benefit, because those people would not generally commit crimes if released. In fact, in our experience, people's rates of misconducts in the prison system decline over time, and eventually virtually disappear at advanced ages, prefiguring lack of recidivism upon release. All told, life without parole sentences force prison systems to spend a lot of money incarcerating people who probably don't need to be confined at all.

A. Lifers cost by far the most to incarcerate of anyone in the prison population.

The base level cost to incarcerate one person per year in Pennsylvania is, like virtually every other state in the country, quite high. Because the prison population has declined over the last three years, the per-person cost of incarcerating someone in the Pennsylvania DOC has increased to about \$60,000 per person as of 2021. See Pennsylvania Department of Corrections, FY22-23 Budget Testimony, Acting Secretary George Little (2022).¹ Pennsylvania has several Commonwealth-specific factors pushing up its per-prisoner cost. Some of those, like the nearly 150% increase in prescriptions for Suboxone just from 2020 to 2021, *id.*, which reflects the burgeoning opioid epidemic, do not owe specifically to life-

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Available

at:

<https://www.cor.pa.gov/About%20Us/Statistics/Documents/Budget%20Documents/Budget%20Testimony%202022-23.pdf>

sentenced prisoners. But many of the most salient Commonwealth-specific factors driving up the cost of incarceration follow directly from incarcerating the lifers at issue in this petition.

First, incarcerating lifers is far more expensive than incarcerating term-limited prisoners, and the Pennsylvania DOC's share of them is increasing over time. As of late 2021, the state DOC held nearly 10,000 people over the age of 50—or about 27% of the total prison population of the DOC. FY22-23 Budget Testimony, *supra*. Because of recent success at lowering the prison population that has come primarily by making changes to incarceration for people who commit minor offenses, that share of the DOC population comprised of people over age 50 has increased over time—in fact, nearly tripling from 2000 to 2021. *Id.* And the people over 50 who remain in custody are necessarily and disproportionately composed of people serving life sentences—people convicted of sentences even to lengthy terms do not generally remain incarcerated into their old age. Lifers, of course, do.

Confining those people simply comes with a higher price tag. The DOC has three special long-term care units at State Correctional Institution (“SCI”) Laurel Highlands, SCI Waymart, and SCI Muncy, to deal with the particular medical needs of elderly and aging people, which requires spending more money to hire medical specialists, spending more money on third party healthcare contractors, and spending more money on security and transport when people with complicated medical needs get

referred to outside medical facilities or hospitals. And prisoners over 50 cost the DOC \$32 million dollars a year *just on medications*—with a per person average medication cost roughly double the cost for prisoners younger than 50. *Id.* For all these reasons, the cost of incarcerating the oldest prisoners who require regular medical attention can far exceed \$100,000 per person, per year—substantially more than the state average. Danielle Ohl, Broken ‘compassionate release’ rules strand Pa.’s sickest prisoners as costs to taxpayers soar, Spotlight PA (March 30, 2022).² The per-prisoner cost at Waymart and Laurel Highlands, the two aforementioned facilities with long-term care units for men, had a per-prisoner cost in 2021 of more than \$119,000 and more than \$112,000, respectively. *Id.*

Second, unlike the federal government or many other states, Pennsylvania law makes very little provision for releasing medically fragile or even incapacitated people—people who are simultaneously often physically incapable of committing new crimes if released and the absolute most expensive to incarcerate. While the Commonwealth established its medical transfer process in 2009, program rules make it extraordinarily difficult to access. The program, which allows for medical transfers from DOC custody directly to a hospital, long-term care facility, or hospice, requires an applicant to have less than a year to live in the

² *Available at:* <https://www.spotlightpa.org/news/2022/03/pa-prison-life-sentence-compassionate-release/>.

opinion of a doctor, or to have a terminal illness and an inability to walk. Because of those narrow criteria, from 2016 to mid-2022, just twenty-two total prisoners were approved via this process. *See* Costs to Taxpayers Soar, *supra*. That was barely more than the eight incarcerated people who died in between applying and receiving a hearing. *Id.* This stands in stark contrast to, for example, the federal prison system, where the First Step Act allows for flexible judicial discretion to grant compassionate release motions based upon medical need and other extraordinary and compelling circumstances. *See, e.g.*, 18 U.S.C. § 3582(c)(1)(A). But especially when accounting for Pennsylvania’s longstanding and expansive felony murder regime at issue in this case, the upshot of all of this is that it’s both far easier to become a lifer in Pennsylvania, and far harder to leave prison once that designation has been applied. And that imposes enormous costs on the Commonwealth’s prison system.

B. That spending does not commensurately increase public safety, because many or even most lifers could be released without incident to their communities.

Many people currently serving life without parole sentences—including especially those serving such sentences after never having personally or intentionally killed anyone—would pose little to no threat to public safety if released. *Amici* know this not only from their own direct experience with aging lifers in the Pennsylvania correctional system, but from empirical research that has followed legal changes that resulted in

the release of hundreds of former juvenile lifers across the country. And indeed, the recidivism statistics for the former juvenile lifers out of Pennsylvania may be especially useful as a comparator here because of similarities between those people and people incarcerated for violating the Commonwealth's longstanding felony murder law.

First, as important context, several decisions of the U.S. Supreme Court set the stage for formerly life-without-parole-sentenced people to access parole eligibility for the first time. Most relevantly here, *Graham v. Florida*, 560 U.S. 48 (2010) held that juveniles could not receive life without parole sentences for non-homicide offenses, and *Miller v. Alabama*, 567 U.S. 460 (2012) held that mandatory life without parole sentences for juveniles were unconstitutional regardless of offense type. The practical effect of these decisions was that thousands of people across the country who had gotten life without parole sentences at very young ages and spent their entire adult lives in correctional systems had to be resentenced to terms that included parole eligibility. And because of past prosecution practices and other factors, Pennsylvania actually incarcerated the largest share of juvenile lifers who ended up qualifying for post-*Miller* resentencings—about 25% of all juvenile lifers in the country were serving their sentences in the Pennsylvania DOC. Tarika Daftary-Kapur and Tina M. Zottoli, *Reentry Experiences of Released*

Juvenile Lifers in Philadelphia, Montclair State Legal Decision Making Lab (2022).³

Second, examining the progression of lifers' sentences demonstrates the suitability of many of them for possible release without jeopardizing public safety. In our experience, and as reflected by research, incarcerated people's in-facility conduct improves over time. People who start out their terms with recklessness, impulsivity, and anti-social behavior, regularly learn and apply new behavioral skills during their sentences. This is why, for example, in-facility misconducts—perhaps the best measure *Amici* know of anti-social behavior in prisons—decline markedly over time on average. Ashley Nellis, *The Lives of Juvenile Lifers: Findings from a National Survey*, The Sentencing Project (March 2012).⁴ It's also why, as another example, a lot of people who enter prison without even a high school diploma end up attaining their GED by diligently studying even in a restrictive environment. *Id.* In fact, contrary to general misconceptions, older people who have already served portions of very long sentences for violent crimes are the most well-adjusted of anyone in the prison population. Lila Kazemian & Jeremy Travis, *Imperative for Inclusion of Long Termers and Lifers in Research and*

³ Available at: <https://www.msuddecisionmakinglab.com/lifers-policy-brief>.

⁴ Available at: https://www.njjn.org/uploads/digital-library/The-Lives-of-Juvenile-Lifers_Sentencing-Project_%20March-1-2012.pdf.

Policy, 14 CRIMINOLOGY & PUB. POL. 2 (2015).⁵ Many of them end up serving as mentors to younger people who enter prisons, and they play key roles in helping maintain stability and safety in their facilities. Ashley Nellis, *A New Lease on Life*, The Sentencing Project (2021);⁶ Mark D. Cunningham and Jon R. Sorenson, *Nothing to Lose? A Comparative Examination of Prison Misconduct Rates Among Life-Without-Parole and Other Long-Term High-Security Inmates*, 33 *Crim. Just. and Behavior* 6, (Dec. 2006).⁷ While we as correctional leaders know that it might hurt to lose them, we also know that the same qualities and growth that make them leaders in our prisons make them suitable for release.

Third, concerning recidivism more generally: the recidivism statistics of former lifers who won release after legal reforms reflect their suitability for release, too. In Philadelphia specifically, the *Miller* and *Montgomery v. Louisiana*, 577 U.S. 190 (2016) legal reforms led to nearly 200 former juvenile lifers reentering the community, and the recidivism rate among that group even years after many had been released was measured at just 1.14% in 2022, a lower offense rate even than people in other demographics with no criminal history at all. *Reentry Experiences of Release Juvenile Lifers*, *supra*. Indeed, very few of them had even had

⁵ Available at: http://www.antonioacasella.eu/nume/Kazemianian_Travis_2015.pdf.

⁶ Available at: <https://www.sentencingproject.org/app/uploads/2022/08/A-New-Lease-on-Life.pdf>.

⁷ Available at: <https://journals.sagepub.com/doi/abs/10.1177/0093854806288273>.

subsequent contacts with police of any kind, and of the two who re-offended, one was a conviction for contempt. *Id.* Beyond the juvenile lifers, people who have served out very long terms of incarceration for violent crimes have the lowest recidivism rates of any category of previously incarcerated people—statistics that have proven durable over time. Tarika Daftary-Kapur, et al., A first look at the reentry experiences of juvenile lifers released in Philadelphia. 28 Psych., Pub. Pol., and Law 3 (2020);⁸ Robert Weisberg, Debbie A. Mukamal & Jordan D. Segall, Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California, Stanford, CA: Stanford Criminal Justice Center (2011).⁹

This all bears particularly on the type of people at issue in this petition. Like the people who won parole eligibility under *Graham*, Mr. Lee and many people incarcerated on life without parole sentences for felony murder in Pennsylvania today never killed anyone themselves. And like the people who won parole eligibility under both *Graham* and *Miller*, many of those people serving life without parole sentences received those sentences at ages when a mandatory sentence did not accurately reflect who those people might grow up to become. *Graham*

⁸ Available at: <https://psycnet.apa.org/record/2022-46629-001?doi=1>.

⁹ Available at: <https://law.stanford.edu/wp-content/uploads/sites/default/files/publication/259833/doc/slspublic/SCJC%20Lifer%20Parole%20Release%20Sept%202011.pdf>

and particularly *Miller* discussed the “diminished culpability and greater prospects for reform” of juveniles, 567 U.S. at 470, and cited “science and social science . . . studies showing that only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior” as reasons supporting invalidation of mandatory life without parole sentences. *Id.* at 471 (cleaned up and citations omitted). But research has demonstrated that 18 is not a hard and fast line; there is “psychological and neuroscientific evidence for expanding the age of youthful offenders” to include a more accurate adolescent age range of 10-24 years old to those experiencing diminished culpability. BJ Casey, C. Simmons, L.H. Sommerville, Making the Sentencing Case: Psychological and Neuroscientific Evidence for Expanding the Age of Youthful Offenders, *Annual Rev. of Criminology* Vol. 5 (2022).¹⁰ But regardless of the age of entry to the correctional system, Mr. Lee and many other lifers are similar to people who won parole eligibility under *Graham* and *Miller* in that they are generally older and more behaviorally well-adjusted, generally more expensive to incarcerate, and generally being permanently confined without commensurate benefit to public safety.

¹⁰ Available at: <https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-030920-113250>.

II. Forcing correctional systems to expend finite resources to incarcerate people unnecessarily prevents correctional systems from reinvesting in people who need and could benefit from rehabilitation.

Spending the money described in Section I on incarcerating aging lifers would be bad enough if it only meant that correctional spending was not meaningfully targeted at improving public safety. But in *Amici*'s experience, that spending poses a separate, related problem. Correctional budgets are, at bottom, zero sum. While *Amici* regularly lobbied Commonwealth leaders to expand the budget of the Pennsylvania Department of Corrections, and while correctional spending has increased over time, *Amici* never had as much money as they would have needed to provide all the programming and services necessary to serve all the interests that society has in imposing punishment on people who commit crimes—especially rehabilitation. Releasing people who don't need to be confined would save enormous sums of money and allow for better allocation of resources within the system.

First, as noted, not only is incarcerating people expensive, but aging lifers cost far more money on average than their younger counterparts with fewer and less expensive medical needs. *See* Section I.a., *supra*. Of course that means that the per-prisoner average spending is lower for younger, non-lifer prisoners. In 2021, compared to people in the long-term care unit at SCI Waymart at \$119,370 per year, people incarcerated at SCI Houtzdale (\$40,555 per prisoner) or SCI Coal Township (\$41,228

per prisoner) had only roughly a third of the monetary resources directed at them. *See Costs to Taxpayers Soar, supra.*

That gulf in funding has real consequences for everyone in the correctional system. When corrections officials must allocate money to caring for geriatric lifers who need not be confined, they cannot allocate that money to other programs. In *Amici's* experience, borne out by research, the Department cannot offer sufficient programming to address the needs of all the people in custody. Data suggests, for example, that more than 50-60% of incarcerated people do not receive correctional programming—not because of lack of interest, but because of institutional policy or capacity. *See Nellis (2012), supra; Reentry Experiences of Released Juvenile Lifers, supra.* In fact, 29% of people in one study could not participate in programming because they had already completed all available programming, or there were simply insufficient programs for them to attend despite wanting to do so. *Nellis (2012), supra.*

Having to spend money on custody and healthcare for lifers who could safely parole out crowds out other spending that could improve public safety, too. Money could be spent to ensure that incarcerated people—especially those on shorter sentences—could stay connected to family and friends on the outside. *Id.* While maintaining connections is vital to both internal success and eventual reentry, much of the cost of remaining connected is passed on to incarcerated people and their families who can

little afford it, fraying those ties. *See* Pennsylvania Profile, Prison Policy Initiative¹¹ (quantifying “the high cost of being incarcerated in Pennsylvania”). Money could be spent on reentry planning and transition services for anyone approaching a return date. Such programming matters especially for categories of people with higher recidivism rates, and prisoners have reported that existing reentry programming does not well prepare them to return to communities. *Reentry Experiences of Released Juvenile Lifers, supra*. Among other things, spending could help limit the biggest category of parole violations—technical, non-criminal violations—that drive reincarceration and keep prison populations higher than necessary. Stuti S. Kokkalera and Beatriz Amalfi Marques, *Parole Revoked: Justifying Rerelease for Juvenile Lifers*, 49 *Crim. Just. and Behavior* 5 (2022).¹² Money could also be spent on making more programming available, including ensuring that everyone in prison has access to programs that will help them improve as people or earn diplomas or degrees. Nellis (2012), *supra*. Not only does this give people something to focus on in the facility and have inherent value, it helps people present more compelling parole applications when the time comes.

¹¹ *Available at:* <https://www.prisonpolicy.org/profiles/PA.html>.

¹² *Available at:* <https://journals.sagepub.com/doi/10.1177/00938548221079254>.

III. Increasing parole eligibility would not threaten public safety because Pennsylvania’s parole system already contains robust safeguards that aggressively prioritize it in considering individual applications.

To the extent that this Court might worry that making felony murder lifers parole eligible based upon their state constitutional rights might threaten public safety, *Amici* would also assure the Court on that score. While the recidivism stats speak for themselves, *see* Section I.b., *supra*, any legal change would not lead to direct release, for anyone. Parole eligibility is just that—an opportunity to be considered for parole by the Board. And Commonwealth law and regulations provide numerous failsafe mechanisms against ill-advised release or early release that undermines penological purposes of sentencing.

First, even more than other states, the Commonwealth’s parole process provides for robust prosecutorial and victim participation in the process. Unlike some other states, Pennsylvania has no presumptive right to parole of any kind—nobody is entitled to it. Commonwealth law requires that “each victim . . . [of] a personal injury crime shall be given an opportunity by the court to submit a preparole statement to the court expressing concerns or recommendations regarding the parole or parole supervision of the offender.” 61 Pa. C.S. § 6134.1(c)(1); *see also* 61 Pa. C.S. § 6140. Not only may victims register themselves, but “the district attorney shall” affirmatively notify those victims about their participation rights. 61 Pa. C.S. § 6134.1(c)(2); *see also* 61 Pa. C.S. § 6140.

Those rights also extend to immediate family members if the victim is a minor, is incapable of testifying, or has died. 61 Pa. C.S. § 6140(a)(2). Statutes also impose a “duty to investigate” on the Parole Board, and specifically directs the Board to consider not only the circumstances of the offense and the “written or personal statement of the testimony of the victim or victim’s family,” 61 Pa. C.S. § 6135(a)(5), but an applicant’s conduct in the DOC, personal and family history, and complete record. *Id.* at § (a)(7). Moreover, statutes also make parole more difficult to obtain for people who commit more serious offenses—including everyone who would be affected by this decision—by specifically contrasting the full process with “short sentence parole” for people convicted of less serious crimes. 61 Pa. C.S. § 6137.1(a). No lifer would receive parole without robust consideration by the state Parole Board, with the benefit of victim input.

Second, in the Commonwealth and elsewhere, lifers—those on life with parole sentences, and those on life without parole sentences who won eligibility through legal reforms—generally serve long terms of years prior to release, if they are released at all. This has increased over time; one study estimated that in California, the length of time served by lifers pre-parole increased from about 12 years in the early 1980s to more than

25 years today. Ashley Nellis, *No End In Sight: America’s Enduring Reliance on Life Sentences*, The Sentencing Project (2021).¹³

Third, experience of the post-*Miller* parole eligibility expansion confirms all of this. The Supreme Court in *Graham* worried as it was that juvenile lifers would not receive a “meaningful opportunity to obtain release based on demonstrated growth and maturity,” 560 U.S. at 74. And perhaps it was right to worry—the Supreme Court itself has never provided any guidance on exactly what such “meaningful review” should entail. Stuti S. Kokkalera & Simon I Singer, *Discretionary Release Practices for Juveniles Facing Life* (2019). Regardless of the reason, parole boards in most states did not throw open the prison doors to even the most sympathetic juvenile lifers post *Miller* and *Montgomery*, with statistics suggesting that many parole boards’ decisions did not even account for young age at the time of conviction—the whole point of those cases. Stuti S. Kokkalera, Simon I. Singer, and Damla Cehreli, *Young Enough for the Maximum: Discretionary Release Decisions in the Post-*Miller* Era*, 68 *Crime & Delinquency* 6-7 (Nov. 2021).¹⁴ In Pennsylvania specifically, which *Amici* believe has done a good job with the post-*Miller* and *Montgomery* process, as of February 2023, twenty-six of the most complicated former juvenile lifers have still not even been resentenced to

¹³ *Available at:* <https://www.sentencingproject.org/reports/no-end-in-sight-americas-enduring-reliance-on-life-sentences/>.

¹⁴ *Available at:* <https://journals.sagepub.com/doi/10.1177/00111287211054734>.

constitutionally compliant parole eligible sentences; of the total eligible population who have won parole eligibility, only about half of resentenced juvenile lifers in Pennsylvania have ultimately received parole. *See* Pennsylvania Parole Board, Juvenile Lifer Statistics as of February 28, 2023.¹⁵ While *Amici* know that some advocates regard this as a sign that the process is not working quickly or well enough, the fact remains that the Parole Board is not releasing people it believes might pose a threat of any kind—and this Court need not worry that it would do that for people on felony murder sentences, either.

CONCLUSION

For all of the foregoing reasons, in addition to the reasons articulated in the petition, this Court should accept and hear this case.

Respectfully submitted,

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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 4,095 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.

/s/ Jim Davy

Jim Davy

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 2023, a true and correct copy of the forgoing Brief of Amicus Curiae was served on the parties via PACfile.

/s/ Jim Davy

Jim Davy