

**IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT
16 WAP 2021**

MARIE SCOTT, NORMITA JACKSON, MARSHA SCAGGS,
and TYREEM RIVERS, Appellants

v.

PENNSYLVANIA BOARD OF PROBATION AND PAROLE, Appellees

**BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES
FOUNDATION OF PENNSYLVANIA AND RODERICK AND SOLANGE
MACARTHUR JUSTICE CENTER IN SUPPORT OF APPELLANTS**

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INTRODUCTION

Over 1,000 people in Pennsylvania are serving life sentences without an opportunity for parole—or, life without parole (“LWOP”)—for felony-murder.¹ A felony-murder conviction does not require any intent to kill; in fact, the person convicted frequently did not take a life.² Instead, they engaged in criminal conduct (for example, they acted as the getaway driver during a robbery) during which someone else (an accomplice, a third-party, even a police officer) killed someone.³ As such, they have diminished culpability for the death—yet are serving one of the harshest sentences possible.⁴

The injustice of LWOP sentences for felony-murder is, in theory, striking. In practice, it is unconscionable. Seventy percent of those serving LWOP sentences for felony-murder in Pennsylvania are Black—despite Black people making up only twelve percent of the state’s population.⁵

¹ *Scott v. Pennsylvania Board of Probation and Parole*, No. 397 MD 2020, Petition for Review at 2 (Commw. Ct. Pa. July 8, 2020).

² *Id.*

³ *See id.*

⁴ *Id.*

⁵ *Id.*

STATEMENT OF INTEREST OF *AMICUS CURIAE*⁶

Amicus curiae The American Civil Liberties Union of Pennsylvania is a non-profit, nonpartisan organization dedicated to defending and expanding individual rights and personal freedoms throughout Pennsylvania. Through advocacy, public education, and litigation, the ACLU of Pennsylvania works to preserve and enhance liberties grounded in the United States and Pennsylvania constitutions and civil rights laws. In particular, the ACLU of Pennsylvania aims to preserve and extend constitutionally guaranteed rights to people who have historically been denied their rights on the basis of race or ethnicity.

Amicus curiae The Roderick and Solange MacArthur Justice Center (RSMJC) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC attorneys have led civil rights battles in areas including police misconduct, the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, and the treatment of incarcerated people. RSMJC has served as merits counsel,

⁶ Pursuant to Pa. R. App. P. 531(b)(2), amici state this brief has not been authored, in whole or in part, by counsel to any party in this appeal. No party or counsel to any party contributed money intended to fund preparation or submission of this brief. No person, other than the amicus, their members, or their counsel, contributed money that was intended to fund preparation or submission of this brief. The amicus, their members, and their counsel have not represented any of the parties to the present appeal in another proceeding involving similar issues, nor have they been parties in a proceeding or legal transaction that is at issue in the present appeal.

amicus counsel, or amicus curiae in numerous cases around the country challenging both racial disparities in the criminal legal system and excessive or unfair sentences, including *Terry v. the United States*, 141 S. Ct. 1858, 1860 (2021) (urging the elimination of the disparity between crack and powder cocaine sentencing); *People v. Silas*, 68 Cal. App. 5th 1057, 284 Cal. Rptr. 3d 48, 55 (Cal. 2021) (arguing that it was improper for a prosecutor to strike a prospective juror who expressed support for Black Lives Matter); *Jones v. Mississippi*, 141 S.Ct. 1307 (2021) (arguing that a sentencer must make a finding that a juvenile is permanently incorrigible for imposing a LWOP sentence), and *Osby v. United States*, 832 Fed.Appx. 230, (4th Cir. 2020), cert. denied, ___S. Ct. __ (U.S. Oct. 4, 2021) (No. 20-1693) (challenging the consideration of acquitted conduct in calculating a sentence).

Amici curiae write to give a careful elaboration of the racially discriminatory administration of justice in felony-murder charging and sentencing, as well as in the application of LWOP sentences more generally. This brief explains the reasons for these disparities, which are not a reflection of greater culpability or criminality among Black Americans, but rather a result of biases among decisionmakers in the criminal legal system and systemic inequality. It also outlines the devastating impacts of these disproportionately long sentences on Black families.

ARGUMENT

I. Black Americans Receive Disproportionately Harsh Sentences For Felony-Murder

Felony-murder charging and sentencing exemplifies the deep racial disparities pervasive in our criminal punishment system. The data, from within and without Pennsylvania, are shocking.

Take, for example, a study that found Black and Latino people were twelve times more likely to be convicted of felony-murder than white people.⁷ The study also found that 66.7% of white people who were convicted of felony-murder started out with more serious offenses—such as intentional murder—and pleaded down to felony-murder.⁸ Only 38.5% of Black and Latino defendants, meanwhile, had their more-serious charges reduced to felony-murder—the remaining 61.5% of these defendants started out with felony-murder as the most serious charge.⁹ This means that white people convicted of felony-murder are more likely to have purposefully caused the death for which they are incarcerated—and are therefore, on average, more culpable—than Black and Latino people convicted of felony-murder.

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

⁸ *Id.*

⁹ *Id.* at 548.

Yet, perversely, white people convicted of felony-murder were given lighter sentences, on average, than people of color. White people convicted of felony-murder received reduced sentences 25% of the time, compared to 16% for nonwhite people with the same conviction.¹⁰ Nonwhite people convicted of felony-murder received reduced sentences about as often as they received aggravated sentences, whereas white people received a reduced sentence 2.5 times as often as an aggravated sentence.¹¹

A white decedent compounds the injustice. In those cases, prosecutors are significantly more likely to charge Black defendants with felony-murder than when the decedent was any other race.¹² Even in cases *with no obvious felony circumstances*, prosecutors were most likely to upgrade the charge to felony-murder when the person facing charges was Black and the victim was white.¹³ Conversely, counties across the country with more Black victims of homicide have statistically fewer LWOP sentences.¹⁴

¹⁰ *Id.* at 546.

¹¹ *Id.*

¹² See William J. Bowers, Glenn L. Pierce & John F. McDevitt, *Legal homicide: Death as punishment in America*, Boston: Northeastern University Press 1864–1982 (1984).

¹³ Michael L. Radelet & Glenn L. Pierce, *Race and prosecutorial discretion in homicide cases*, 19 L. & Soc’y Rev. 587, 592 (1985).

¹⁴ *Id.*; Brandon L. Garrett, Travis M. Seale-Carlisle, Karima Modjadidi & Kristen M. Renberg, *Life Without Parole Sentencing in North Carolina*, 99 N.C. L. Rev. 279 (Jan. 1, 2021), <https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=6815&context=nclr>.

Pennsylvania offers a particularly stark example of this disparity. In the keystone state, over 70 percent of people sentenced to die in prison for a death they had no intention to cause—and that was, in fact, caused by another person—are Black. Meanwhile, Black Pennsylvanians make up only 12 percent of the state’s population.¹⁵

II. Racial Disparities in LWOP Felony-Murder Sentencing Are The Result Of Bias And Systemic Inequities, Not Disproportionate Criminality

The data above conclusively show that inequitable felony-murder LWOP sentencing cannot be explained by the rate at which Black and white Americans commit felonious offenses. Instead, racial bias and systemic inequality, both of which impact the criminal legal system from arrest to sentencing, drive disparities in LWOP sentences for felony-murder.

a. Racial Bias

The criminal legal system is shaped by the biases—both explicit and implicit—of those administering it. Explicit bias refers to a person’s clear feelings and attitudes toward a group of people.¹⁶ When an actor harbors explicit bias, his or

¹⁵ See Petition for Review, *supra* note 1, at 3; see also Carrie Johnson, *Life Without Parole For ‘Felony Murder’: Pa. Case Targets Sentencing Law*, NPR (Feb. 4, 2021), <https://www.npr.org/2021/02/04/963147433/life-without-parole-for-felony-murder-pa-case-targets-sentencing-law>.

¹⁶ Kimberly Papillon, *Conscious & Unconscious Biases in Health Care, Module 3: Bias and Well-Meaning People*, National Center for Cultural Competence at

her behaviors with regard to members of that group are conducted with intent.¹⁷ Meanwhile, human brains are also susceptible to “implicit” racial bias, “an automatic positive or negative preference for a group, based on one’s subconscious thoughts” and personal characteristics.¹⁸ Implicit bias often exists in the absence of racial animus; indeed, humans are seldom aware of the implicit bias driving their decision-making.¹⁹ Implicit bias is pervasive precisely because people are unaware of these biases, leading them to be “unwittingly complicit in the perpetuation of discrimination.”²⁰ These biases, though often not grounded in hatred, nonetheless can result in discriminatory outcomes, including in employment, medical care, and as relevant here, criminal justice.²¹

The racial disparity in felony-murder sentencing is the cumulative effect of bias at every stage of the criminal process—searches, arrests, case processing,

Georgetown University (July 2012), <https://nccc.georgetown.edu/bias/module-3/1.php>.

¹⁷ *Id.*

¹⁸ See, e.g., U.S. Dep’t of Just., *Understanding Bias: A Resource Guide* (2015), <https://www.justice.gov/file/1437326/download>; Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 *Duke L.J.* 345, 351 (2007); Patricia G. Devine, *Stereotypes and prejudice: Their automatic and controlled components*, 56 *J. Personality & Soc. Psych.* 5 (1989).

¹⁹ Levinson, *supra* note 18, at 350.

²⁰ Patricia G. Devine, Patrick S. Forscher, Anthony J. Austin & William T. L. Cox, *Long-term reduction in implicit race bias: A prejudice habit-breaking intervention*, 48 *J. Exp. Soc. Psych.* 1267, 1267 (2012).

²¹ *Id.*

charging, plea bargaining, jury selection, trial strategy, and sentencing.²² This makes sense: All humans, including police, prosecutors, defense counsel, judges, and jurors, are susceptible to implicit bias, and many harbor explicit bias as well. The cumulative impact of bias among citizens fulfilling these roles practically guarantees the unjust outcomes pervasive in Pennsylvania.

Although the data show police are no more susceptible to bias than ordinary members of the community, bias by the police has real consequences.²³ Research overwhelmingly confirms police stop Black people more than white people, search and arrest them more frequently once stopped, and treat them more harshly for the same violations.²⁴ For example, Black people in Philadelphia make up 71% of those stopped by police, but only 44% of the city's population.²⁵ Meanwhile, white people account for just 22% of police stops and 35% of the population.²⁶ Of those who are

²² See Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 Yale L.J. 1 (Oct. 2013).

²³ Joshua Correll, Bernadette Park, C. Judd, B. Wittenbrink, Melody Sadler & Tracie Keese, *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. Personality & Soc. Psych. 1006, 1015 (2007).

²⁴ Michael R. Smith & Geoffrey P. Alpert, *Explaining Police Bias: A Theory of Social Conditioning and Illusory Correlation*, 34 Crim. Just. & Behav. 1262, 1263 (2007) (collecting studies).

²⁵ *Bailey v. City of Philadelphia*, No. 10-5952, Memorandum of Law in Support of Plaintiffs' Motion to Mandate Racial Bias Remedial Measures at 3 (E.D. Pa. Mar. 18, 2021).

²⁶ *Id.*

frisked after being stopped by police, 82% are Black and only 12% are white.²⁷ Black people are also over 50% more likely to be stopped without reasonable suspicion than white people.²⁸ In another study, police exhibited “shooter bias” in simulated exercises involving shooting perpetrators and sparing innocent bystanders.²⁹ Police officers were quicker to shoot Black perpetrators than white perpetrators, and hesitated longer to spare Black bystanders than white bystanders.³⁰

Bias in prosecution is just as widespread as in policing, but perhaps even more of a causal factor when it comes to sentencing disparities for several reasons. First, prosecutors have the discretion to decide whether or not to charge an accomplice with felony-murder for a death the accused person had no part in.³¹ Second, felony-murder can cover such a wide range of culpability that prosecutors can justify bringing or dropping the charge according to their preference.³²

Considering prosecutorial discretion, it is no surprise that the data show that for lower-culpability crimes like felony-murder, bias plays an outsized role in determining sentence length.³³ For example, a study of more than 48,000 cases found

²⁷ *Id.*

²⁸ *Id.* at 4.

²⁹ Correll, et al., *supra* note 23.

³⁰ *Id.*

³¹ Egan, *supra* note 7, at 543.

³² *Id.*

³³ Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. Rev. 2031, 2081 (2010).

that white defendants got their top charge dropped 25% more often than did Black defendants.³⁴ Another study showed that federal prosecutors were nearly twice as likely to charge Black men with offenses carrying mandatory minimum sentences as similarly-situated white men, even controlling for poverty, unemployment, and other factors.³⁵ Pennsylvania data also show that when Black people exercise their constitutional right to go to trial rather than enter a guilty plea, they pay a higher “trial penalty”—a phrase used to describe the phenomenon that people found guilty after trial instead of initially pleading guilty receive harsher sentences—than white people facing similar charges.³⁶

Racial bias persists at the sentencing and post-sentencing phases, too. Black people are more likely than white people to receive aggravated sentences, even controlling for criminal history and other factors.³⁷ Nationally, across all offenses, Black men’s sentences are 20 times longer on average than white men’s.³⁸ Another

³⁴ Elizabeth Hinton, LeShae Henderson & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, Vera Institute of Justice at 8 (May 2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>.

³⁵ Starr & Rehavi, *supra* note 22, at 28–29.

³⁶ Tushar Kansal, *Racial Disparity in Sentencing: A Review of the Literature*, at 9 (Jan. 2005), https://www.opensocietyfoundations.org/publications/racial-disparity-sentencing#publications_download.

³⁷ Hinton, et al., *supra* note 34, at 8.

³⁸ See Christopher Ingraham, *Black Men Sentenced to More Time for Committing the Exact Same Crime as a White Person, Study Finds*, The Washington Post (Nov. 16, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/11/16/black-men-sentenced-to-more-time-for-committing-the-exact-same-crime-as-a-white->

study found that Black men were 21.2% less likely than white men to receive a reduced sentence from a judge without a request from the prosecutor.³⁹ Even when Black men receive a below-guidelines sentence, their sentences are 16.8% longer than white men who received below-guideline sentences.⁴⁰ Robust empirical scholarship demonstrates that in homicide cases, judges and juries disproportionately impose the harshest possible penalty—including, where applicable, the death penalty—where the decedent is white and the person facing charges is Black.⁴¹

b. Systemic Inequities

The massive racial disparity in life without parole sentences for people convicted of felony-murder is the product of racial bias at every step of the way through the system. But it is not the only driver of sentencing disparities. Systemic inequities also play a role.⁴²

person-study-finds/; see also Aris Folley, *Study: Two-Thirds of Prisoners Serving Life Sentences are People of Color*, The Hill (Mar. 2, 2021), <https://thehill.com/homenews/news/541285-study-two-thirds-of-prisoners-serving-life-sentences-are-people-of-color>.

³⁹ Equal Justice Initiative, *Sentencing Commission Finds Black Men Receive Longer Sentences Than White Men For Same Crime* (Nov. 20, 2017), <https://eji.org/news/sentencing-commission-finds-Black-men-receive-longer-sentences/>.

⁴⁰ *Id.*

⁴¹ Radelet & Pierce, *supra* note 13, at 590–91.

⁴² Weihua Li, *The Growing Racial Disparity in Prison Time*, The Marshall Project (Dec. 3, 2019), <https://www.themarshallproject.org/2019/12/03/the-growing-racial-disparity-in-prison-time>.

To start, decades of “tough on crime” policy—starting in the 1970s—targeted Black men, in particular, and pushed them into the criminal punishment system.⁴³ In Pennsylvania and across the country, judges use criminal history to enhance sentences, making it more likely that someone will receive life without parole for a death they personally did not cause.⁴⁴

The reasons why increased incarceration in the United States disproportionately left Black men with long criminal records are rooted in the country’s long history of racial injustice. Presumptions of guilt and dangerousness rooted in racial stereotypes have led to the over-policing of Black neighborhoods, making the people living in those neighborhoods more likely to be arrested than other citizens.⁴⁵ This over-policing is not related to crime rates; in Philadelphia, predominantly Black neighborhoods have a significantly higher rate of police stops than predominantly white neighborhoods that have higher violent crime rates.⁴⁶ Moreover, in predominantly white neighborhoods in Philadelphia, Black people are stopped at rates up to 15 times higher than white people. Overall, Black people account for a higher share of the stops in all but one Philadelphia police service area;

⁴³ Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, *The Atlantic* (Oct. 2015), https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/?utm_source=copy-link&utm_medium=social&utm_campaign=share.

⁴⁴ See 204 Pa. Code § 303.

⁴⁵ Coates, *supra* note 43.

⁴⁶ *Bailey Memorandum of Law*, *supra* note 25, at 5.

in several, they are stopped at a rate of over five times their share of the population.⁴⁷ Once arrested, Black people have confronted the biases discussed above every step of the way, resulting in disproportionately long criminal records—which, in turn, enhance their sentences.

The impact of criminal records on sentencing disparities, however, should not be oversold. Even where a Black person has a comparable criminal record to a similarly situated white person, the Black person is still, on average, sentenced more severely.⁴⁸ One study found that, even after taking into account past violent conduct, Black men still received sentences on average 20.4 percent longer than similarly situated white men.⁴⁹ This suggests that, while criminal records do play a role in racial disparities in sentencing, bias throughout the system is a much more powerful driver of disproportionately harsh sentences for Black people.

Unequal financial resources borne of centuries of purposeful discrimination also matter. A skilled defense attorney can shield a person facing criminal conviction from the harshest sentence. Studies show that white people facing criminal charges are “much more likely to hire a private attorney” than Black people, likely because of disparities in personal and family wealth.⁵⁰ (In 2016, the net worth of an average

⁴⁷ *Id.*

⁴⁸ Kansal, *supra* note 36, at 2.

⁴⁹ Equal Justice Initiative, *supra* note 39.

⁵⁰ Kansal, *supra* note 36, at 10.

Black family was \$17,150, compared to \$171,000 for typical white family—nearly ten times greater—due to “the effects of accumulated inequality and discrimination, as well as differences in power and opportunity that can be traced back to this nation’s inception.”⁵¹) Retention of a private attorney, in turn, “tends to result in less severe sentences.”⁵² This is especially true in Pennsylvania, where, according to this Court, public defender’s offices “are chronically underfunded and understaffed, and are hard-pressed to meet the baseline demands of the Sixth Amendment, raising the disconcerting question of whether counties are complying with *Gideon* [*v. Wainwright*],”⁵³ the seminal U.S. Supreme Court case holding that people facing state criminal charges have a constitutional right to counsel. “[T]o describe the state of affairs in [Pennsylvania’s public defender officers] as approaching crisis stage is not an exaggeration.”⁵⁴

III. Life Without Parole Disproportionately Impacts Black Families

This disproportionate racial impact has devastating consequences not only for people sentenced to die in prison, but also for the next generation, thereby entrenching and perpetuating inequality. Because Black Pennsylvanians are more

⁵¹ Kriston McIntosh, Emily Moss, Ryan Nunn & Jay Shambaugh, *Examining the Black-white Wealth Gap*, Brookings (Feb. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/>.

⁵² *Id.*

⁵³ *Kuren v. Luzerne Cnty.*, 637 Pa. 33, 37–38, 146 A.3d 715, 717–18 (2016) (citing *Gideon*, 372 U.S. 335, 342 (1963)).

⁵⁴ *Id.*

likely than people of other races to be sentenced to life without parole in Pennsylvania, the destruction wreaked by this sentence falls disproportionately on Black families and children. This, in turn, reinforces cycles of harm to Black communities.

a. Children

The effects of parental incarceration on children can be disastrous. Parental incarceration can lead to a host of negative outcomes for children, including developmental disruptions, physical and mental health problems, poverty, homelessness, food insecurity, poor academic performance, and, ultimately, involvement with the criminal punishment system themselves.⁵⁵

The harms of having a parent behind bars start almost immediately. Infants with an incarcerated parent miss out on forming a secure attachment with that parent, a crucial developmental foundation for lifelong health and success.⁵⁶ Insecure attachments have been linked to poorer peer relationships; diminished cognitive

⁵⁵ Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, 278 N.I.J. J. 1, 3 (Mar. 2017) <https://www.ojp.gov/pdffiles1/nij/250349.pdf>.

⁵⁶ *Cates v. Stroud*, No. 20-1438, 2021 WL 1966500 Brief of the American Civil Liberties Union of Nevada, National Lawyers Guild Las Vegas Chapter, Nevada Attorneys for Criminal Justice, and University of Nevada Las Vegas Policing and Protest Clinic, Mass Liberation Nevada, and Forced Trajectory Project as Amici Curiae in Support of Petitioner at *11 (U.S. May 11, 2021); The Anne E. Casey Foundation, *A Shared Sentence: The Devastating Toll of Parental Incarceration on Kids, Families and Communities*, at 3 (Apr. 2016), <https://assets.aecf.org/m/resourcedoc/aecf-asharedsentence-2016.pdf>.

abilities; eating disorders; mental health problems like anxiety, withdrawal, hypervigilance, depression, shame and guilt; and aggression and hostility toward caregivers and siblings.⁵⁷ Attachment problems can also lead to problems forming close, nurturing relationships with friends and romantic partners later in life.⁵⁸

As children grow, these impacts deepen. Research has found that school-age children with an incarcerated parent are more likely than their peers to suffer adverse health impacts. For example, these children experience disproportionately high rates of migraines, asthma, high cholesterol, depression, anxiety, and posttraumatic stress disorder.⁵⁹ They are also more likely to develop learning disabilities, including attention deficit hyperactivity disorder.⁶⁰ These health problems persist into adulthood; childhood parental incarceration has been associated with depression, posttraumatic stress disorder, anxiety, high cholesterol, asthma, migraines,

⁵⁷ Ross Parke & K. Allison Clarke-Stewart, *Effects of Parental Incarceration on Young Children*, Urban Institute at 4 (Jan. 30, 2002), <https://www.urban.org/sites/default/files/publication/60691/410627-Effects-of-Parental-Incarceration-on-Young-Children.PDF>.

⁵⁸ Berit Brogaard, *Parental Attachment Problems: Child Neglect and Its Consequences*, *Psychology Today* (Nov. 9, 2016), <https://www.psychologytoday.com/us/blog/the-mysteries-love/201611/parental-attachment-problems>.

⁵⁹ Leila Morsy & Richard Rothstein, *Mass Incarceration and Children's Outcomes: Criminal Justice Policy is Education Policy*, Economic Policy Institute (Dec. 15, 2016), <https://files.epi.org/pdf/118615.pdf>; The Anne E. Casey Foundation, *supra* note 56, at 3.

⁶⁰ *Id.*

HIV/AIDS, and generally fair or poor health among young adults.⁶¹ These consequences have been observed independent of other social and economic indicators.⁶²

Children who suffer the loss of a parent through imprisonment are also more likely to face poverty, homelessness, and food insecurity.⁶³ Indeed, the rise in incarceration in the United States over the last few decades has contributed to a rise in child homelessness, especially for Black children.⁶⁴ And one study found a significant, measurable increase in the likelihood of food insecurity among households with children that have experienced a parental incarceration.⁶⁵

Unsurprisingly, health issues, poverty, homelessness, and food insecurity translate into academic challenges for many children with an incarcerated parent—and, ultimately, can perpetuate cycles of harm by leading to increased rates of incarceration for people who lost a parent to the prison system. These children are

⁶¹ Rosalyn D. Lee, Xiangming Fang & Feijun Luo, *The Impact of Parental Incarceration on the Physical and Mental Health of Young Adults*, 131(4) *Pediatrics* 1188–95 (Apr. 1, 2013). The researchers noted that “[t]he association between paternal incarceration and HIV/AIDSs should be interpreted with caution because of the low sample prevalence of HIV/AIDSs.” *Id.*

⁶² Morsy & Rothstein, *supra* note 59, at 1; The Anne E. Casey Foundation, *supra* note 56, at 3.

⁶³ Martin, *supra* note 55, at 3; Parke & Clarke-Stewart, *supra* note 57, at 16.

⁶⁴ The Anne E. Casey Foundation, *supra* note 56, at 3.

⁶⁵ Robynn Cox & Sally Wallace, *Identifying the Link Between Food Insecurity and Incarceration*, 82(4) *S. Econ. J.* 1062–77 (2016), <https://www.jstor.org/stable/26632307>.

more likely than their peers to struggle with school work, misbehave in school, and, ultimately, drop out of school.⁶⁶ They are more vulnerable to recruitment into a gang, substance abuse, teen pregnancy, and juvenile delinquency.⁶⁷ And they are more likely to experience unemployment in adulthood than those whose parents were never incarcerated.⁶⁸ Finally, children of incarcerated parents are six times more likely on average to become incarcerated themselves—restarting a devastating cycle for impacted families.⁶⁹

b. Families

Not only children suffer when a family-member is incarcerated. Spouses, parents, siblings, and others also face financial, social, and health consequences.

⁶⁶ Morsy & Rothstein, *supra* note 59, at 15.

⁶⁷ *Id.*

⁶⁸ See Milena Nikolova & Boris Nikolaev, *How Having Unemployed Parents Affects Children's Future Well-Being*, Brookings (July 13, 2018), <https://www.brookings.edu/blog/up-front/2018/07/13/how-having-unemployed-parents-affects-childrens-future-well-being/>; Minela Nikolova & Boris N. Nikolaev, *Family Matters: Involuntary Parents Unemployment During Childhood and Subjective Well-Being Later in Life*, 212 GLO Discussion Paper Series 1 (2018); see also Martin, *supra* note 55, at 1; Lauren Davis & Rebecca J. Shlafer, *Mental Health of Adolescents with Currently and Formerly Incarcerated Parents*, 54 J. Adolesc. 120 (2017); Alyssa Robillard, Dana D. DeHart, Rhonda Conerly Holliday & Kaleea Lewis, *An Exploratory Study Examining Risk Communication among Adolescent Children, Their Incarcerated Mothers, and Their Caregivers*, 27 J. Healthcare for Poor & Underserved 101 (2016); Elizabeth I. Johnson & Beth Easterling, *Coping with Confinement*, 30 J. Adolescent Res. 244 (2014).

⁶⁹ Martin, *supra* note 55, at 2.

Like children, these people have not been convicted of any crime, yet shoulder significant harms nonetheless.

Most significantly, having a loved one serving an LWOP sentence is economically destabilizing for families. It can be particularly burdensome for Black families, many of whom already faced economic poverty before losing a loved one to LWOP.⁷⁰ Almost 25% of Black people in Pennsylvania are living in poverty, as opposed to 8.7% of white people.⁷¹ At the time of arrest, incarcerated Black men have a median annual income of \$17,625, compared to \$41,250 for non-incarcerated men of all races.⁷² Black women's median income is \$12,735 at the time of arrest, compared with a median \$23,745 for non-incarcerated women.⁷³ As such, Black families are least likely to be in a financial position to shoulder the expenses of incarceration, yet most likely to be forced to endure those expenses for life due to racial disparities in LWOP sentencing.

Long-term incarceration of a loved one compounds poverty and intensifies a family's need for financial resources, as incarceration brings innumerable financial

⁷⁰ Saneta deVuomo-Powell et al., *Who Pays? The True Cost of Incarceration on Families*, Ella Baker Center for Human Rights, Forward Together, & Research Action Design, at 9 (Sept. 2015), <http://whopaysreport.org/who-pays-full-report/9/>.

⁷¹ Talk Poverty, *Pennsylvania State Report 2020* (last visited Oct. 22, 2021) <https://talkpoverty.org/state-year-report/pennsylvania-2020-report/>.

⁷² Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, Prison Policy Initiative (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html>.

⁷³ *Id.*

burdens for families. When a family member is incarcerated, that person often transforms from a breadwinner and source of support into a loved one in need of financial assistance. Families must scrape together funds to cover bail bond premiums, court costs, other fines and fees, and to fill commissary accounts so their loved one can maintain proper hygiene and meet basic nutritional needs. Miniscule wages paid for prison jobs—ranging from \$.19 per hour to \$1.00 per hour in Pennsylvania prisons⁷⁴—mean that, in reality, the costs of incarceration fall on families. In a recent survey, two-thirds of families reported difficulties meeting their own basic needs, such as housing and food, because of the financial costs of having an incarcerated loved one.⁷⁵

The financial burdens a family experiences intensify the longer a loved one is incarcerated. Every year of incarceration, families must pay almost \$1,000 per year for essentials at the prison commissary, like food, to ensure basic nutrition and toiletries to help maintain health and hygiene.⁷⁶ Food represents the vast majority of spending in commissaries; over 70% of money spent at commissaries goes to food and beverages to supplement the notoriously “small portions of unappealing food”

⁷⁴ Wendy Sawyer, *How much do incarcerated people earn in each state?*, Prison Policy Initiative (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/>.

⁷⁵ deVuono-Powell, *supra* note 70, at 7–9.

⁷⁶ Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, Prison Policy Initiative (May 2018), <https://www.prisonpolicy.org/reports/commissary.html>.

served in prison cafeterias.⁷⁷ Another major category of commissary spending is hygiene products, like toilet paper, antacid tablets, vitamins, hemorrhoid ointment, antihistamines, shower sandals, and eye drops.⁷⁸ Commissary goods are typically as expensive or more expensive than comparable goods outside of the prison—in some prisons, basic necessities cost 50 percent more than they do in the free world.⁷⁹ Families of incarcerated Pennsylvanians are also charged huge sums to stay in touch with their incarcerated loved one, whether through fees for phone calls or e-mails.⁸⁰ Because these means of communicating are essential to the health and wellbeing of incarcerated people as well as their families and loved ones, they are expenses that many have no choice but to endure.⁸¹

In addition to the significant financial strains of supporting a loved one incarcerated for life, family members may face adverse health and social consequences. In one study, researchers found that having a family member who is incarcerated negatively impacts women’s cardiovascular health.⁸² And,

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *See id.*

⁸⁰ Peter Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons and Private Phone Providers*, Prison Policy Initiative (Feb. 2019) https://www.prisonpolicy.org/phones/state_of_phone_justice.html.

⁸¹ Creasie Finney Hairston, *Family Ties During Imprisonment: Important to Whom and for What?*, 18(1) *J. of Socio. & Soc. Welfare* 87–104 (1991).

⁸² Hinton, et al., *supra* note 34, at 10.

unsurprisingly, incarceration is disruptive to marital relationships, further destabilizing families.⁸³

IV. Racial Disparities in Sentencing Delegitimize The Criminal Legal System

Unjust sentencing schemes are not just catastrophic for those impacted. They also contribute to a crisis of legitimacy that threatens to undermine the American criminal legal system as a whole. Research shows that racial disparities, in particular, undermine the perceived legitimacy of our criminal justice institutions among all people, not just those who are discriminated against. When individuals perceive the legal system as unfair or illegitimate, they are less likely to obey the law, less likely to seek assistance through the law, and less likely to assist authorities in enforcing the law.

The effectiveness of the legal system depends largely on public cooperation.⁸⁴ Individuals are more likely to follow the law when they have institutional trust in legal authorities and perceive the law as legitimate.⁸⁵ The perceived moral legitimacy of a law has been shown to be a better predictor of compliance than the

⁸³ Robert Apel, *The Effects of Jail and Prison Confinement on Cohabitation and Marriage*, 665 *Annals Am. Acad. Pol. & Soc. Sci.* 103 1-26 (2016).

⁸⁴ Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 *Crime and Just.* 283, 284 (2003).

⁸⁵ *Id.* at 286.

perceived likelihood or severity of punishment for violating that law.⁸⁶ More broadly, people who are exposed to particular laws that they perceive as unjust are more willing to violate completely unrelated laws.⁸⁷ This relationship between perceived legitimacy and compliance is not only seen in the general public; it holds among previously incarcerated people as well.⁸⁸

Lack of perceived legitimacy also impairs the ability of courts and law enforcement to investigate crime and keep people safe. Individuals who experience or learn of injustice in the criminal system are less likely to cooperate with that system by reporting offenses or turning in evidence.⁸⁹ Instances of experiencing or witnessing injustice have been shown to reduce 911 calls reporting crime, particularly in Black communities.⁹⁰ Such effects can result from relatively low-profile local incidents as well as high-profile national stories.⁹¹ A breakdown in institutional trust does not just encourage individuals to break the law; it discourages

⁸⁶ Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 Wake Forest L. Rev. 211, 259–60 (2012).

⁸⁷ Janice Nadler, *Flouting the Law*, 83 Tex. L. Rev. 1399, 1414 (2005).

⁸⁸ Andrew V. Papachristos, Tracy L. Meares & Jeffrey Fagan, *Why Do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Gun Offenders*, 102 J. Crim. L. & Criminology 397, 436 (2012).

⁸⁹ Bowers, *supra* note 86, at 258.

⁹⁰ Matthew Desmond, Andrew V. Papachristos & David S. Kirk, *Police Violence and Citizen Crime Reporting in the Black Community*, 81 Am. Soc. Rev. 857, 865 (2016).

⁹¹ *Id.* at 871.

innocent victims from turning to the criminal legal system for protection and recourse.

In judging the legitimacy of courts and police, people place significantly more weight on fairness than on the effectiveness of those institutions in controlling crime.⁹² So, legitimacy can be damaged when there is disparity between the public perception of the harm associated with a particular crime and the severity of the punishment for that crime—that is, when the severity of the punishment is perceived as “unfair” relative to the severity of the crime.⁹³ Even when a punishment would otherwise be considered fair, legitimacy is undermined when there is a perceived inequality in application of the law.⁹⁴

Racial disparities in the criminal justice system are particularly effective in eroding public trust for all people, not just those impacted by racial biases. In one study, perceived bias against *other* races made white respondents less confident even in their *own* interactions with police, to say nothing of their confidence in the system as a whole.⁹⁵ In other words, perceived bias against anyone damages the legitimacy

⁹² Tyler, *supra* note 84, at 318.

⁹³ Jeffrey Fagan, *Legitimacy and Criminal Justice*, 6 Ohio St. J. Crim. L. 123, 130 (2008).

⁹⁴ *Id.*

⁹⁵ Lawrence D. Bobo & Victor Thompson, *Unfair by Design: The War on Drugs, Race, and the Legitimacy of the Criminal Justice System*, 73 Soc. Res. 445, 463 (2006).

of the criminal justice system in the eyes of everyone. Disparate sentencing like that at issue here is, unsurprisingly, a significant cause of perceived racial bias.⁹⁶

CONCLUSION

The racial disparities in the application of LWOP sentences for felony-murder are unconscionable. They amount to a gross miscarriage of justice, wreak havoc on Black families, and undermine the legitimacy of our criminal legal system as whole.

Amici respectfully urge this Court to overturn the Commonwealth Court's dismissal of Plaintiffs' claims so that the merits of their challenge to 61 Pa.C.S. § 6137(a), which prohibits them being considered for parole despite having never taken a life or having had no intent to take a life, can be considered.

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⁹⁶ *See id.* at 458–59.

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CERTIFICATES OF COMPLIANCE

Certification Pursuant to Rule 531

I hereby certify that no person or entity other than staff of the American Civil Liberties Union of Pennsylvania (“ACLU”) and Roderick & Solange MacArthur Justice Center has: (1) paid in whole or part for the preparation of the amicus curiae brief filed by the ACLU in this matter, or (2) authored, in whole or in part, the amicus curiae brief filed by the ACLU in this matter.

Dated: October 22, 2021

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Nyssa Taylor

Certification of Word Count

I hereby certify that this brief contains 5,682 words, exclusive of cover, tables and certifications, as determined by the word-count feature of Microsoft Word, the word-processing program used to prepare this brief.

Dated: October 22, 2021

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Certificate of Compliance with Pa.R.A.P. 127

I hereby certify, pursuant to Pa.R.A.P. 127, that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief was served via email this 22nd day of October, 2021 upon the following parties of record:

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