

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 PROSECUTORS AND JUDGES OF PENNSYLVANIA AS *AMICI
CURIAE* SUPPORTING PETITIONER**

Lauren E. O'Donnell
Attorney No. 306890
Robert M. Shinehouse
Attorney No. 330522
Asia O. Livingstone
Attorney No. 333718
BLANK ROME LLP
One Logan Square
130 North 18th Street,
Philadelphia, PA 19103
Tel.: (215) 569-5000

Counsel for *Amici Curiae*

April 26, 2024

FULL LIST OF AMICI CURIAE

Marco Attisano

Assistant District Attorney, Allegheny County District Attorney's Office, 2014-2016.

Hon. Cynthia Baldwin

Justice, Pennsylvania Supreme Court, 2006-2008.

Judge, Allegheny County Court of Common Pleas, 1990-2006.

Attorney-in-Charge, Office of Attorney General, Western Region, Bureau of Consumer Protection, 1983-1986.

Deputy Attorney General with the Office of Attorney General, Western Region, Bureau of Consumer Protection, 1981-1983.

Jason Bologna

Assistant United States Attorney, Eastern District of Pennsylvania, 2007-2022.

Assistant District Attorney, Philadelphia District Attorney's Office, 1998-2007.

Hon. Edward Cahn

Chief Judge, United States District Court for the Eastern District of Pennsylvania, 1993-1998.

Judge, United States District Court for the Eastern District of Pennsylvania, 1975-1993.

Hon. Robert Cindrich

Judge, United States District Court for the Western District of Pennsylvania, 1994-2004.

United States Attorney, Western District of Pennsylvania, 1978-1981.

Assistant District Attorney, Allegheny County, Pennsylvania, 1970-1972.

Walter Cohen

Acting Attorney General, Commonwealth of Pennsylvania, 1995.

First Deputy Attorney General, Commonwealth of Pennsylvania, 1989-1994.

Chief Assistant District Attorney, Philadelphia District Attorney's Office, 1970-1973.

Assistant District Attorney, Philadelphia District Attorney's Office, 1969-1974.

Laurel Gift

Senior Deputy Attorney General, Pennsylvania Office of the Attorney General, 2008-2014.

Assistant District Attorney, Allegheny County District Attorney's Office, 2001-2008.

Hon. James Giles

Chief Judge, United States District Court for the Eastern District of Pennsylvania, 1999-2005.

Judge, United States District Court for the Eastern District of Pennsylvania, 1979-2008.

Hon. John E. Jones, III

Chief Judge, United States District Court for the Middle District of Pennsylvania, 2020-2021.

Judge, United States District Court for the Middle District of Pennsylvania, 2002-2021.

Hon. Timothy K. Lewis

Judge, United States Court of Appeals for the Third Circuit, 1992-1999.

Judge, United States District Court for the Western District of Pennsylvania, 1991-1992.

Assistant United States Attorney, Western District of Pennsylvania, 1983-1991.

Assistant District Attorney, Allegheny County, Pennsylvania, 1980-1983.

Hon. Carl Solano

Judge, Pennsylvania Superior Court, 2016-2017.

Hon. Thomas I. Vanaskie

Judge, United States Court of Appeals for the Third Circuit, 2010-2018.

Chief Judge, United States District Court for the Middle District of Pennsylvania, 1999-2006.

Judge, United States District Court for the Middle District of Pennsylvania, 1994-2010.

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INTERESTS OF THE AMICI CURIAE

Amici curiae (“*Amici*”) are former Pennsylvania prosecutors and judges. Through their experience invoking discretion in prosecuting and sentencing individuals charged with serious crimes and in reviewing criminal convictions on appeal, *Amici* have a unique perspective on how life without parole sentences for felony murder convictions are applied in the legal system and have recognized the flaws of this mandatory sentencing scheme.

INTRODUCTION

Pursuant to *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), *Amici* understand that this Court will consider a variety of policy factors when determining whether mandatory life without parole sentences for felony murder convictions violate the Pennsylvania and United States Constitutions. This brief focuses on one such policy factor—the importance of prosecutorial and judicial discretion in recommending and imposing sentences upon individuals convicted of felony murder.

As of February 4, 2021, there were over 1,000 people serving mandatory life sentences without the opportunity for parole (“life without parole” or “LWOP”) in Pennsylvania for felony-murder convictions. Critically, Pennsylvania is one of only

two states that require LWOP in cases of felony murder.¹ This requirement forces judges to impose a LWOP sentence on anyone who committed a felony during which a murder took place, even if they had nothing to do with the murder. Judges cannot consider who actually committed the murder or the role that the defendant played in the murder. Similarly, prosecutors lose the ability to recommend sentences to courts based on the facts of each individual defendant's case.² Consequently, individuals like Petitioner—who did not even witness a murder and had no intent to kill anyone or knowledge that anyone would be killed—must serve the same sentence as the person who committed the murder.³

Preventing prosecutors and judges from exercising their discretion in recommending and imposing sentences also precludes them from considering the significant racial disparities that result from mandatory LWOP for felony murder. Rather than enhance these disparities, as the current regime clearly does, prosecutorial and judicial discretion would permit more tailored, appropriate

¹ See 18 Pa.C.S. § 1102(b) (mandatory life imprisonment for second-degree murder) and 61 Pa.C.S. § 6137(a) (no parole for life sentence). See also La Stat Ann 14:30.1.

² While prosecutors may have the discretion to charge an individual with a different crime in order to circumvent a mandatory LWOP sentence, there may be cases in which the factual circumstances of the crime prevent lesser charges.

³ Carrie Johnson, *Life without Parole For 'Felony Murder': Pa. Case Targets Sentencing Law*, NPR (Feb. 4, 2021), <https://www.npr.org/2021/02/04/963147433/life-without-parole-for-felony-murder-pa-case-targets-sentencing-law>.

sentences, regardless of race. Finally, preventing prosecutors and judges from exercising their discretion strips them of the ability to determine what sentence is appropriate for the community affected by the crime.

ARGUMENT

I. Judges and Prosecutors Should Have Discretion to Ensure Felony Murder Sentences Are Appropriately Tailored to Each Individual Case and Defendant.

Allowing judges to have discretion in sentencing enables them to tailor an individual's punishment to the particular facts of each case, thus preventing unduly lenient or harsh sentences.⁴ Similarly, allowing prosecutors to have discretion in recommending sentences that are tailored to each individual case ensures that the office charged with acting as "ministers of justice" and holding individuals accountable for their actions also has an opportunity to provide meaningful input into the sentences that courts eventually impose.⁵

⁴ Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. Rev. 105, 165 (1994) ("[A] legal system which seeks to cover everything by a special provision becomes cumbersome and unworkable"); Walter Evans and Frank Gilbert, *The Case for Judicial Discretion in Sentencing*, 61 *Judicature* 66 (1977); Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 *Cardozo L. Rev.* 1, 13 (2010).

⁵ *See, e.g.*, Model Rules of Prof'l Conduct R. 3.8, cmt. 1 (2024) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); National District Attorneys Association, *What is a DA* ("The role of the prosecutor is vital to the criminal justice system. They work to hold individuals accountable for their actions, deter crime, and protect the public from harm. The work of prosecutors is essential to maintaining a fair and just society, and they play a critical role in

Pennsylvania's mandatory sentencing scheme precludes all of this and instead requires that individuals convicted of felony murder serve LWOP regardless of the circumstances of the case, often with inherently unjust consequences. Indeed, consider *Commonwealth of Pennsylvania v. Andre Howard*, No. 3388-3390, in which the defendant was convicted of felony murder and sentenced to LWOP. Mr. Howard stole the wallet of Tyrone Cooke at a subway stop in Philadelphia. A struggle ensued, and Mr. Howard pushed Mr. Cooke and fled with the wallet. While Mr. Howard only intended to push Mr. Cooke to end the struggle and escape, Mr. Cooke fell down the stairs, hit his head, and later succumbed to his injuries. Mr. Howard never intended to kill anyone. But the sentencing judge was mandated to impose the same sentence upon him as someone who shoots at point-blank range a helpless store owner during the commission of a robbery. And the district attorney who prosecuted the case had no discretion to recommend to the court a sentence that accounted for the vast disparities between that case and other felony murder cases.

The importance of judicial and prosecutorial discretion in felony murder cases is magnified by the reality that the facts do not merely differ between cases, but also between co-defendants. As seen in Petitioner's case, two individuals were involved

ensuring that justice is served for all.”), available at <https://ndaa.org/about/what-does-a-da-do/>.

in a felony murder, but only one pulled the trigger—Petitioner was on a completely different floor of the house when the murder occurred. By way of another example, a defendant who waits in the getaway car during the commission of a bank robbery will receive the same sentence as his co-defendant who, without the defendant’s knowledge or complicity, shoots and kills the bank teller while inside the bank.

Mandating that each of these individuals receive the same sentence prevents judges and prosecutors from considering that the individuals engaged in vastly different conduct. It also prevents judges and prosecutors from considering each individual’s criminal intent, prior criminal history or lack thereof, personal background, family circumstances,⁶ contributions to the community, and any other factors that may be relevant in determining an appropriate sentence for each individual.

Pennsylvania’s mandatory sentencing scheme has severe ramifications for those convicted of felony murder because life sentences without parole alter “the offender’s life by a forfeiture that is irrevocable” and thereby deprive him “of the most basic liberties.” *Graham v. Florida*, 560 U.S. 48, 69-70 (2010). Indeed, life without the possibility of parole is simply a prolonged death sentence.

⁶ For example, parental incarceration leads to child poverty, homelessness, and food insecurity. See The Anne E. Casey Foundation, *A Shared Sentence: The Devastating Toll of Parental Incarceration on Kids, Families and Communities*, at 3-4 (Apr. 2016). Available at [aecf-asharedsentence-2016.pdf](#).

Amici recognize that there may be limited options for release available to those sentenced to LWOP. Specifically, the Board of Pardons and the Governor have granted commutations for individuals convicted of felony murder who did not commit the violent act. While commutations aid in addressing mandatory LWOP sentences, they are not an adequate substitute for preventing these sentences from being automatically imposed. Accordingly, judges and prosecutors should be permitted to exercise their discretion in imposing or recommending the appropriate sentences for felony murder convictions.

II. Discretion in Sentencing Individuals Convicted of Felony Murder Would Allow Prosecutors and Judges to Address Sentencing Disparities.

As an initial matter, Pennsylvania's mandatory LWOP sentencing scheme suffers from well-documented racial disparities. Black and Latino people are twelve times more likely to be convicted of felony-murder than their white counterparts.⁷ In 2020, four out of every five imprisoned individuals with a felony murder conviction were people of color.⁸ Further, seventy percent of those individuals were

⁷ Greg Egan, *George Floyd's Legacy: Reforming, Relating, and Rethinking Through Chauvin's Conviction and Appeal Under a Felony-Murder Doctrine Long-Weaponized Against People of Color*, 39 Minn. J.L. Ineq. 543, 545 (2021).

⁸ Andrea Lindsay, Philadelphia Lawyers for Social Equity, *Life Without Parole for Second Degree Murder in Pennsylvania: An Objective Assessment of Sentencing* 42 (2021). Available at <https://www.plsephilly.org/wp-content/uploads/2021/01/PLSE-Second-Degree-Murder-Audit-Jan-19-2021.pdf>.

Black. *Id.* This is true despite the fact that Black people make up only eleven percent of Pennsylvania’s population. *Id.* Although incarceration rates across the country suffer from similar racial disparities,⁹ people of color in Pennsylvania are not merely disproportionately convicted—they are also disproportionately subjected to a life sentence without the possibility of parole.

Allowing discretion in recommending and imposing sentences will enable judges and prosecutors to directly address these disparities by focusing on issues such as levels of culpability and the likelihood of rehabilitation. This would transform blatant racial disparities into sentencing differences that are tailored and adaptive.

III. Mandated LWOP Sentences Fail to Allow Prosecutors and Judges to Consider or Meet Community Needs.

Discretion would also allow prosecutors and judges to recommend and impose sentences that serve the specific needs of the affected community.

As this Court is aware, deterrence is one of the main goals of incarceration.¹⁰ Undoubtedly, deterrence affects the community at large. Because mandatory LWOP sentences for felony murder provide the same punishment to every person involved,

⁹ Nzgol Ghandoosh, et al., *Felony Murder: An On-Ramp for Extreme Sentencing* (2022).

¹⁰ Tiffany J. Jones, *Neglected by the System: A Call for Equal Treatment for Incarcerated Fathers and Their Children-Will Father Absenteeism Perpetuate the Cycle of Criminality?*, 39 Cal. W. L. Rev. 87, 89 (2002).

even if an individual had nothing to do with a loss of life, they fail to provide effective deterrence.¹¹ Put simply, the threat of mandatory LWOP for felony murder does not deter someone from conduct if he could not have foreseen that a life would be taken. *See Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (“[C]apital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.”). Deterrence applies to *intentional* conduct—actions that are premeditated and purposeful, and many participants in felony murders have not purposefully or with premeditation killed anyone. Discretion is necessary to ensure that deterrence actually reflects the actions of the defendant.

Mandated LWOP sentences for felony murder also prevent judges and prosecutors from considering recidivism—which certainly impacts the community—in sentencing. Life sentences are not required to prevent recidivism. In fact, when 174 former juvenile lifers were released in Pennsylvania, ranging in age from thirty-five to sixty-eight, only two of them, 1.1%, were convicted of a new offense, neither of which was a crime of violence.¹² This directly contradicts the notion that individuals convicted of felony murder would be a public safety risk unless they receive a life sentence.

¹¹ Johnson, *Life without Parole for ‘Felony Murder’: Pa. Case Targets Sentencing Law*, supra note 1.

¹² Lindsay, *Objective Assessment*.

CONCLUSION

Pennsylvania's mandatory LWOP sentencing scheme for individuals convicted of felony murder strips prosecutors and judges of the discretion they should be able to exercise in recommending and imposing appropriately tailored sentences. We urge this Court to incorporate these considerations into its overall assessment of the constitutional challenges before it.

Respectfully submitted,

BLANK ROME LLP

/s/ Lauren E. O'Donnell

Lauren E. O'Donnell

Attorney No. 306890

Robert M. Shinehouse

Attorney No. 330522

Asia O. Livingstone

Attorney No. 333718

One Logan Square

130 North 18th Street,

Philadelphia, PA 19103

Tel.: (215) 569-5000

Counsel for *Amici Curiae*

April 26, 2024