

**IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT**

No. 3 WAP 2024

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

v.

DEREK LEE,
Appellant.

BRIEF OF JUVENILE LAW CENTER, YOUTH SENTENCING &
REENTRY PROJECT AND PHILADELPHIA LAWYERS FOR SOCIAL
EQUITY AS *AMICI CURIAE* IN SUPPORT OF APPELLANT DEREK LEE

Appeal from the June 13, 2023 Judgment of the Superior
Court of Pennsylvania, No. 1008 WDA 2021, Affirming the
December 19, 2016 Judgment of Sentence of the Court of
Common Pleas of Allegheny County, CP-02-CR-0016878-2014

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STATEMENT OF INTEREST OF *AMICI CURIAE*¹

Juvenile Law Center fights for rights, dignity, equity, and opportunity for youth. Juvenile Law Center works to reduce the harm of the child welfare and justice systems, limit their reach, and ultimately abolish them so all young people can thrive. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center’s legal and policy agenda is informed by—and often conducted in collaboration with—youth, family members, and grassroots partners. Since its founding, Juvenile Law Center has filed influential *amicus* briefs in state and federal courts across the country to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are consistent with children’s unique developmental characteristics and human dignity.

The **Youth Sentencing & Reentry Project** is a nonprofit organization based in Philadelphia that uses direct service and policy advocacy to transform the experiences of children charged and prosecuted in the adult criminal justice system, and to ensure fair and thoughtful resentencing and reentry for individuals who were sentenced to life without parole as children (“juvenile lifers”). YSRP partners with court-involved youth and juvenile lifers, their families, and lawyers to develop holistic, humanizing narratives that mitigate the facts of each case; get cases

¹ Pursuant to Rule 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.

transferred to the juvenile system or resentenced; and make crucial connections to community resources providing education, healthcare, housing, and employment. YSRP also provides trainings on mitigation, and recruits, trains, and supervises students and other volunteers to assist in this work. YSRP's ultimate goals are to keep children out of adult jails and prisons and to enhance the quality of representation juvenile lifers receive at resentencing as they prepare to reenter the community.

Philadelphia Lawyers for Social Equity (PLSE) is dedicated to ameliorating the destruction of mass incarceration. PLSE helps low-income people with record clearing so they can access education, employment, healthcare, and other opportunities essential to life. PLSE was founded in 2010 and has filed *amicus* briefs in Pennsylvania state court consistent with ending the lifelong harms of incarceration and criminal records.

SUMMARY OF ARGUMENT

While the Pennsylvania legislature has eliminated life without parole sentences for second-degree murder for youth under the age of 18, 18 Pa.C.S.A. § 1102.1(c), data shows almost three quarters of individuals serving life without parole sentences were age 25 or younger at the time of their offense. Andrea Lindsay, Philadelphia Lawyers for Social Equity, *Life Without Parole for Second-Degree Murder in Pennsylvania: An Objective Assessment of Sentencing* 12 (2021), <https://>

www.plsephilly.org/wp-content/uploads/2021/01/PLSE-Second-Degree-Murder-Audit-Jan-19-2021.pdf; *see also* 18 Pa.C.S.A. § 1102(b) (imposing life imprisonment for all second-degree murder convictions for defendants over age 18). Imposing life without parole on young adults who did not kill or intend to kill disregards the research that confirms young adults, like children under 18, are more impulsive, are less able to foresee the immediate or long-term consequences of their actions, are more susceptible to outside pressures, and are less deserving of extreme punishments. *See infra* Section I.B. As such, this sentence is unconstitutionally cruel under Article I, Section 13 of the Pennsylvania Constitution, which prohibits a broader range of punishment than the Eighth Amendment. *See infra*, Section II.A-B.

Amici write to underscore that the Court should prohibit the harsh punishment of life without parole for all persons convicted of felony murder in light of developmental and neuroscientific findings about the reduced culpability of young adults—who will typically comprise close to 75% of the cohort of people subject to this sentence. Absent a ban on this punishment, the sentence will be unconstitutionally disproportionate for the majority of individuals who receive it.

ARGUMENT

Where the majority of people serving life without parole sentences in Pennsylvania for felony murder were age 25 or younger at the time of the offense, and research confirms that people between the ages of 18-25 are substantially similar developmentally to young people under the age of 18, allowing the punishment of life without parole to stand means that the vast majority of people currently fulfilling this sentence are serving, and will continue to serve, an unconstitutionally cruel sentence.²

I. YOUNG ADULTS OVER AGE 18, JUST LIKE CHILDREN, ARE STILL DEVELOPING AND SHOULD NOT RECEIVE LIFE WITHOUT PAROLE SENTENCES FOR FELONY MURDER

A. Research Confirms That The Vast Majority Of People In Pennsylvania Serving Life Without Parole Sentences For Felony Murder Were Age 25 Or Younger At The Time Of The Offense

Over 73% of individuals in Pennsylvania serving life without parole sentences for second-degree murder were age 25 or younger at the time of the underlying offense. Andrea Lindsay, Philadelphia Lawyers for Social Equity, *Life Without Parole for Second-Degree Murder in Pennsylvania: An Objective Assessment of Sentencing* 12 (2021), <https://www.plsephilly.org/wp-content/uploads/2021/01/PLS-E-Second-Degree-Murder-Audit-Jan-19-2021.pdf>. Over 42% of those imprisoned

² While Mr. Lee is challenging mandatory life without parole sentences for felony murder, *Amici* oppose the sentence altogether because the majority of individuals who receive this sentence were under age 25 at the time of the offense.

for life for second-degree murder were between the ages of 18 to 21 when the underlying offense occurred. *Id.*

This data comports with a broader trend in Pennsylvania of imprisoning young adults for life. A recent study of 20 states' imposition of life without parole on emerging adults (not limited to second-degree murder) found that in Pennsylvania, half of the people sentenced to life without parole were younger than 26 years old at the time of the sentencing—a higher proportion than in any other state. Ashley Nellis & Nikki Monazzam, The Sent'g Project, *Left to Die in Prison: Emerging Adults 25 and Younger Sentenced to Life Without Parole* 5 (2023), <https://www.sentencingproject.org/app/uploads/2023/09/Left-to-Die-in-Prison-Emerging-Adults-25-and-Younger-Sentenced.pdf>.

As discussed in Section II.D, *infra*, Black young adults are particularly over-represented in the second-degree population in Pennsylvania and Hispanic/Latinx young people are also disproportionately represented.

B. Research Confirms That There Is Little Difference Developmentally Between Young People Under The Age Of 18 And Young Adults 18 And Older

It is settled constitutional law that children are developmentally different from adults and sentencing practices must conform to and reflect these differences. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 578 (2005) (banning the death penalty for individuals convicted of murder under the age of eighteen); *Graham v. Florida*, 560

U.S. 48, 82 (2010) (banning life without parole sentences on juveniles convicted of non-homicide offenses); *Miller v. Alabama*, 567 U.S. 460, 465 (2012) (banning mandatory life without parole sentences for juveniles convicted of homicide); *Jones v. Mississippi*, 593 U.S. 98, 106 n.2 (2021) (quoting *Montgomery v. Louisiana*, 577 U.S. 190, 211 (2016)) (holding that it remains a violation of the Eighth Amendment to impose a life without parole sentence on youths whose crimes reflect transient immaturity). Citing scientific and sociological studies, the Supreme Court relied on three key developmental characteristics of youth in reaching its conclusions: (1) youth's lack of maturity, impulsivity, and impetuosity; (2) youth's susceptibility to outside influences; and (3) youth's capacity for change. *Roper*, 543 U.S. at 569-70; *see also Montgomery*, 577 U.S. at 206-07 (quoting *Miller*, 567 U.S. at 471).

The neurological developments that differentiate children from adults are especially salient in the context of felony murder. Liability for felony murder need not depend on an intent to kill: a person can be convicted of felony murder even if the killing was “accidental, unforeseeable, or committed by another participant in the felony.” Emily Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of Roper, Graham & J.D.B.*, 11 Conn. Pub. Int. L.J. 297, 302-03 (2012). Liability is justified by a theory of “transferred intent;”—the intent to kill is inferred from an individual's intent to commit the underlying felony because a reasonable person would know that death is a possible result of dangerous

felonious activities. *Id.* at 305. However, as Justice Breyer explained in his concurring opinion in *Miller v. Alabama*, this rationale fails when applied to youth:

[a]t base, the theory of transferring a defendant’s intent is premised on the idea that one engaged in a dangerous felony should understand the risk that the victim of the felony could be killed, even by a confederate. Yet the ability to consider the full consequences of a course of action and to adjust one’s conduct accordingly is precisely what we know juveniles lack capacity to do effectively.

567 U.S. at 492 (Breyer, J., concurring) (citation omitted).

Current research shows that older adolescents and young adults into their 20s share similar physiological and psychological traits as teenagers, making extreme punishments for felony murder inappropriate for both. A comprehensive 2019 report from the National Academies of Sciences, Engineering, and Medicine explains this shift in the understanding of adolescence, noting that “the unique period of brain development and heightened brain plasticity. . . continues into the mid-20s,” and that “most 18-25-year-olds experience a prolonged period of transition to independent adulthood, a worldwide trend that blurs the boundary between adolescence and ‘young adulthood,’ developmentally speaking.” Nat’l Acads. of Scis., Eng’g & Med., *The Promise of Adolescence: Realizing Opportunity for All Youth* 22 (Richard J. Bonnie & Emily P. Backes eds., 2019) (emphasis omitted), <https://nap.nationalacademies.org/read/25388/chapter/1>. The report concludes it would be “arbitrary in developmental terms to draw a cut-off line at age 18.” *Id.*

Numerous papers published over the past several decades confirm that the parts of the brain active in most crime situations, including those associated with characteristics of impulse control, propensity for risky behavior, vulnerability, and susceptibility to peer pressure, are still developing well into late adolescence and even for individuals above age 20. Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 *Fordham L. Rev.* 641, 642 (2016) (“Over the past decade, developmental psychologists and neuroscientists have found that biological and psychological development continues into the early twenties, well beyond the age of majority.” (citing Laurence Steinberg, *Age of Opportunity: Lessons from the New Science of Adolescence* 5 (2014))); *see also* Laurence Steinberg, *Does Recent Research on Adolescent Brain Development Inform the Mature Minor Doctrine?*, 38 *J. Med. & Phil.* 256, 263-64 (2013). Indeed, “[m]aturation of brain structure, brain function, and brain connectivity continues throughout the early twenties.” Robert Kinscherff, *Ctr. for L. Brain & Behav.*, *White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys and Policy Makers* 2 (2022) (citing Leah Somerville, *Searching for Signatures of Brain Maturity: What are We Searching For?*, 92 *Neuron* 1164, 1164-67 (2016)), <https://clbb.mgh.harvard.edu/wp-content/uploads/CLBB-White-Paper-on-the-Science-of-Late-Adolescence-3.pdf>; *see also* Catherine Lebel & Christian Beaulieu, *Longitudinal Development of Human Brain Wiring*

Continues from Childhood into Adulthood, 31 J. Neurosci. 10937, 10937, 10943 (2011); Adolf Pfefferbaum et al., *Variation in Longitudinal Trajectories of Regional Brain Volumes of Healthy Men and Women (Ages 0 to 85 Years) Measured with Atlas-Based Parcellation of MRI*, 65 NeuroImage 176, 189 (2013). While regions of the brain mature at different times, areas controlling impulse control, peer pressure, and “‘hot cognition’ (thinking that takes place under conditions of emotional or social arousal)” develop later. Scott et al., *supra*, at 651-52.

The ways in which young adults’ risk assessment and decision-making capacities, like adolescents’, differ from those of adults are particularly relevant to felony murder cases. The U.S. Supreme Court has observed that adolescents “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.” *J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011) (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)). The ability to think ahead to the future improves from ages 10 to 25. Kinscherff, *supra*, at 15-16. “While adults tend to integrate potential consequences of decisions, middle adolescents and late adolescents exhibit less future-oriented decision-making.” *Id.* at 14. Young adults who participate in felonies are consequently less likely to account for the possibility that someone may get killed during that felony.

The ability to prioritize longer-term gains over immediate (delayed gratification) also continues to develop into adulthood, which can lead young adults

to engage in riskier behaviors that provide short-term rewards. Kinscherff, *supra*, at 2, 14-16 (discussing older adolescents ages 18-21); Scott et al., *supra*, at 645 (same). Brain development relevant to risk taking, reward seeking, and impulse control continues into the early twenties. Kinscherff, *supra*, at 2, 14-16. Older adolescents ages 18 to 21, in particular, are similar to youth in their need for “sensation-seeking” behavior, which can also increase risky behaviors. *See id.* at 2 (citing Laurence Steinberg, Adolescent Brain Science and Juvenile Justice Policymaking, 23 *Psych., Pub. Pol’y, & L.* 410 (2017)).

[T]he relatively high rate of risky activity observed in late adolescence and young adulthood—including criminal offending—is likely due to a combination of high reward seeking and poor self-control, leading individuals to make impetuous, short-sighted decisions that privilege the potential rewards or risky choices and underestimates the potential costs.

Scott et al., *supra*, at 647. Like children, late adolescents ages 18-21 have been shown to take more risks when their peers are present. Kinscherff, *supra*, at 24. As with children, these characteristics help explain criminal behavior and render young adults “less deserving of the most severe punishments.” *See Miller*, 567 U.S. at 471 (quoting *Graham*, 560 U.S. at 68).

Importantly, like children, young adults are still in “a window of opportunity for prosocial learning and adaption.” Kinscherff, *supra*, at 36. The prolonged period of heightened brain “plasticity,” which “describ[es] the brain’s ability to change and

adapt in response to experience,” extends into young adulthood. *Id.* Young adults, like children, can change and reform and should not be condemned to die behind bars.

C. Emerging Jurisprudence Extends To Young Adults The Proscriptions On Extreme Sentencing Of Youth

This Court would not be the first “to appreciate the distinct ways in which our laws bear on emerging adults.” *See Commonwealth v. Mattis*, 224 N.E.3d 410, 426 (Mass. 2024). Other courts have relied on both the interpretation of their state constitutional protections against cruel or unusual punishment as well as developmental science to extend sentencing protections to this cohort.

Most recently, the Massachusetts Supreme Judicial Court held that imposing life without parole on emerging adults who were 18, 19, or 20 at the time of their offense violates the Massachusetts Constitution. *Mattis*, 224 N.E.3d at 415. In a detailed opinion, the court relied on extensive scientific research developed over the past twenty years demonstrating “[a]dvancements in scientific research have confirmed what many know well through experience: the brains of emerging adults are not fully mature. Specifically, the scientific record strongly supports the contention that emerging adults have the same core neurological characteristics as juveniles have.” *Id.* at 420-21. The court approved factual findings made by the Superior Court judge based on record evidence that

emerging adults (1) have a lack of impulse control similar

to sixteen and seventeen year olds in emotionally arousing situations, (2) are more prone to risk taking in pursuit of rewards than those under eighteen years and those under twenty-one years, (3) are more susceptible to peer influence than individuals over twenty-one years, and (4) have a greater capacity for change than older individuals due to the plasticity of their brains.

Id. at 421 (footnote omitted). There are “anatomical and physiological differences between the brains of emerging adults and older adults” that render “emerging adults, like juveniles, ‘particularly vulnerable to risk-taking that can lead to poor outcomes.’” *Id.* (first citing Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 *Developmental Rev.* 78, 82-84, 85-89 (2008); and then quoting Findings of Fact at 17, *Commonwealth v. Mattis*, No. 1184CR11291 (Mass. Super. Ct. July 20, 2022)). The court further discussed statutes and judicial rulings from Massachusetts and across the country, as well as from other nations, and found that “contemporary standards of decency do not support imposing life without parole sentences on emerging adults.” *Id.* at 424.

Mattis follows Michigan and Washington Supreme Court decisions that also interpreted their Eighth Amendment analogues more broadly than the Eighth Amendment and extended protections beyond age 18. *People v. Parks*, 987 N.W.2d 161, 169-70, 175, 183 (Mich. 2022) (holding mandatory life without parole for 18-year-olds violates the Michigan Constitution’s bar on “cruel or unusual punishment” and determining, based on research, that “there is no meaningful distinction between

those who are 17 years old and those who are 18 years old”); *In re Monschke*, 482 P.3d 276, 286-87 (Wash. 2021) (holding that a mandatory life without parole sentence for any individual ages 18 to 20 at the time of the crime violates the Washington Constitution as “no meaningful neurological bright line exists between . . . age 17 on the one hand, and ages 19 and 20 on the other hand”).

D. State Laws Further Support Extending The Line Demarcating Childhood Past Age 18

In recognition of the developmental similarities between teenagers and young adults, Pennsylvania, like many states, no longer draws the line at age 18 when distinguishing childhood and adulthood. The Pennsylvania Juvenile Act defines “child” as not only those youth under 18, but also youth under 21 in certain circumstances, including that youth adjudicated delinquent before turning 18 can remain under supervision until 21. 42 Pa.C.S.A. § 6302. Additionally, acknowledging the lack of independence for most youth at age 18, Pennsylvania extends foster care to age 21 under certain criteria, 42 Pa.C.S.A. § 6302, 42 Pa.C.S.A. § 6351(j), and aftercare services to ease the transition may continue until age 23, *Chafee Foster Care Program for Successful Transition to Adulthood*, Pa. Dep’t of Hum. Servs., <https://www.dhs.pa.gov/providers/Providers/Pages/Chafee-Foster-Care.aspx> (last visited Apr. 26, 2024). Pennsylvania youth can also attend public schools until age 21. 24 P.S. § 13-1301.

Pennsylvania, like many states, restricts access to certain controlled

substances past age 18. It is illegal for anyone under age 21 to possess or buy alcohol or use tobacco. 18 Pa.C.S.A § 6308; 18 Pa.C.S.A. § 6305. A proposed bill to legalize the use and distribution of recreational marijuana would likewise limit access to recreational marijuana for Pennsylvanians under 21 years old. S.B. 846, 2023-2024 Leg., Reg. Sess. (Pa. 2023).

Other states and federal programs also extend protections to young people past age 18. For example, the Affordable Care Act required healthcare plans and issuers that offer dependent child coverage to make coverage available to dependents between age 19 and 26. 45 C.F.R. § 147.120. This expansion “highlight[ed] the ongoing dependence that now characterizes the early years of adulthood.” Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 Tul. L. Rev. 55, 58-59 (2016).

II. A SENTENCE OF LIFE WITHOUT PAROLE IMPOSED ON PEOPLE CONVICTED OF FELONY MURDER IS UNCONSTITUTIONAL UNDER ARTICLE 1, SECTION 13 OF THE PENNSYLVANIA CONSTITUTION

The Pennsylvania constitutional ban on “cruel punishments” is distinct from the Eighth Amendment and only allows punishments designed to rehabilitate or deter. Life without parole sentences imposed on young adults for felony murder do neither.

Pennsylvania is not “bound by the decisions of the United States Supreme Court which interpret similar (yet distinct) federal constitutional provisions.” *Commonwealth v. Edmunds*, 586 A.2d 887, 894 (Pa. 1991). The Federal Constitution

establishes a minimum level of rights and protections, but states have the power to provide broader relief “beyond the minimum floor which is established by the federal Constitution.” *Id.* (citing *Commonwealth v. Sell*, 470 A.2d 457, 467 (Pa. 1983)). To maintain autonomy, states are encouraged to engage in their own independent analysis “in drawing meaning from their own state constitutions.” *Id.* This Court last considered whether to accord Article 1, Section 13 a broader interpretation than the Eighth Amendment ten years ago in *Commonwealth v. Batts*, 66 A.3d 286, 297-99 (Pa. 2013). In declining to do so, this Court wrote: “the arguments presented do not persuade us that the Pennsylvania Constitution requires a broader approach to proportionality vis-à-vis juveniles than is reflected in prevailing United States Supreme Court jurisprudence.” *Id.* at 299. This Court’s previous position on the meaning of the Pennsylvania Constitution cruel punishments clause cannot be squared with the historical record underlying the provision, nor with its own framework for evaluating this question.

To determine whether the Pennsylvania statute provides broader protection than the federal statute, the Court must analyze: “1) [the] text of the Pennsylvania constitutional provision; 2) [the] history of the provision, including Pennsylvania case-law; 3) related case-law from other states; and 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.” *Edmunds*, 586 A.2d at 895. As outlined below, all four

factors support reading the Pennsylvania Cruel Punishments provision more broadly than the Eighth Amendment.³

A. The Text Of The Pennsylvania Constitution Is Broader Than The Eighth Amendment

On its face, the text of the Pennsylvania Constitution is broader than the Eighth Amendment of the United States Constitution. Article I, Section 13 of the Pennsylvania Constitution provides: “excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.” Pa. Const. art. I, § 13. This differs from the Eighth Amendment’s more narrow prohibition against punishments that must be both “cruel” *and* “unusual.” U.S. Const. amend. VIII.

B. Drafters Of Article I, Section 13 Sought To Prohibit All Punishments Which Did Not Deter Or Support Reformation Of The Individual

In a recent examination of the historical foundations for Pennsylvania’s “cruel punishments” ban, one commentator has noted that the original understanding of “cruel” by the Pennsylvania Framers actually favors a broader interpretation of the state provision. *See generally* Kevin Bendesky, “*The Key-Stone to the Arch*”: *Unlocking Section 13’s Original Meaning*, 26 U. Pa. J. Const. L. 201 (2023). The

³ This Court’s interpretation of Article I, Section 13 here will have important ramifications for numerous juvenile sentencing cases currently pending before the lower courts. *See, e.g., Commonwealth v. Foust*, No. 1306 WDA 2023 (Pa. Super. Ct. appeal docketed Nov. 7, 2023); *Commonwealth v. King*, No. 406 EDA 2023 (Pa. Super. Ct. appeal docketed Feb. 19, 2023); *Commonwealth v. Hernandez*, No. 1785 EDA 2023 (Pa. Super. Ct. appeal docketed July 17, 2023); *Commonwealth v. Bourgeois*, No. CP-36-CR-0004224-2001 (Pa. Ct. C.P. Lancaster Cnty. filed May 23, 2023).

Pennsylvania Constitution was adopted on September 28, 1776, ten years before ratification of the U.S. Constitution. *Edmunds*, 586 A.2d at 896. In fact, the Federal Bill of Rights “borrowed heavily” from the Declaration of Rights of Pennsylvania and other colonies. *Id.* Pennsylvania ratified the second constitution in 1790, a year before adoption of the Eighth Amendment, and forbid all cruel punishments. Bendesky, *supra*, at 205. This provision remains in the Pennsylvania Constitution to date.

The original purpose of punishment in Pennsylvania was to deter and reform. As adopted by Enlightenment thinkers Cesare Beccaria and Baron De Montesquieu, no punishment was permissible unless necessary, making “cruel” anything that did not deter or reform. Bendesky, *supra*, at 215-18 (first citing Montesquieu, *The Spirit of Laws* (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 2018) (1748), and then citing Cesare Beccaria, *On Crimes and Punishments* (1794), reprinted in *On Crimes and Punishments and Other Writing* (Richard Bellamy ed., Richard Davies trans., 2003)). Pennsylvania constitutional Framers wrote against “sanguinary” punishments. *See* Jared Ingersoll, *Report*, 7 J. Juris: New Series Am. L.J. 325, 325 (1821), bit.ly/44Qt8OM; Bendesky, *supra*, at 213. Framers came to believe that every punishment that is not absolutely necessary for deterrence, is “tyrannical” and cruel. *See* Bendesky, *supra*, at 216. This informed the meaning of cruelty and led to Section 13 of the Pennsylvania Constitution.

In contrast, the Eighth Amendment drew on England’s 1688 Bill of Rights and was meant to admonish and warn the “National Government” against violent proceedings that had taken place in England. Ben Finholt, *Toward Mercy: Excessive Sentencing and the Untapped Power of North Carolina’s Constitution*, *Elon L. Rev.* (forthcoming) (manuscript at 5), <https://ssrn.com/abstract=4464100>. The federal Amendment originally sought to prohibit punishments that were unusual, where “terror, pain, or disgrace [were] superadded” to the penalty of death. *Bucklew v. Precythe*, 587 U.S. 119, 130 (2019) (alteration in original) (quoting William Blackstone, *Commentaries on the Laws of England* 370 (1769)). “Cruel” was understood to mean “[p]leased with hurting others; inhuman; hard-hearted; void of pity; wanting compassion; savage; barbarous; unrelenting,” or “[d]isposed to give pain to others, in body or mind; willing or pleased to torment, vex or afflict; inhuman; destitute of pity, compassion or kindness.” *Id.* (alterations in original) (first quoting Samuel Johnson, *A Dictionary of the English Language* (4th ed. 1773), and then quoting Noah Webster, *An American Dictionary of the English Language* (1828)). Ratifiers of the Eighth Amendment sought to prohibit torturous and barbarous punishments such as disemboweling, public dissection, burning alive, mutilating, and other “atrocious” methods of execution, practices which “had long fallen out of use and so had become ‘unusual.’” *See id.* at 130-31. Thus, the federal Framers were not concerned with proportionality, but with outlawing barbarous

punishments.

At the federal level, a punishment also had to be both cruel *and* unusual, as the Court would permit punishments that were unusual, but not cruel. *See Bucklew*, 587 U.S. at 1123-24 (citing *In Re Kemmler*, 136 U.S. 436, 447 (1890) (where death by electrocution was a new method of punishment, and could be considered unusual, but was legal because the “punishment of death is not cruel, within the meaning of that word as used in the Constitution”)). According to the late Justice Scalia, this was intentional as the Framers of the Federal Constitution knew of state constitutions, like Pennsylvania’s and South Carolina’s, which prohibited only cruel punishment and guaranteed proportional punishments, but purposely chose not to adopt such provisions. *See Harmelin v. Michigan*, 501 U.S. 957, 966 (1991); *see also Bucklew*, 587 U.S. at 1124.

Pennsylvania’s independent meaning of “cruel” prevailed until the federal government ruled that the Eighth Amendment applied to the states. *See Robinson v. California*, 370 U.S. 660, 666 (1962). Since then, Pennsylvania courts appear to have ignored the state’s history and purpose in choosing “cruel” versus “cruel and unusual” constitutional language.

C. Other Jurisdictions Have Interpreted Similar State Protections More Broadly Than The Eighth Amendment

Pennsylvania’s ban on cruel punishments is not unique; several other jurisdictions have likewise banned cruel punishments, or cruel *or* unusual punishments. As Petitioner Lee and *Amici* urge here, many of these state constitutional provisions have been interpreted to provide greater protections than the Eighth Amendment. *See State v. Vang*, 847 N.W.2d 248, 263 (Minn. 2014) (where the Minnesota Supreme Court found the difference between its nearly identical “cruel or unusual” punishment provision as “‘not trivial’ because the ‘United States Supreme Court has upheld punishments that, although . . . cruel, are not unusual’” (quoting *State v. Mitchell*, 577 N.W.2d 481, 488 (Minn. 1998))); *Hale v. State*, 630 So.2d 521, 526 (Fla. 1993) (“The federal constitution protects against sentences that are *both* cruel and unusual. The Florida Constitution, arguably a broader constitutional provision, protects against sentences that are *either* cruel or unusual.”); *Commonwealth v. Concepcion*, 164 N.E.3d 842, 855 (Mass. 2021) (noting that Article 26 of the Massachusetts Constitution “affords defendants greater protections than the Eighth Amendment”); *People v. Anderson*, 493 P.2d 880, 883 (Cal. 1972), *superseded by constitutional amendment*, Cal. Const. art. 1, § 27 (where the California Supreme Court rejected the idea that their state constitution was “coextensive” with the Eighth Amendment, and found that use of the disjunctive “or” in the state constitution was significant and purposeful); *People v. Baker*, 229

Cal. Rptr. 3d 431, 442 (Cal. Ct. App. 2018) (where the California Court of Appeal construed the state constitutional provision separate from its federal counterpart and found that the distinction between Eighth Amendment wording and the California Constitution was “purposeful and substantive rather than merely semantic” (quoting *People v. Carmony*, 26 Cal. Rptr. 3d. 365, 378 (Cal. Ct. App. 2005)); see also *Burnor v. State*, 829 P.2d 837, 839-40 (Alaska Ct. App. 1992) (applying its own “single test to determine whether a statutory penalty constitutes cruel and unusual punishment”); see also Section I.C, *supra*, discussing decisions extending protections beyond age 18.

The Washington Supreme Court has also interpreted its constitution as more protective than the Eighth Amendment. *State v. Fain*, 617 P.2d 720, 723 (Wash. 1980) (en banc). In *Fain*, the court reasoned that “[e]specially where the language of our constitution is different from the analogous federal provision, we are not bound to assume the framers intended an identical interpretation.” *Id.* This was clear from historical evidence that revealed that the Framers viewed the word “cruel” as sufficient to express their intent and “refused to adopt an amendment inserting the word unusual.” *Id.* In 2018, after an *Edmunds*-like analysis, the court confirmed its broader interpretation in the context of youth sentencing. *State v. Bassett*, 428 P.3d 343, 346 (Wash. 2018). It reasoned that “on its face” the Washington Constitution offers greater protection because it prohibits “merely cruel” punishments. *Id.* at 349

(quoting *State v. Dodd*, 838 P.2d 86, 96 (Wash. 1992) (en banc)). The Court also recognized how the state evolved, through legislation and case law, to recognize that children warrant special protection. *Id.* at 350. The court reasoned that, in the context of juvenile sentencing, the Washington Constitution provided greater protection than the Eighth Amendment. *Id.*

In *State v. Kelliher*, the North Carolina Supreme Court held that it violates both the Eighth Amendment and its state constitution to sentence a youth convicted of homicide “who has been determined to be ‘neither incorrigible nor irredeemable’ to life without parole.” 873 S.E.2d 366, 370 (N.C. 2022). The court found that the North Carolina Constitution, which prohibits “cruel *or* unusual punishments,” N.C. Const. art. I, § 27 (emphasis added), offers protections that are distinct and broader than those provided under the Eighth Amendment, *Kelliher*, 873 S.E.2d at 382. The court presumed that the Framers of the North Carolina Constitution intentionally chose the words “cruel or unusual punishments” to prohibit punishments that were either cruel or unusual, “consistent with the ordinary meaning of the disjunctive term ‘or.’” *Id.* After analyzing text and precedent, the court determined the North Carolina Constitution is *not* in “lockstep” with the Eighth Amendment. *Id.* at 383. The court also noted how its own interpretation changed to conform with contemporary understanding of adolescent development. *Id.* at 384.

D. Policy Favors Enhanced Protections For Black And Latinx Young Adults Who Are Significantly Over-Represented In The Second-Degree Population

Imposing life without parole for felony murder disproportionately harms Black and Latinx young adults. As discussed above, the overwhelming majority of individuals serving life without parole for felony murder in Pennsylvania were 25 or under at the time of the offense—with close to half being under the age of 21. Lindsay, *supra*, at 12. Moreover, Black people are significantly overrepresented in the population of individuals confined for second-degree murder, they are 5.8 times overrepresented compared to statewide population. Andrea Lindsay & Clara Rawlings, Philadelphia Lawyers for Social Equity, *Life Without Parole for Second-Degree Murder in Pennsylvania: An Objective Assessment of Race* 4 (2021), https://www.plsephilly.org/wpcontent/uploads/2021/04/PLSE_SecondDegreeMurder_and_Race_Apr2021.pdf. Hispanic/Latinx people, too, represent 8.4% of the individuals serving life for second-degree murder, compared to 7.4% of the state population. *Id.* White people, in contrast, are significantly *under*-represented. *Id.* at 4. Drawing the line at 18 also most negatively impacts Black and Latinx young adults, because data shows they were younger at the time of the offense. *Id.* at 5-11. “[T]he data are clear that the second-degree murder statute—along with its mandatory life without parole sentence—contributes to racial disparities, particularly for young people of color.” *Id.* at 4, 20.

The particularly profound disproportionate sentencing of Black individuals in Pennsylvania aligns with national data finding Black people comprised over half of all people serving life without parole (for any charge) in 2020. Nellis & Monazzam, *supra*, at 6. A study of 20 states found that the majority (66%) of emerging adults sentenced to life without parole for any charge were Black—undoubtedly due to racism including adultification bias in which Black children are perceived as older and more culpable, and pervasive dehumanizing language weaponized against Black youth. *Id.* at 4, 6-7.

Moreover “if the point of life sentences is deterrence—that is, that the punishment is sufficiently harsh enough to prevent crime in the first place—the same developmental factors that characterize youth clearly limit life sentences’ efficacy for nearly three-quarters of the second-degree population given that youth are much more likely to act impulsively with little foresight into consequences.” Lindsay, *supra*, at 21; *see also Graham*, 560 U.S. at 72 (youths’ developmental characteristics render them “less susceptible to deterrence.” (quoting *Roper*, 543 U.S. at 571)). And the sentence itself “forswears altogether the rehabilitative ideal.” *Graham*, 560 U.S. at 74. “By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person’s value and place in society.” *Id.* Yet, despite there being little to no deterrent potential, no offer of rehabilitation, and although young adults are also less blameworthy due to their brain development,

young adults sentenced to life without parole for felony murder—and therefore especially Black young adults who are over-represented—are in fact punished *more* harshly than older adults. Lindsay, *supra*, at 20 (“[Y]oung people ‘on average serve more years and a greater percentage of [their] life in prison’ such that ‘a 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.” (alteration in original) (quoting *Graham*, 560 U.S. at 70)); *see also Graham*, 560 U.S. at 74 (life without parole not appropriate given youths’ “capacity for change and limited moral culpability”).

III. THE SUCCESSFUL RETURN OF YOUNG PEOPLE SENTENCED TO LIFE WITHOUT PAROLE BUT LATER RELEASED POST-MILLER DEMONSTRATE THE IMPORTANCE OF ABOLISHING PUNISHMENTS THAT FORECLOSE HOPE OF REHABILITATION

Although many individuals continue to serve life without parole for second-degree murder committed when they were young adults, over 1,000 have been released and hundreds have returned home here in Pennsylvania. Their stories, shared with permission, underscore why the Court should prohibit sentences that mandate young people die in prison. Extreme sentences impede the growth, resilience and joy evidenced in these examples. The individuals featured below, who are all working to serve their communities, urge the Court to ban life without parole sentences for all those accused of felony murder.

A. John^{4, 5}

Incarcerated at age 17, John served over 32 years on a second-degree murder conviction. While in prison, he held many leadership roles and earned a college degree. Like many released juvenile lifers, he has devoted his life to assisting those returning from incarceration, disrupting the cycle of violence among young people, and advocating for criminal justice reform. John is the Senior Reentry Coordinator at Youth Sentencing & Reentry Project (YSRP), where he supports juvenile lifers and justice-involved youth returning from incarceration. At YSRP, he established and continues to coordinate YSRP's Intergenerational Healing Circles, a facilitated space where juvenile lifers and justice-involved youth come together to promote healing from trauma and to provide mutual support. He has received multiple awards for his work and been chosen to receive a Represent Justice Fellowship from a Hollywood-based non-profit devoted to telling the stories of incarcerated people to promote criminal justice awareness and reform. He serves on the board of the Philadelphia Bail Fund and the Education Committee of Eastern University, and his success has been featured in multiple national media outlets.

⁴ Further detail on Tamika's, John's, and Stacey's experiences are provided in the Defender Association of Philadelphia's *amicus* brief.

⁵ Former Juvenile Lifer Interviews (Mar. 2024) (on file with Eleanor Myers, Esq, Senior Advisor, Youth Sentencing & Reentry Project).

B. Giovanni⁶

Incarcerated for second-degree murder at age 17, Giovanni served over 26 years. Since his release, he has won multiple awards, including Employee of the Month and the Philadelphia Reentry Coalition's Reentry Star of the Year. At Temple University, he is part of the Inside-Out program, which sponsors college courses for incarcerated people and university students to study together. Giovanni provides nationwide training to prospective university faculty. He participates in YSRP's Intergenerational Healing Circle and Speakers Bureau. He is active in his mosque, Sister Clara Muhammad, where he assists previously incarcerated people coming home by providing them with essentials and other financial support through his own personal means. He regularly spends a few thousand dollars on each person, and he has assisted dozens of individuals to date. He also cared for his ailing father for almost seven years before his recent passing.

C. Marlo⁷

Marlo was incarcerated for 25 years on a second-degree murder charge from an incident that occurred when he was 16 years old. Within a year of his release, he received his Commercial Driving License (CDL) and has been employed ever since as a long-distance truck driver with JB Hunt, a large logistics and moving company. He has been recognized as an exemplary employee and is now the top

⁶ *Id.*

⁷ *Id.*

CDL trainer in his truck yard. He regularly assists organizations such as the Urban League and Impact Philadelphia to find CDL training opportunities for formerly incarcerated people. Active in the Greater Canaan Church of God in Christ, where he regularly mentors formerly incarcerated people, Marlo states, “I use my second chance to help you have a second thought before you do something that will change your life.”

D. Stacey⁸

Stacey was incarcerated at age 14 and served 30 years in prison. While there, he earned his GED and completed 9 college courses. Since his release, he has worked in construction. Recently he also joined The Fountain Fund as the Community Outreach Coordinator. The Fund is a nationwide lending organization supporting formerly incarcerated people to start their own businesses. Stacey gives back to the formerly incarcerated community in many ways: he participates in YSRP’s Intergenerational Healing Circles and Speakers Bureau; he has created a clothing bank; and he engages in the fellowship at Bibleway Baptist Church, mentoring and playing basketball with incarcerated youth. Most recently, he incorporated the Free Mind Entrepreneurial Network to train, equip, and place those returning from prison in construction jobs. He participates in the Campaign for the Fair Sentencing of Youth (CFSY), a nationwide racial equity organization. He is regularly profiled in

⁸ *Id.*

national media. Through every public engagement, Stacey pursues a singular mission: “I want people to have an easier path than I did.”

E. Charlie⁹

At age 16, Charlie was incarcerated on a second-degree murder conviction, serving more than 36 years. While in prison, he earned two GED degrees and took many college courses at multiple universities including University of Pittsburgh, Temple, and Swarthmore. Charlie has been employed at Jade Yoga warehouse for the past seven years, with great success. He is a member of the Fellowship at Bibleway Baptist Church, where he travels to Philadelphia city prisons to play basketball and talk with and mentor young adults. He is in the process of organizing a legal clinic at the church to assist incarcerated individuals with their legal claims. He is also active in FAMM, Families Against Mandatory Minimums, and ICAN, The Incarcerated Children’s Advocacy Network, a national network of formerly incarcerated adults, who were sentenced to extreme or life sentences as children. ICAN provides support for its members and empowers them to create positive change in their communities.

F. Tamika¹⁰

Tamika was incarcerated for more than 22 years for second-degree murder for an incident that occurred when she was 16 years old. Since her return, she has gotten

⁹ *Id.*

¹⁰ *Id.*

married, reconciled with her mother, and established close connections with her nine nieces and nephews. She also regularly visits her father, who suffers from dementia. Tamika has engaged in YSRP's Speakers Bureau, and other opportunities for speaking and interacting with young people.

Tamika's image smiles brightly in an exhibit entitled "On the Day They Come Home," part of a series of striking murals of formerly incarcerated women pictured in the New York Times Art Section. Tess Thackara, *They Are Their Own Monuments* N.Y. Times (May 3, 2021), <https://www.nytimes.com/2021/05/03/arts/design/monument-lab-philadelphia.html>. Tamika was also featured in an episode of the PBS documentary series *Returning Citizens: Life Beyond Incarceration*, as well as the films *The Command Center to Bring Women Home* and *Wide Open. Returning Citizens: Life Beyond Incarceration: Testimony* (PBS television broadcast Mar. 1, 2024); *The Command Center to Bring Women Home* (PBS 2022); *Let's Get Free, Wide Open*, YouTube (Nov. 14, 2020), <https://www.youtube.com/watch?v=Ot1AL9lKmcg>.

G. Abd'Allah¹¹

Abd'Allah was imprisoned at age 16 for second-degree murder on which he served more than 31 years. Since his release, he has earned more accolades and awards than can be adequately described here. He currently serves as Co-Deputy

¹¹ Former Juvenile Lifer Interviews, *supra*.

Director of The Campaign for the Fair Sentencing of Youth (CFSY), a national nonprofit that leads efforts to ban extreme prison sentences for children. In that role, he is involved in nationwide policy work, public speaking, organizing and advocacy, and media appearances on behalf of CFSY. He was active in Philadelphia's Reentry Think Tank which connects returning citizens with artists and advocates to transform the stereotypes, social services, and platforms that influence our communities. Abd'Allah won awards for this work and the Philadelphia Reentry Coalition and Philadelphia City Counsel honored the organization for its impact. He is on the board of directors of Juvenile Law Center, Center for Employment Opportunities (CEO) (national board) and New Leash on Life (USA).

CONCLUSION

Almost three fourths of those serving life without parole for second-degree murder were, at the time of the offense, young adults who share the same developmental traits and characteristics as young people under the age of 18. For youth whose offenses took place when they were younger than 18, those same developmental characteristics led to a federal ban on life without parole sentences in all non-homicide cases and a ban on mandatory life without parole in homicide cases. For the foregoing reasons, *Amici* urge this Court to reverse the holding of the lower court and find life without parole sentences imposed for second-degree murder violate Article I, Section 13 of the Pennsylvania Constitution.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the word count limitation of Rule 531 and 2135 of the Pennsylvania Rules of Appellate Procedure. This brief contains 6,999 words. In preparing this certificate, I relied on the word count feature of Microsoft Word.

I further 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/ Marsha L. Levick
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