

IN THE SUPREME COURT OF PENNSYLVANIA

No. 3 WAP 2024

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

DEREK LEE,

Appellant

**BRIEF OF AMICI CURIAE THE ANTIRACISM AND COMMUNITY
LAWYERING PRACTICUM AT BOSTON UNIVERSITY SCHOOL OF
LAW, FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY,
AND THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
IN SUPPORT OF APPELLANT DEREK LEE**

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

Counsel Listed on Following Page

Vanessa M. Brown, Pa. ID No. 331451
Morgan, Lewis & Bockius LLP
2222 Market Street
Philadelphia, PA 19103
(215) 963-5000

Duke K. McCall III
1111 Pennsylvania Avenue, NW
Washington, DC 20004-2541
(202) 739-3000

Counsel for Amicus Curiae

Robert S. Chang
Fred T. Korematsu Center for Law
and Equality
Seattle University School of Law
901 12th Avenue
Seattle, WA 98122-1090
206 398-4025

Counsel for Amicus Curiae

Caitlin Glass
The Antiracism and Community
Lawyering Practicum at Boston
University School of Law
765 Commonwealth Avenue
Boston, MA 02115
617-353-3131

Counsel for Amicus Curiae

Alaizah Koorji
Adam Murphy
Devin McCowan
NAACP Legal Defense and
Educational Fund., Inc.
40 Rector Street, 5th Floor
New York, NY 10006
212-965-2200

Counsel for Amicus Curiae

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST OF AMICI CURIAE.....	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. Racial Bias Influences the Application of Pennsylvania’s Felony Murder Statute and Has Led to Significant Racial Disparities.....	6
A. Data demonstrate significant racial disparities in the application of Pennsylvania’s felony murder law	7
B. The racially disparate application of felony murder in Pennsylvania stems from cognitive biases coupled with unusually broad prosecutorial discretion	11
II. The Felony Murder Doctrine Disproportionately Targets Black Youth.....	17
CONCLUSION.....	22
CERTIFICATE OF COMPLIANCE.....	25
CERTIFICATE OF COMPLIANCE.....	26
PROOF OF SERVICE.....	27

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Banks v Dretke</i> , 540 U.S. 668 (2004).....	2
<i>Buck v Davis</i> , 580 U.S. 100 (2017).....	2, 11, 12, 22
<i>Coker v. Georgia</i> , 433 U.S. 584 (1977).....	2
<i>Commonwealth v Dew</i> , 492 Mass. 254 (2023)	2
<i>Commonwealth v Gelin</i> , No. SJC-13433 (Mass., argued Dec. 4, 2023)	2
<i>Commonwealth v. Mattis</i> , 224 N.E.3d 410 (Mass. 2024).....	19
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972).....	2
<i>Graham v. Florida</i> , 560 U.S. 48 (2010).....	6, 20, 21
<i>In re Monschke</i> , 197 Wash. 2d 305 (2021).....	19
<i>McCleskey v. Kemp</i> , 481 U.S. 279 (1987).....	2
<i>Miller v. Alabama</i> , 567 U.S. 460 (2012).....	6, 18, 19, 20
<i>Peña-Rodriguez v Colorado</i> , 580 U.S. 206 (2017).....	22

<i>People v. Paredes</i> , No. SC-166129 (Mich., filed Dec. 12, 2023)	2
<i>People v. Parks</i> , 987 N.W.2d 161 (Mich. 2022).....	19
<i>Reed v Goertz</i> , 598 U.S. 230 (2023).....	2
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005).....	20, 21
<i>Smith v. United States</i> , No. 20-CF-0190 (D.C., filed Mar. 4, 2024).....	2
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976).....	6
Statutes, Codes and Rules	
18 Pa. C.S. § 1102(b).....	3
18 Pa. C.S. § 1102(d).....	14
18 Pa. C.S. § 1103(1).....	13
18 Pa. C.S. § 2502(a).....	15
18 Pa. C.S. § 2502(b).....	6, 15
18 Pa. C.S. § 3701.....	13
61 Pa. C.S. § 6137(a).....	3
210 Pa. Code § 531.....	1
Other Authorities	
Amistad Law Project, <i>End Death By Incarceration: Scott v. Pennsylvania Board of Probation and Pa</i> , https://amistadlaw.org/end-death-incarceration-scott-v-pennsylvania-board-probation-and-pa	18

Andrea Lindsay, *Life Without Parole for Second-Degree Murder in Pennsylvania: An Objective Assessment of Sentencing*, Philadelphia Lawyers for Social Equity (2021), <https://plsephilly.org/wp-content/uploads/2021/01/PLSE-Second-Degree-Murder-Audit-Jan-19-2021.pdf>5, 9

Andrea Lindsay & Clara Rawlings, *Life Without Parole for Second-Degree Murder in Pennsylvania: An Objective Assessment of Race*, Philadelphia Lawyers for Social Equity (2021), https://plsephilly.org/wp-content/uploads/2021/04/PLSE_SecondDegreeMurder_and_Race_Apr2021.pdf.....passim

Ann Tiegen, *Juvenile Life Without Parole*, Nat’l Conference of State Legislatures, <https://www.ncsl.org/civil-and-criminal-justice/juvenile-life-without-parole>19

Catherine Insel et al., Ctr. for Law, Brain & Behavior at Mass. General Hospital, *White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys, and Policy Makers* (2022), <https://clbb.mgh.harvard.edu/wp-content/uploads/CLBB-White-Paper-on-the-Science-of-Late-Adolescence.pdf>.....20

Center for Constitutional Rights, *Death by Incarceration in Pennsylvania - Client Profiles*, <https://ccrjustice.org/death-incarceration-pennsylvania-client-profiles> (July 8, 2020).....21

Darrell Steffensmeier et al., *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 *Criminology* 763 (1998).....13

G. Ben Cohen, et al., *Racial Bias, Accomplice Liability, and The Felony Murder Rule: a National Empirical Study*, 101 *Denver L. Rev.* 65 (2024)15, 16, 17

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 (2021)11, 14

Jennifer Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 *J. Personality & Soc. Psych.* 876 (2004)12

Josh Gupta-Kagan, <i>The Intersection Between Young Adult Sentencing and Mass Incarceration</i> , 2018 Wis. L. Rev. 669 (2018).....	12
K. Lindell & K. Goodjoint, Juvenile Law Center, <i>Rethinking Justice for Emerging Adults: Spotlight on the Great Lakes Region</i> (2020). https://jlc.org/sites/default/files/attachments/2020-09/JLC-Emerging-Adults-92.pdf	19
Katherine B. Spencer et al., <i>Implicit Bias and Policing</i> , 10 Soc. & Personality Psych. Compass 50 (2016)	12
Lincoln Quillian & Devah Pager, <i>Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime</i> , 107 Am. J. Soc. 717 (2001).....	13
Mona Lynch & Craig Haney, <i>Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury</i> , 2011 Mich. St. L. Rev. 573 (2011)	13
Nazgol Ghandnoosh et al., The Sentencing Project & Fair and Just Prosecution, <i>Felony Murder: An On-Ramp for Extreme Sentencing</i> (2022), https://www.sentencingproject.org/app/uploads/2022/10/Felony-Murder-An-On-Ramp-for-Extreme-Sentencing.pdf	14, 20
Pa. Dep’t of Corrs., https://www.cor.pa.gov/About%20Us/Initiatives/Pages/Death%20Penalty.aspx	4
Pa. Dep’t of Corrs., <i>Racial Disparities</i> , https://dashboard.cor.pa.gov/us-pa/narratives/racial-disparities/3	8
Pa. Dist. Att’ys Ass’n, https://www.pdaa.org/da-directory/	13
Perry Moriearty et al., <i>Race, Racial Bias, and Imputed Liability Murder</i> , 51 Fordham Urb. L.J. 675 (2024).....	15

Ram Subramanian, et al., Vera Inst. Of Just., *In the Shadows: A Review of the Research on Plea Bargaining* (2020), <https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf>14

Reflective Democracy Campaign, *Tipping the Scales: Challengers Take On the Old Boys’ Club of Elected Prosecutors* (Oct. 2019), <https://wholeads.us/wp-content/uploads/2019/10/Tipping-the-Scales-Prosecutor-Report-10-22.pdf>13

Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 Ala. L. Rev. 871 (2015).....13

Samuel L. Gaertner & John F. Dovidio, *Understanding and Addressing Contemporary Racism: From Aversive Racism to the Common In-group Identity Model*, 61 J. Soc. Issues 615 (2005).....12

Sophie Trawalter et al., *Attending to Threat: Race-Based Patterns of Selective Attention*, 44 J. Experimental Soc. Psych. 1322 (2008).....12

Vera Inst. of Just., *Incarceration Trends in Pennsylvania*, <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-pennsylvania.pdf>.....4

U.S. Census Bureau, *Census Quick Facts*, <https://www.census.gov/quickfacts/fact/table/PA/PST045222>4

STATEMENT OF INTEREST OF AMICI CURIAE¹

The Antiracism and Community Lawyering Practicum at Boston University School of Law (“ACLP”) is staffed by law students and faculty who provide legal support for racial justice projects in collaboration with community partners. As such, the ACLP has an interest in challenging policies of criminalization and punishment that undermine safety, justice, and healing, and disproportionately harm people of color. The ACLP joins this brief to share critical context about racial bias in the application of felony murder laws, and to emphasize that life-without-parole sentences for felony murder are unconstitutional. The ACLP does not, in this brief or otherwise, represent the official views of Boston University.

The Fred T. Korematsu Center for Law and Equality (“Korematsu Center”) is a non-profit organization based at the Seattle University School of Law. Inspired by the legacy of Fred Korematsu, who defied military orders during World War II that ultimately led to the unlawful incarceration of over 120,000 Japanese Americans, the Korematsu Center works to advance social justice for all. It has a special interest in ensuring fair treatment in our nation’s courts. It has filed amicus briefs in state and federal courts to inform courts about race disproportionality in the treatment and punishment of Black people in the criminal legal system. The

¹ Pursuant to 210 Pa. Code § 531, no counsel for a party authored this brief in whole or in part. No person or entity, other than Amici, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

The NAACP Legal Defense and Educational Fund Inc. (“LDF”) is the nation’s first and foremost civil rights law organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break barriers that prevent Black people from realizing their basic civil and human rights. LDF has a long history of challenging the arbitrary and pernicious influence of racial discrimination in the criminal legal system, including, as counsel of record and *amicus curiae*, urging courts to acknowledge and overturn convictions and sentences plagued by such discrimination. *See, e.g., Furman v. Georgia*, 408 U.S. 238 (1972); *Coker v. Georgia*, 433 U.S. 584 (1977); *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Banks v. Dretke*, 540 U.S. 668 (2004); *Buck v Davis*, 580 U.S. 100 (2017); *Reed v Goertz*, 598 U.S. 230 (2023) (as *amicus*); *Commonwealth v Dew*, 492 Mass. 254 (2023) (same); *Commonwealth v Gelin*, No. SJC-13433 (Mass., argued Dec. 4, 2023) (same); *People v. Paredes*, No. SC-166129 (Mich., filed Dec. 12, 2023) (same); *Smith v. United States*, No. 20-CF-0190 (D.C., filed Mar. 4, 2024) (en banc) (same). Based on the historical and geographical breadth of its expertise, LDF’s perspective can benefit this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Pennsylvania’s felony murder law is among the most draconian of all felony murder laws in the United States. This law imposes a mandatory sentence of life without parole (“LWOP”) for so-called “strict-liability” felony murder, which requires no *mens rea* and no *actus reus* related to the death.² The result is that a person like Derek Lee will be automatically condemned to die in prison even though he did not kill or intend to kill anyone.

This appeal presents the question of whether Pennsylvania’s protection against “cruel punishments” prohibits imposing mandatory LWOP sentences for people who neither killed nor intended to kill anyone. That question should be answered in the affirmative because, as explained by Petitioner and other amici, Pennsylvania’s felony murder sentencing scheme is categorically severe for accomplices, increasingly out of step with the rest of the country, contrary to the fundamental principle that a person’s culpability depends on their actions and state of mind, and antithetical to the goals of rehabilitation and consideration of mitigating evidence. *See* Brief of Amici Curiae The MacArthur Justice Center et al., Brief of

² The Pennsylvania Crimes Code mandates a life sentence for second-degree murder. 18 Pa. C.S. § 1102(b). However, life-sentenced individuals are excluded from parole eligibility pursuant to 61 Pa. C.S. § 6137(a). In effect, this means that people convicted of felony murder in Pennsylvania are condemned to die in prison. Accordingly, this brief refers to the sentence imposed for felony murder as a “life without parole” sentence.

Amici Curiae The Sentencing Project et al., and Brief of Amici Curiae Scholars of Eighth Amendment Law.

In conducting this constitutional inquiry, amici urge the Court to also consider strong evidence of racial bias in the application of Pennsylvania’s felony murder law. Although racial bias infects Pennsylvania’s entire criminal legal system, resulting in severe racial disproportionality in the Commonwealth’s overall incarcerated population as well as among those sentenced to be executed, the disparities are even starker with respect to people convicted of felony murder. While Black people constitute 12% of the state’s population,³ 47% of the state’s prison population,⁴ and 48% of those on the state’s death row,⁵ they constitute 70% of those serving mandatory LWOP for felony murder.⁶ According to a recent state-backed

³ U.S. Census Bureau, *Census Quick Facts*, <https://www.census.gov/quickfacts/fact/table/PA/PST045222> (last visited Apr. 26, 2024).

⁴ Vera Inst. of Just., *Incarceration Trends in Pennsylvania*, <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-pennsylvania.pdf>.

⁵ Pa. Dep’t of Corrs., <https://www.cor.pa.gov/About%20Us/Initiatives/Pages/Death%20Penalty.aspx> (click on “Execution List”; then sort by “Ethnicity” listing 47 of the 97 people awaiting execution as Black).

⁶ Andrea Lindsay & Clara Rawlings, *Life Without Parole for Second-Degree Murder in Pennsylvania: An Objective Assessment of Race*, Philadelphia Lawyers for Social Equity at 1, 23 n.15 (2021), https://plsephilly.org/wp-content/uploads/2021/04/PLSE_SecondDegreeMurder_and_Race_Apr2021.pdf [hereinafter *An Objective Assessment of Race*]. Throughout this brief, we round

audit, Black people in Pennsylvania have been convicted of felony murder at a rate that is more than 21 times higher than for white people in the state.⁷

The evidence suggests that these racial disparities persist and are driven by cases like Mr. Lee's, where people were convicted as accomplices for strict liability felony murder. For example, data show that 40% of Black people convicted of felony murder were prosecuted with at least one co-defendant, compared to 15% of white people, which suggests that white people convicted of felony murder are "more likely to be principals," and Black people are more likely to be accomplices.⁸

In Part I, amici present data demonstrating stark racial disparities in felony murder convictions in Pennsylvania and discuss the ways that racial bias can influence felony murder charges and convictions. In Part II, amici explain that Pennsylvania's felony murder statute disproportionately targets Black youth, whose age and capacity for rehabilitation can never be considered under a mandatory scheme, adding to the cruel and excessive nature of mandatory LWOP sentences for

percentages to the nearest whole number, except those that are included in a direct quotation.

⁷ *Id.* at 3.

⁸ *Id.* at 12, 19; Andrea Lindsay, *Life Without Parole for Second-Degree Murder in Pennsylvania: An Objective Assessment of Sentencing*, Philadelphia Lawyers for Social Equity at 17 (2021), <https://plsephilly.org/wp-content/uploads/2021/01/PLSE-Second-Degree-Murder-Audit-Jan-19-2021.pdf> [hereinafter *An Objective Assessment of Sentencing*].

accomplices.⁹ Black 19-year-olds are the single most common group to be serving mandatory LWOP sentences for felony murder in Pennsylvania,¹⁰ and will spend a greater proportion of their lives in prison than older people who commit the same or more serious crimes. *See, e.g., Graham v. Florida*, 560 U.S. 48, 70-71 (2010) (explaining that a young person and older person “sentenced to life without parole receive the same punishment in name only”).

Such racially disparate and excessive sentences not only harm individuals like Mr. Lee but also compromise the rule of law, the credibility of the judicial process, and the most basic notions of equality and fairness.

ARGUMENT

I. Racial Bias Influences the Application of Pennsylvania’s Felony Murder Statute and Has Led to Significant Racial Disparities.

In Pennsylvania, a person can be charged with felony murder when a “criminal homicide . . . is committed while [the] defendant was engaged as a principal or an accomplice in the perpetration of a felony.”¹¹ Accordingly, the State

⁹ *See, e.g., Miller v. Alabama*, 567 U.S. 460, 465 (2012) (“State law mandated that [the petitioners] die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life *with* the possibility of parole) more appropriate.”). *See also Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (describing as a “constitutional shortcoming” the “failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant”).

¹⁰ *An Objective Assessment of Race*, *supra* note 6 at 6.

¹¹ 18 Pa. C.S. § 2502(b).

is relieved of its typical burden to prove the most clearly defined indicia of culpability when it comes to murder: *actus reus* (an act in furtherance of a killing) and *mens rea* (intent or recklessness with respect to the killing), especially for accomplices. Prosecutors are thus afforded broad discretion to charge accomplices with strict liability felony murder, third-degree murder, or simply the underlying felony. With such disparate charging options and limited objective criteria to guide those decisions, there is a significant risk, as borne out by the data, that racial bias will influence charging and plea outcomes.

A. Data demonstrate significant racial disparities in the application of Pennsylvania’s felony murder law.

Data demonstrate acute racial disparities in the administration of Pennsylvania’s felony murder statute. A recent state-backed audit found that Black people comprise nearly 70% of those convicted of felony murder despite making up only 12% of the state’s population.¹² This means that Black people are convicted of felony murder—and serving the attendant mandatory life without parole sentence—at a rate that is 5.8 times higher than their share of the state population.¹³ This disparity grows even starker when comparing the rates of felony-murder convictions

¹² *An Objective Assessment of Race*, *supra* note 6 at 5. The specific demographic breakdown is as follows: “Of the 1,166 people incarcerated for second-degree murder in Pennsylvania, 69.9% (815) are Black, 20.6% (240) are white, 8.4% (98) are Hispanic, and 1.1% (13) are Asian, Native American, or another race.” *Id.* at 3.

¹³ *Id.* at 4.

for Black and white Pennsylvanians: Black people in Pennsylvania have been convicted and mandatorily sentenced to die in prison at a rate that is more than 21 times higher than for white people in the state.¹⁴

These figures stand out even within a state prison population where racial bias in other aspects of society and the criminal legal system means Black people are significantly overrepresented:

	Pennsylvania Population	State Prison Population	Death Row	Felony Murder LWOP
Black	12%	47%	48%	70%
White	81%	43%	48%	21%

In comprising 70% of the population serving mandatory life without parole sentences for felony murder, Black people are “1.5 times overrepresented in the [felony murder] population compared to the [Department of Corrections] population,”¹⁵ which is already racially skewed.¹⁶ Conversely, white people serving

¹⁴ *Id.* at 3.

¹⁵ *Id.* at 5.

¹⁶ Black people comprise approximately 12% of the state population but 46% of people confined to state correctional facilities. *See* Pa. Dep’t of Corrs., *Racial Disparities*, <https://dashboard.cor.pa.gov/us-pa/narratives/racial-disparities/3> (last visited Apr. 26, 2024).

mandatory life without parole for felony murder are “2.1 times underrepresented.”¹⁷

These racial disparities are particularly concerning because white people convicted of felony murder are more often involved in the most serious underlying felonies and less likely to be accomplices. Compared to Black people convicted of felony murder, white people are 4.5 times as likely to be involved in kidnapping, 4.9 times as likely to be involved in sexual assault, and 6.0 times as likely to be involved in arson.¹⁸ Additionally, white people are more likely to be principals who acted alone, rather than accomplices: 40% of Black people convicted of felony murder were prosecuted with at least one co-defendant, compared to 15% of white people convicted of felony murder.¹⁹ This data strongly suggests, as the auditors found, that the “statute’s broad application to both principals and accomplices to a felony related to someone’s death has a greater net-widening effect on Black people overall.”²⁰

The Pennsylvania audit data also suggests that differences in prosecutorial

¹⁷ *An Objective Assessment of Race* *supra* note 6 at 5.

¹⁸ *Id.* at 16.

¹⁹ *An Objective Assessment of Sentencing*, *supra* note 8 at 16. The same is true when examining larger accomplice involvement, as “groups of two or more Black people were convicted of second-degree murder for involvement in the *same* felony more often than any other racial group.” *An Objective Assessment on Race*, *supra* note 6 at 13 (emphasis added). This “disparity is especially great compared to White people.” *Id.* The result is that “the number of Black people in the second-degree population is not equal to the number of events during which a death occurred,” which “increas[es] the likelihood that the proportion of accomplices compared to principals” is “greater for the Black population than other racial groups.” *Id.*

²⁰ *An Objective Assessment of Race*, *supra* note 6 at 12.

decision-making, particularly as it relates to plea bargaining, contributes to this net-widening effect. White defendants plead guilty to felony murder “over three times as often as Black people.”²¹ That race “proved to be a significant predictor” in “plea versus trial choices” may be explained in part by the fact that white people “were more likely to not have had co-defendants.”²² The auditors inferred that, “[i]n turn, this could influence the decision to plead guilty due to increased likelihood of being convicted of first-degree murder at trial and thus potentially subject to the death penalty.”²³ The data also showed that white defendants were more likely to plead guilty than Black defendants no matter the underlying felony type.

This data suggests that prosecutors are more inclined to offer white principals the benefit of pleading down from first-degree murder to felony murder—while not offering Black accomplices (who have relatively diminished culpability) a similar opportunity to plead to lesser crimes (such as third-degree murder or to the underlying felony)—“and/or that the terms offered [to Black defendants] were [more often] an insufficient incentive to pleading guilty when balanced against perceived probability of conviction at trial.”²⁴

²¹ *Id.* at 16.

²² *Id.* at 17.

²³ *Id.* at 19.

²⁴ *Id.* This data echoes findings from a Minnesota study that illustrated differential treatment of white and Black defendants regarding second-degree felony murder

Overall, the picture that emerges from the data is that the administration of Pennsylvania’s felony murder statute creates the risk that people with significant differences in culpability will be sentenced to the same severe sentence, which is being driven, at least in part, by the race of the defendant. Such a practice cannot withstand constitutional scrutiny, as race is a quintessentially arbitrary and pernicious factor that has nothing to do with individual moral culpability. *See Buck v. Davis*, 580 U.S. 100, 123 (2017) (explaining that “a basic premise of our criminal justice system” is that the law must “punish[] people for what they do, not who they are”).

B. The racially disparate application of felony murder in Pennsylvania stems from cognitive biases coupled with unusually broad prosecutorial discretion.

As set forth above, racial bias infects the administration of Pennsylvania’s felony murder statute, which disproportionately harms Black defendants. This is

there. *See* 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 (2021). That study used criminal complaints to compare the respective facts and outcomes of individual felony-murder cases—including comparisons of co-defendants of different races within the same case—and found white “defendants are frequently punished leniently, while defendants of color receive harsher treatment even when the facts support opposite outcomes.” *Id.* at 548-51. The study found white defendants convicted of second-degree felony murder were more likely to have pled down to the charge, whereas Black defendants convicted of felony murder were more likely to have been convicted of the most severe offense with which they were charged, suggesting that Black defendants received harsher plea offers than their white counterparts. *Id.* at 548.

attributable, in part, to the wide discretion the statute affords prosecutors. Pennsylvania’s felony murder law covers an unusually wide range of culpability. Prosecutors can bring, drop, or negotiate charges ranging from the underlying felony to murder carrying a mandatory LWOP sentence. Such discretion leaves significant room for racial bias to influence decisions about a person’s culpability, the appropriate charge, the plea offered, and the ultimate sentence imposed.

Cognitive racial biases—conscious or subconscious—can impact charging and sentencing determinations through both aversive anti-Black racism and white favoritism. Aversive racism refers to negative beliefs about another racialized group that contribute to negative treatment of that group.²⁵ Research illustrates that unwarranted associations between Blackness, criminality, and violence, can impact decision-making in policing, prosecution, and sentencing. *See Buck*, 580 U.S. at 121 (describing the “powerful racial stereotype” that “[B]lack men [are] ‘violence prone’” (citation omitted)).²⁶ On the other hand, white favoritism, which can be

²⁵ Samuel L. Gaertner & John F. Dovidio, *Understanding and Addressing Contemporary Racism: From Aversive Racism to the Common In-group Identity Model*, 61 J. Soc. Issues 615, 618 (2005).

²⁶ *See also, e.g.*, Josh Gupta-Kagan, *The Intersection Between Young Adult Sentencing and Mass Incarceration*, 2018 Wis. L. Rev. 669, 723 (2018); Katherine B. Spencer et al., *Implicit Bias and Policing*, 10 Soc. & Personality Psych. Compass 50, 54-55 (2016); Sophie Trawalter et al., *Attending to Threat: Race-Based Patterns of Selective Attention*, 44 J. Experimental Soc. Psych. 1322, 1322 (2008); Jennifer Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality

explicit or implicit, involves the “association of positive stereotypes and attitudes” with white people, which can result in “preferential treatment” of white people.²⁷ In Pennsylvania, where prosecutors are predominantly white,²⁸ and where 100% of the state’s elected district attorneys are white,²⁹ there is a significant risk of favoritism towards white defendants and aversive racism against Black defendants.³⁰

Pennsylvania’s felony murder statute gives prosecutors a particularly wide range of charging options for offenses involving more than one defendant, creating more potential for bias to influence charging decisions. In Mr. Lee’s case, instead of being charged with felony murder carrying a mandatory LWOP sentence, he could have been charged with robbery alone, carrying a maximum of 20 years in prison.³¹

& Soc. Psych. 876, 878, 889-891 (2004); Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 Am. J. Soc. 717, 718 (2001); Darrell Steffensmeier et al., *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 Criminology 763, 769 (1998).

²⁷ Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 Ala. L. Rev. 871, 873-74 (2015).

²⁸ Reflective Democracy Campaign, *Tipping the Scales: Challengers Take On the Old Boys’ Club of Elected Prosecutors* 1 (Oct. 2019), <https://wholeads.us/wp-content/uploads/2019/10/Tipping-the-Scales-Prosecutor-Report-10-22.pdf> (finding that 95% of elected prosecutors are White).

²⁹ Pa. Dist. Att’ys Ass’n, <https://www.pdaa.org/da-directory/> (last visited Apr. 26, 2024).

³⁰ Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 Mich. St. L. Rev. 573, 589-90 (2011); see also Smith, *supra* note 27 at 899 (discussing social science research showing that “empathy is experienced more for in-group members than out-group members”).

³¹ 18 Pa. C.S. §§ 1103(1); 3701.

Or he could have been charged with third-degree murder, which carries a maximum of 40 years in prison.³² When “wide-ranging homicidal liability . . . exists on strikingly similar facts,” the resulting broad prosecutorial discretion may contribute to “inequity in plea negotiations, trials, and sentencings, leaving a system ripe for abuse and incapable of delivering racial equity.”³³ Indeed, substantial evidence reflects that “racial disparities in prosecutors’ use of discretion—in decisions about which homicides to prosecute as felony-murder and how many people to charge as co-defendants—directly disadvantages people of color.”³⁴

The felony murder statute also reduces the state’s burden of proof, leaving fewer evidentiary guardrails to guide both charging decisions and determinations of guilt, especially when it comes to accomplices. When prosecutors pursue a conviction for first degree murder, they must prove through direct or circumstantial evidence that the defendant both: (1) committed an act that caused death; and (2)

³² 18 Pa. C.S. § 1102(d).

³³ Egan, *supra* note 24 at 551.

³⁴ Nazgol Ghandnoosh et al., *The Sentencing Project & Fair and Just Prosecution, Felony Murder: An On-Ramp for Extreme Sentencing* 6 (2022), <https://www.sentencingproject.org/app/uploads/2022/10/Felony-Murder-An-On-Ramp-for-Extreme-Sentencing.pdf>; see also Ram Subramanian, et al., Vera Inst. of Just., *In the Shadows: A Review of the Research on Plea Bargaining* 24 (2020), <https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf> (“[S]everal studies have found that people of color are often treated less favorably than white people during the plea bargain process.”).

acted with intent. 18 Pa. C.S. § 2502(a) (“A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.”). The felony murder statute relieves the prosecution of this burden, requiring only proof that the defendant participated in a felony where a death occurred. 18 Pa. C.S. § 2502(b) (“A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony.”).³⁵

Social psychology research shows that racial biases are especially likely to influence decision-making under the precise circumstances presented by the felony murder law—that is, when “decisional criteria are uncertain,” and when “decisions . . . involve high levels of discretion or subjectivity.”³⁶ The application of Pennsylvania’s strict-liability felony murder statute to an accomplice leaves prosecutors, judges, and juries especially susceptible to racial biases that affect decision-making.³⁷

³⁵ See also G. Ben Cohen, et al., *Racial Bias, Accomplice Liability, and The Felony Murder Rule: a National Empirical Study*, 101 *Denver L. Rev.* 65, 75 (2024) (“Unlike the majority of elements in a criminal prosecution, the felony murder rule and accomplice liability doctrine invite jurors to engage in an imaginative inquiry whereby both intent and action are inferred”).

³⁶ Perry Moriearty et al., *Race, Racial Bias, and Imputed Liability Murder*, 51 *Fordham Urb. L.J.* 675, 737 (2024).

³⁷ See, e.g., *id.* at 729 (“By reducing the legal elements that prosecutors must prove while allowing them to charge a wide range of defendants with murder, we claim

Felony murder cases involving accomplices can also trigger an additional form of racial bias involving whether a decisionmaker perceives a defendant as having acted alone or as a member of a group. A recent empirical study indicates that decision-makers are more likely to infer group liability in cases involving defendants of color, yet more likely to treat white defendants as individuals.³⁸ For that study, researchers used an Implicit Association Test with over 500 jury-eligible participants to measure racialized differences in how jurors perceive defendants to be individuals or members of a group.³⁹ The researchers found that “[p]articipants were significantly more likely to quickly group together Black and Latino names with words associated with groups, such as ‘group, pack, crew, them, crowd, folks, bunch,’ and white faces with individuality, such as ‘individual, self, one, solo, single, somebody, character.’”⁴⁰ Further, “[d]efendants with Latino-sounding names were judged to have more culpable mental states and believed to be more responsible for the crimes.”⁴¹

The degree to which a defendant is seen as an individual impacts their liability

that charging decisions in imputed liability murder cases are necessarily less dependent on the law and the evidence, and more apt to be driven by extra-legal factors, than their direct liability murder counterparts.”).

³⁸ Cohen *supra* note 35.

³⁹ *Id.* at 104.

⁴⁰ *Id.* at 108 (citations omitted).

⁴¹ *Id.* at 109 (internal footnote omitted).

in a felony murder case because defendants “who are perceived more as members of groups, and less as individuals, would likely be held more responsible for the crimes of accomplices, whereas defendants who are perceived more as individuals would be likely to be held less responsible for the crimes of accomplices.”⁴² These findings raise serious concerns that police, prosecutors, and juries will be more likely to impute liability for Black and Latino defendants. This risk is especially high because the most common interrogation techniques pressure suspects to falsely admit to lesser involvement in the offense and then, through the “felony murder rule[] face consequences for the full offense.”⁴³ Those factors lead to an “exponential[]” increase in the risk of wrongful convictions and false confessions in felony murder prosecutions.⁴⁴

In sum, substantial research shows how racial biases improperly influence felony murder convictions—especially for accomplices—and the LWOP sentences imposed for these convictions. Such a result creates a significant risk of arbitrary outcomes that serve no penological purpose.

II. The Felony Murder Doctrine Disproportionately Targets Black Youth.

Pennsylvania’s felony murder statute not only disproportionately harms Black

⁴² *Id.* at 104.

⁴³ *Id.* at 117.

⁴⁴ *Id.* at 116-17.

people, but also targets Black youth. In Pennsylvania, nearly 73% of people convicted of felony murder are 25 or younger at the time of the offense.⁴⁵ And of the 18- to 20-year-olds convicted, 77% are Black.⁴⁶ The state’s audit showed that “Black and Hispanic/Latinx people were significantly younger than” white people at the time of offense, “many just past their 18th birthdays.”⁴⁷ Black youth in Pennsylvania are especially likely to have co-defendants, meaning many are likely to have been accomplices who did not know or foresee that a death would occur.⁴⁸

Courts have recognized the diminished culpability of young people and emerging adults, and the resulting cruelty of subjecting them to the most severe sentences. The U.S. Supreme Court has held that people under the age of 18 are “constitutionally different from adults for purposes of sentencing,” and in *Miller v. Alabama*, the Court prohibited mandatory life without parole sentences for this cohort—including those convicted of intentional homicide offenses. *Miller*, 567 U.S. at 471. The majority of states have gone further than *Miller*’s floor, eliminating

⁴⁵ *An Objective Assessment of Race*, *supra* note 6 at 7.

⁴⁶ *Id.*

⁴⁷ *Id.* at 11, 20.

⁴⁸ *Id.* at 5-6; See also Amistad Law Project, *End Death By Incarceration: Scott v. Pennsylvania Board of Probation and Pa*, <https://amistadlaw.org/end-death-incarceration-scott-v-pennsylvania-board-probation-and-pa> (explaining that accomplices sentenced under this scheme include lookouts or getaway drivers “who themselves did not take anyone’s life or were people whose acts are attributed to a death, such as a heart attack, that happened during the course of a felony”).

life without parole *altogether* for people under the age of 18.⁴⁹ Earlier this year, Massachusetts did the same for anyone under the age of 21. *See Commonwealth v. Mattis*, 224 N.E.3d 410, 430 (Mass. 2024) (recognizing the “‘unique characteristics’ of emerging adults that render them ‘constitutionally different’ from adults for purposes of sentencing” (citations omitted)). Other states have raised the age range contemplated by *Miller*. *See, e.g., People v. Parks*, 987 N.W.2d 161, 176, 179 (Mich. 2022) (invalidating mandatory life without parole sentences for 18-year-olds); *In re Monschke*, 197 Wash. 2d 305, 306 (2021) (same for defendants under age 21). The application of Pennsylvania’s felony murder doctrine is thus out of step with the national trend recognizing the diminished culpability of young people and the need to reflect that reduced culpability in sentencing determinations.⁵⁰

The trend away from such severe sentences for young people—including young people convicted of murder—is supported by significant neurological research showing that the prefrontal cortex of the brain, responsible for rational analysis and prediction of future consequences, does not fully mature until

⁴⁹ Ann Tiegen, *Juvenile Life Without Parole*, Nat’l Conference of State Legislatures, <https://www.ncsl.org/civil-and-criminal-justice/juvenile-life-without-parole> (last updated Feb. 24, 2024).

⁵⁰ *See* K. Lindell & K. Goodjoint, Juvenile Law Center, *Rethinking Justice for Emerging Adults: Spotlight on the Great Lakes Region* (2020). <https://jlc.org/sites/default/files/attachments/2020-09/JLC-Emerging-Adults-92.pdf>.

approximately age 25.⁵¹ Late adolescents are less mature, more prone to “impetuous and ill-considered actions and decisions,” *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (citation omitted), and “more vulnerable . . . to negative influences and outside pressures,” *Miller*, 567 U.S. at 471 (alteration in original) (citation omitted), including from peers.⁵²

Felony murder offenses—particularly involving accomplices—implicate precisely the impulsivity and peer pressure dynamics that are especially acute for adolescents. “Felony murder laws” thus “ignore the cognitive vulnerabilities of youth and emerging adults by assuming that they recognize the remote consequences of their own actions—and those of others in their group.”⁵³ Where those laws impose mandatory LWOP, young people who have not fully developed the capacity to assess risk or extricate themselves from negative situations are condemned to die in prison. In Pennsylvania, Black teenagers are disproportionately being sentenced “by a [mandatory] forfeiture that is irrevocable,” *Graham*, 560 U.S. at 69, often as accomplices who neither killed nor intended to kill anyone.

⁵¹ *An Objective Assessment of Race*, *supra* note 6 at 7.

⁵² Catherine Insel et al., Ctr. for Law, Brain & Behavior at Mass. General Hospital, *White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys, and Policy Makers* 24 (2022), <https://clbb.mgh.harvard.edu/wp-content/uploads/CLBB-White-Paper-on-the-Science-of-Late-Adolescence.pdf> (“[L]ate adolescents are more likely to take risks in the presence of peers than when they are alone or when an adult is watching.”).

⁵³ Ghandnoosh, *supra* note 34 at 2.

The imposition of mandatory LWOP for felony murder further denies Black adolescents the opportunity for rehabilitation, which “means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the person convicted], he will remain in prison for the rest of his days.” *Graham*, 560 U.S. at 70 (citation omitted). As Marie Scott, a Black woman serving a life without parole sentence for strict liability felony murder in Pennsylvania, shared recently: “We are human beings who made terrible choices when we were very young.”⁵⁴ *See also Roper*, 543 U.S. at 571 (“Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”).

Finally, youth convicted of felony murder, a disproportionate percentage of whom are Black, will spend more of their lives in prison than those older at the time of their offense. An 18-year-old and a “75-year-old each sentenced to life without parole receive the same punishment in name only.” *Graham*, 560 U.S. at 70. Such a punitive sentence of mandatory LWOP to a group with categorically diminished

⁵⁴ Center for Constitutional Rights, *Death by Incarceration in Pennsylvania - Client Profiles*, <https://ccrjustice.org/death-incarceration-pennsylvania-client-profiles> (July 8, 2020). Ms. Scott, who is 70 years old, was 19 years old when she was an accomplice to a robbery. *Id.* Black 19-year-olds like Ms. Scott are the most common group to be serving mandatory LWOP sentences for felony murder in Pennsylvania. *An Objective Assessment of Race*, *supra* note 6 at 6.

culpability only furthers the cruelty and excessiveness of strict liability felony murder in Pennsylvania.

CONCLUSION

Racial bias in the administration of strict liability felony murder not only harms people like Mr. Lee, but also the reliability, credibility, and integrity of the judicial system. A system where race influences outcomes is an arbitrary one. The evidence is clear that Pennsylvania's felony murder statute disproportionately targets Black people for "who they are," not "what they do," therefore undermining principles of fairness and representing a "disturbing departure of a basic premise of our criminal justice system." *See Buck*, 580 US at 123 ("Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle."). This Court must "ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy." *Peña-Rodriguez v Colorado*, 580 U.S. 206, 224 (2017). Failure to do so would "poison[] public confidence" in our courts and damage "the law as an institution." *Buck*, 580 US at 124 (citations omitted).

This Court should hold that mandatory LWOP sentences for people who neither killed nor intended to kill violates the Pennsylvania Constitution.

Dated: April 26, 2024

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

/s/ Vanessa M. Brown

Vanessa M. Brown, Pa. ID No. 331451

Morgan, Lewis & Bockius LLP

2222 Market Street

Philadelphia, PA 19103

(215) 963-5000

vanessa.brown@morganlewis.com

Duke K. McCall III

1111 Pennsylvania Avenue, NW

Washington, DC 20004-2541

(202) 739-3000

duke.mccall@morganlewis.com

Counsel for Amicus Curiae

Caitlin Glass

The Antiracism and Community

Lawyering Practicum at Boston

University School of Law

765 Commonwealth Avenue

Boston, MA 02115

617-353-3131

glassc@bu.edu

Counsel for Amicus Curiae

Robert S. Chang

Fred T. Korematsu Center for Law

and Equality

Seattle University School of Law

901 12th Avenue

Seattle, WA 98122-1090

206 398-4025

changro@seattleu.edu

Counsel for Amicus Curiae

Alaizah Koorji
Adam Murphy
Devin McCowan
NAACP Legal Defense and
Educational Fund., Inc.
40 Rector Street, 5th Floor
New York, NY 10006
212-965-2200
akoorji@naacpldf.org
amurphy@naacpldf.org
dmccowan@naacpldf.org

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

In accordance with Pa. R.A.P. 2135(d), I hereby certify that this brief complies with length limitation in Pa. R.A.P. 531(b)(3) in that it contains fewer than 7,000 words, excluding the supplementary matter exempted by Pa. R.A.P. 2135(b), as determined by the word counting function in the word processing system used to prepare the brief, Microsoft Word for Microsoft 365 MSO.

Dated: April 26, 2024

/s/ Vanessa M. Brown

Vanessa M. Brown

CERTIFICATE OF COMPLIANCE

I 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.

Dated: April 26, 2024

/s/ Vanessa M. Brown

Vanessa M. Brown

PROOF OF SERVICE

I hereby certify that on April 26, 2024, the foregoing brief of amici curiae was served via email upon the following parties of record:

Brett Grote
Quinn Cozzens
Abolitionist Law Center
P.O. Box 8654
Pittsburgh, PA 15221
bretgrote@abolitionistlawcenter.org
qcozzens@alcenter.org
Counsel for Derek Lee

Ronald Wabby, Jr.
Kevin McCarthy
Allegheny County District Attorney's Office
436 Grant Street,
Pittsburgh, PA 15219
rwabby@alleghenycountyda.us
kmccarthy@alleghenycountyda.us
Counsel for the Commonwealth of Pennsylvania

Dated: April 26, 2024

/s/ Vanessa M. Brown
Vanessa M. Brown