



**Testimony of Ashley Nellis, Ph.D.  
Co-Director of Research**

**Before the House Judiciary Committee**

**May 30, 2024**

**Regarding HB 2296**

Dear Chairperson Briggs and Members of the Committee:

My name is Ashley Nellis and I am the Co-Director of Research at The Sentencing Project, where I have worked the past 16 years. The focus of my research has been nearly exclusively on documenting the expansion of life imprisonment in the U.S. I have written extensively on this topic and produced numerous studies of this population.

Today I would like to share with this committee that the state's use of mandatory life without parole sentences for second degree murder makes it a clear outlier in the U.S. Pennsylvania is one of only two states that requires life without parole (LWOP) for first and second degree murder.<sup>1</sup> This is a key driver in its extraordinarily large "lifer" population.<sup>2</sup> Nearly one of every 5 people serving LWOP in Pennsylvania has been sentenced to die in prison despite the fact that their role in the crime of conviction may have been minor or even unknown to them.

A recent study<sup>3</sup> of the population of those serving LWOP for felony murder in Pennsylvania identified the following disturbing statistics, as of 2020:

- In 2020, 80 percent of imprisoned individuals with a felony murder conviction were people of color — 70 percent were African American;
- 40 of the 201 women serving LWOP were convicted of felony murder;
- Over half (58 percent) of those imprisoned with felony-murder convictions have already served over 20 years and over one-quarter (28 percent) have already served over 30 years;
- 73 percent of people serving LWOP for felony murder were age 25 or younger at the time of their offense.

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<sup>1</sup> Lindsay, A. (2021). Life without Parole for Second Degree Murder in Pennsylvania: An Objective Assessment of Sentencing. Philadelphia Lawyers for Social Equity.

<sup>2</sup> Nellis, A. (2021). No End in Sight. The Sentencing Project.

<sup>3</sup> Ghandnoosh, N., Stammen, E., & Budaci, C. (2022). Felony Murder: An On-Ramp for Extreme Sentencing. The Sentencing Project.

Pennsylvania is among a minority of states that even *allow* extreme punishment of individuals who did not take, or did not intend to take, a life. Moreover, recent trends in state sentencing regimes evidence a shift away from Pennsylvania's approach.

In 2018, California passed SB 1437, dramatically redefining felony murder for accomplices. Now, to be convicted as an accomplice for felony murder (i.e., someone who was involved in the offense but did not kill), an individual must have either intended to kill or been both a "major participant" in the underlying felony and acted with "reckless indifference to human life" in connection with the killing.<sup>4</sup>

In 2021, Colorado eliminated its mandatory life-without-parole sentence for felony murder, substituting it with a sentence of 16 to 48 years in prison.<sup>5</sup> At the same time, Colorado also removed two of the conditions required for an affirmative defense to felony murder, permitting more individuals to meet the defense's requirements. And in May 2023, Minnesota passed a law that prosecutors cannot seek a conviction for felony murder unless a person was a major participant in the underlying felony and acted with extreme indifference to human life.<sup>6</sup>

The atypicality of Pennsylvania's approach is also apparent when measured against the nationwide approach to felony murder generally. Two states, Hawaii and Kentucky, have no felony murder law at all, and a handful of states require a culpable mental state for all felony-murder convictions; New Hampshire, for example, requires proof of extreme indifference to human life.

Still other states afford an affirmative defense to a felony-murder prosecution where the accused (1) did not commit the killing; (2) was not armed with a dangerous weapon; (3)

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<sup>4</sup> Scholtens, I. (2024). Advocates Seek Justice in the Growing Movement to End the Felony Murder Rule in America. Columbia Journalism School.

<sup>5</sup> ACLU of Colorado (2021). SB21-124: Changes to Felony Murder. ACLU.

<sup>6</sup> Winter, D. (2023). Minnesota lawmakers changed felony murder laws, which could mean the release of prisoners. Minnesota Reformer.

reasonably believed that no other participant was armed; or (4) reasonably believed that no other participant intended to engage in conduct likely to result in death.

Because of the severity of the sentence, some states have severely limited the application of it to homicides that include intent. Pennsylvania, by contrast, has not.

### **Felony Murder Sentencing is Fundamentally Unfair**

As this body knows, the state Supreme Court is reviewing the constitutionality of imposing mandatory LWOP for second degree murder. This landmark case was brought by a man challenging the constitutionality of his LWOP sentence.<sup>7</sup> Derek Lee argues that, because he did not kill or intend to kill anyone, his sentence is disproportionate and cruel under both the U.S. and Pennsylvania constitutions. He seeks to end the state's ban on parole for those convicted of felony murder.

Notably, Lee's case has received broad support, including from some unlikely allies. I weighed in in my personal capacity as a criminologist whose focus has been on the utility of sentence length on meeting the goals of incarceration. Together with fellow sentencing scholars, we explain through theory and data that life sentences fail to meet any of the goals of punishment (i.e., deterrence, rehabilitation, retribution, and incapacitation).

It is an uncontested research finding in studies of crime over the lifespan that people age out of crime, which means life sentences end up incarcerating most people long past any point of dangerousness. And yet in Pennsylvania, 58% of those imprisoned with felony murder convictions have already served over 20 years and 28% have already served over 30 years.<sup>8</sup>

### **Pennsylvania Was Not Always This Way**

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<sup>7</sup> Supreme Court of Pennsylvania Western District. (2024). *Commonwealth of Pennsylvania v Derek Lee*.

<sup>8</sup> Lindsay, A. (2021). *Life without Parole for Second Degree Murder in Pennsylvania: An Objective Assessment of Sentencing*. Philadelphia Lawyers for Social Equity.

Pennsylvania’s current practice—the permanent incarceration of everyone convicted of felony murder without meaningful opportunity for release—is in many ways inconsistent with its own historical practice. Until relatively recently, executive clemency—which provides the governor with the power to issue pardons and commute (i.e., reduce) sentences—was regularly used to commute the sentences of individuals serving life without parole. It was common for “lifers” to serve less than 20 years.<sup>9</sup>

### **Safety is Not Achieved Through LWOP**

We can safely release people from prison who have been convicted of violent crime much sooner than we typically do.

Consider data analyzed by the Bureau of Justice Statistics. Researchers tracked the arrests of over 400,000 people exiting prison in 2005 across 30 states; within three years, 42% were rearrested and within five years just over half had been rearrested. Twenty percent of all individuals released from prison were arrested for a new violent offense within three years. The majority of these were for assault, 1% included a homicide, and 2% included a sexual assault/rape. Even among those who had initially been convicted of a homicide, only 2% committed a subsequent homicide. These individuals were less likely to commit any other violent offense than released persons who were initially convicted of a nonhomicide.

When BJS examined recidivism rates for people with violent convictions released from state prisons, it found that those who had served more than six years were 25% less likely to recidivate than those who had served one year.<sup>10</sup>

Finally, studies of people released after decades of imprisonment for the most serious crimes have found extremely low recidivism rates, meaning that these individuals have

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<sup>9</sup> Seeds, C. (2019). Governors and Prisoners: The Death of Clemency and the Making of Life Sentences without Release in Pennsylvania. *Social Justice*, 46(4 (158)), 81-106.

<sup>10</sup> Antenangeli, L., & Durose, M.R. (2021). *Recidivism of prisoners released in 24 states in 2008: A 10-year follow-up period (2008-2018)*. Bureau of Justice Statistics.

been imprisoned until they pose a fraction of the recidivism risk of those released from shorter sentences.<sup>11</sup>

A prime example lies in Pennsylvania. Researchers from Montclair University tracked the outcomes of 174 men and women released from LWOP sentences who returned to their communities in Philadelphia over a three-year period. They observed an astounding low 1.14% reconviction rate within this group. The authors estimate that approximately \$9.5 million is saved through their release instead of their continued incarceration.<sup>12</sup>

### **Pennsylvania Already Recognizes Gradations in Culpability Through Third Degree Murder Sentence**

Pennsylvania law already allows for shorter prison sentences based on reduced involvement in a crime: third degree murder convictions are punishable by a term of years. Like felony murder, third-degree murder does not require intent to kill. However, whereas felony murder applies to any accomplices to the underlying felony, third-degree murder only applies to accomplices who aid or facilitate the killing. Further, third degree murder requires a malicious killing, whereas the malice in felony murder can derive solely from the underlying felony regardless of intent to harm. Therefore, felony murder captures a broader range of conduct and accomplices with a lower level of culpability. Yet, inexplicably, individuals convicted of murder in the third-degree can at most be sentenced to 40 years in prison, and have the opportunity for parole, whereas individuals convicted of felony murder are required to be given a life sentence without any possibility of release. The legislature therefore has at its disposal a structure around which a reform to the state's second degree murder statute could be modeled.

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<sup>11</sup> Nellis, A. (2021c). *A new lease on life*. The Sentencing Project.

<sup>12</sup> Daftary-Kapur, T. & Zottoli, T. M. (2023). *Resentencing of Juvenile Lifers: The Philadelphia Experience*. Montclair University.

## Reforms Should be Retroactive

For those already sentenced, retroactive application of sentencing reforms, increased discretionary release, and *second look* reforms enabling a sentence review, in addition to executive clemency, are important tools for correcting sentencing excesses of the past. Jurisdictions should expedite minimum eligible release dates through good time credits, earned time credits, and parole—and increase their use of discretion to curb excessive prison terms.<sup>13</sup>

## Concluding Remarks

The imposition of mandatory LWOP in Pennsylvania is virtually unique in the country and represents an especially reckless approach to administering justice as the 8th Amendment intends. Felony murder laws vastly expand the imposition of extreme sentences; have particularly adverse impacts on people of color, young people, and women; and are counterproductive to public safety through incarceration long past the point of dangerousness. Reforms to the law in Pennsylvania are overdue but are still achievable. We urge that all reforms to the law be made both prospectively and retroactively. I want to thank you for your time and attention. If you have any questions or need any additional information I am happy to assist.

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<sup>13</sup> See Reitz, Rhine, Lukac, & Griffin (2022), note 24; Mitchell, K. L., Laskorunsky, J., Bielenberg, N., Chin, L., & Wadsworth, M. (2022) *Examining prison releases in response to COVID: Lessons learned for reducing the effects of mass incarceration*, Robina Institute of Criminal Law and Criminal Justice.