SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

No. SJC-13340

COMMONWEALTH,
APPELLEE,
v.

DERRELL L. FISHER
APPELLANT.

ON APPEAL FROM THE MIDDLESEX SUPERIOR COURT

BRIEF OF AMICI CURIAE BOSTON UNIVERSITY CENTER FOR ANTIRACIST RESEARCH, MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, FELONY MURDER ELIMINATION PROJECT, NATIONAL COUNCIL FOR INCARCERATED AND FORMERLY INCARCERATED WOMEN AND GIRLS, PROFESSOR KAT ALBRECHT, AND THE SENTENCING PROJECT IN SUPPORT OF APPELLANT DERRELL L. FISHER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, 437 Mass. 1303 (2002), the Boston University Center for Antiracist Research, Felony Murder Elimination Project, The Sentencing Project, the Massachusetts Association of Criminal Defense Lawyers, and The National Council for Incarcerated and Formerly Incarcerated Women and Girls are not publicly-held corporations, do not issue stock, do not have parent corporations and, consequently, there exist no publicly held corporations which own ten percent or more of their stock.

PREPARATION OF AMICUS BRIEF

Pursuant to Mass. R. App. P. 17(c)(5), amici and their counsel declare that:

(a) no party or party's counsel authored this brief in whole or in part;

(b) no party or party's counsel contributed money to fund preparing or submitting this brief;

(c) no person or entity, including amicus curiae, contributed money that was intended to fund preparing or submitting this brief; and

(d) counsel has not represented any party in this case or in proceedings involving similar issues, or any party in a case or legal transaction at issue in the present appeal.

IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae, the Boston University Center for Antiracist Research, the Massachusetts Association of Criminal Defense Lawyers, Felony Murder Elimination Project, the National Council for Incarcerated and Formerly Incarcerated Women and Girls, The Sentencing Project, and Professor Kat Albrecht engage in research, education, and/or advocacy related to racism, racial justice, and the criminal legal system.[1] Amici are keenly aware of the influence of racial bias on the administration of the felony-murder rule, throughout the nation and in Massachusetts. Amici submit this brief to provide critical contextual information about the inability of a malice requirement to cure the deficiencies of the felony-murder rule, which results in sentences that are unconstitutionally disproportionate, cruel, and improperly influenced by extralegal factors such as racism.

INTRODUCTION AND SUMMARY OF ARGUMENT

The felony-murder rule's fundamental flaws have been decisively established by both legal scholarship and empirical research.[2] Legal scholars have long argued that the rule violates the principle of proportionality in sentencing, which holds that

[1] Amici and their interests are detailed individually in Appendix A.

[2] E.g. Binder, The Origins of American Felony Murder Rules, 57 Stan. L. Rev. 59, 60 (2004) ("Felony murder liability is one of the most persistently and widely criticized features of American criminal law.").

"punishment for crime should be graduated and proportioned to [an] offense."[3] An increasing body of social science research also demonstrates stark racial disparities in the prosecution of felony-murder cases, suggesting that impermissible extralegal factors such as racial bias impact the rule's administration.[4] Accordingly, the extreme sentences resulting from felony-murder convictions are not only disproportionate but also unconstitutionally cruel and arbitrary.

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[3] N. Ghandnoosh, E. Stammen & C. Budaci, The Sentencing Project & Fair and Just Prosecution, Felony Murder: An On-Ramp for Extreme Sentencing 9-10 (2022), https://www.sentencingproject.org/app/uploads/2022/10/Felony-Murder-An-On-Ramp-for-Extreme-Sentencing.pdf. See also Serota, Proportional Mens Rea and the Future of Criminal Code Reform, 52 Wake Forest L. Rev. 1201 (2017); Roth & Sundby, Felony-Murder Rule: A Doctrine at Constitutional Crossroads, 70 Cornell L. Rev. 446 (1985); Gerber, The Felony Murder Rule: Conundrum Without Principle, 31 Ariz. St. L.J. 763 (1999).

[4] See Binder & Yankah, Police Killings as Felony Murder, 17 Harv. L. & Pol'y Rev. 157, 206 (2022); A. Lindsay, Philadelphia Lawyers for Social Equity, Life Without Parole for Second-Degree Murder in Pennsylvania 11-27 (2021), https://plsephilly.org/wp-content/uploads/2021/01/PLSE-Second-Degree-Murder-Audit-Jan-19-2021.pdf; 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 Law & Ineq. 543, 547-56 (2021); Albrecht, Data Transparency & The Disparate Impact of the Felony Murder Rule, Duke Ctr. for Firearms L. (Aug. 11, 2020), https://firearmslaw.duke.edu/2020/08/data-transparency-the-disparate-impact-of-the-felony-murder-rule; Grosso, Fagan, Laurence, Baldus, Woodworth & Newell, Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement, 66 UCLA L. Rev. 1394, 1442 (2019); Radelet & Pierce, Race and Prosecutorial Discretion in Homicide Cases, 19 Law & Soc'y Rev. 587, 601 (1985); Baldus, Pulaski & Woodworth, Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience, 74 J. Crim. L. & Criminology 661 (1983).

In Commonwealth v. Brown, 477 Mass. 805 (2017), this Court recognized that the felony-murder rule leads to disproportionate punishments for people who neither killed nor intended to kill or seriously harm anyone. The Court sought to remedy this injustice by limiting first-degree murder convictions to cases where there has been a finding of malice: intent to kill, intent to cause grievous bodily harm, or intent to do an act that a reasonable person would have known created a plain and strong likelihood of death. Id. at 825 (Gants, C.J. concurring). The rationale was that the malice requirement would preclude murder convictions in cases where a person participated in a felony but would not have reasonably anticipated the felony could result in a death. Id. at 832 (Gants, C.J., concurring) ("[A] defendant who commits an armed robbery as a joint venturer will be found guilty of murder where a killing was committed in the course of that robbery if he or she knowingly participated in the killing with the intent required to commit it . . . .") (emphasis added). In other words, the fact of participating in a felony—even an armed felony—that resulted in a death should not, on its own, provide a sufficient basis for a murder conviction.

In practice, however, third-prong malice—intent to do an act that a reasonable person would have known created a plain and strong risk of death—invites a broad interpretation such that felony-murder disproportionately punishes joint venturers much as it did before. For example, in the instant case, the finding of malice appears

to have been based solely on Mr. Fisher's participation in an armed robbery, since there was no evidence that Mr. Fisher intended to do an act that created a strong likelihood of death. See infra at 17-18. Moreover, the trial court's instructions improperly suggested that participation in an armed felony is sufficient to establish malice, illustrating the risk of misinterpretation that third-prong malice entails. See infra at 18-19. The felony-murder rule in Massachusetts thus continues to raise concerns about proportionality and racial bias, as it did before Brown.

Lessons from Michigan further illustrate that a malice requirement offers little protection against the injustices of the felony-murder rule. Since 1980, Michigan's felony-murder rule has included a minimum culpable mental state of "wanton and willful disregard of the likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm." People v. Aaron, 409 Mich. 672, 728 (1980). This standard closely resembles Massachusetts's current definition of third-prong malice, yet Michigan still incarcerates over 1,000 people for felony-murder—roughly the same number as in Pennsylvania, which has no malice requirement. See infra at 20.

The malice requirement's inefficacy is particularly troublesome given the history of racial bias in the administration of the felony-murder rule in Massachusetts. Pre-Brown data reveal a stark racial disparity among people convicted of first-degree felony-murder in Massachusetts—one that exceeds the

racial disparity among other first-degree murder convictions, and among the state prison population overall. See infra at 22-25.

As scholarship and research have shown, the racially disproportionate application of felony-murder relates to the breadth of the rule and the wide discretion prosecutors have in applying it. Racialized narratives of criminality, structural racism, and implicit White favoritism all contribute to the racially biased exercise of prosecutorial discretion. See infra at 25-37. Since third-prong malice invites a broad interpretation that effectively allows the felony-murder rule to function as it did before Brown, there is every reason to believe the racialized prosecution of felony-murder will persist until the rule is abolished. See infra at 37-40.[5]

In sum, the felony-murder rule still allows for unconstitutionally cruel, racially biased, and disproportionate life-without-parole sentences that violate the Eighth Amendment and article 26 of the Massachusetts Declaration of Rights. Accordingly, this Court should end the use of the felony-murder doctrine in

[5] The felony-murder rule is not universal. Neither Hawaii nor Kentucky have it, and the United Kingdom—where felony murder originated—abolished the doctrine in 1957. See Commonwealth v. Tejeda, 473 Mass. 269, 277, n.9 (2015). Other countries that have since eliminated felony-murder include Canada, the Republic of Ireland, Antigua and Barbuda, Barbados, and Tuvalu. See Ghandnoosh, Stammen & Budaci, supra note 3, at 8-9; see also Hughes, The Capital Punishment Issue, and Various Reforms in the Law of Murder and Manslaughter, 49 J. Crim. L., Criminology & Police Sci. 521, 522-24 (1959) (discussing reforms to felony-murder laws).

Massachusetts, or at least end the use of third-prong malice for joint venturers in the felony-murder context.

ARGUMENT

I. This Court's amended felony-murder rule still allows for unconstitutionally disproportionate punishments for people—particularly people of color—convicted under the third prong of the malice requirement.

The felony-murder rule, even as amended by Commonwealth v. Brown, 477 Mass. 805 (2017), results in life-without-parole sentences for people who did not kill anyone, intend to kill anyone, or foresee a plain and strong likelihood of death during their participation in a felony. As discussed below, such sentences are disproportionately severe and influenced by racial bias, and thus violate the Eighth Amendment and article 26 of the Massachusetts Declaration of Rights.

In Brown, this Court attempted to address the constitutional deficiencies of the felony-murder rule by conditioning felony-murder convictions on a finding of malice. In doing so, this Court affirmed two fundamental principles of criminal law: a person should be "punished for his own blameworthy conduct, not that of others," Brown, 477 Mass. at 830, and "criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result." Id. at 831 (Gants, C.J., concurring). The Court made clear that a defendant's participation in a felony that results in a death, without additional evidence of malice,

should not constitute a sufficient basis for a murder conviction—especially where the defendant is a joint venturer. Id. at 832 (Gants, C.J., concurring).

Yet third-prong malice is so broad that it effectively allows the felony-murder rule to function as it did before Brown. Third-prong malice allows any person who participates in a felony that results in a death to receive a mandatory life-without-parole sentence so long as "a reasonable person would have known [that their actions] created a plain and strong likelihood" of death.[6] Contrary to the principles animating Brown, this standard does not require any subjective awareness of a strong risk of death, and invites trial courts and juries to improperly impose felony-murder convictions based solely on a joint venturer's participation in an underlying "life felony." Brown, 477 Mass. at 832 & n.4.[7]

The instant case illustrates the inability of the malice requirement to prevent unconstitutionally disproportionate sentences for felony-murder. Here, the finding of malice appears to have been based solely on Mr. Fisher's participation in an armed robbery, since there was no evidence that Mr. Fisher brought the gun, knew it was loaded, fired it, or otherwise intended to do an act that created a strong likelihood of death. App. Fisher Br. at 73-79, 95-96; Comm. Br. at 16-22. Instead, Mr. Fisher's

[6] Model Jury Instructions on Homicide 50 (2018) (emphasis added).

[7] See Binder & Yankah, supra note 4, at 171-72 (noting that, while eight states and federal system "condition felony murder on 'malice,' . . . whether this requires any culpability beyond the intent to commit the felony is often unclear").

alleged actions included being present during his co-felon's use of a gun, searching the victims' rooms for valuables, and trying to get information about the police investigation after the offenses. Comm. Br. at 84-85. These are not acts that a reasonable person would have thought created a plain and strong likelihood of death.

Indeed, the trial court's instructions improperly suggested that participation in an armed robbery was sufficient to establish malice, illustrating the risk of misinterpretation that third-prong malice invites. After the court instructed the jurors that third-prong malice requires intent to do an act that a reasonable person would have known created a strong likelihood of death, the jurors asked for clarity about the phrase "[i]ntended to do an act," asking, "is that act attempted armed robbery or the discharge of a firearm?" Tr. 15:32. At this point, pursuant to Brown, the trial court should have clarified that intent to commit an armed robbery, alone, would not establish third-prong malice. Instead, however, the court stated:

> You must determine separately for each defendant from the totality of the circumstances which you find occurred whether what occurred constitutes an intent to do an act which in the circumstances known to the defendant a reasonable person would have known created a plain and strong likelihood that death would occur.

Tr. 15:51. Moreover, the court instructed the jurors that they could "infer that a person who intentionally uses a dangerous weapon on another person intends to kill that person or to cause that person grievous bodily harm or intends to do an act,

which in the circumstances known to him, a reasonable person would know creates a plain and strong likelihood that death would result." Tr.13:65. Taken together, the court's instructions suggested that participation in an armed robbery alone satisfies the malice requirement, thereby negating the intended purpose of that requirement: to narrow the scope of the felony-murder rule to knowing participation in a killing.

The Commonwealth's brief underscores the risk of unconstitutionally disproportionate felony-murder convictions based on third-prong malice. That brief disregards Mr. Fisher's "argument that there was no evidence he knew the gun was loaded or functional," claiming that no such showing is required to "prove felony-murder." Comm. Br. at 86. The Commonwealth thus inconceivably implies that an unarmed accomplice could be convicted of first-degree felony-murder even if they believed that their co-felon was carrying an unloaded weapon and lacked ammunition. Id., citing Commonwealth v. Carter, 396 Mass. 234, 237 (1985) ("Where an unarmed felon knows that his accomplice in a robbery is carrying a gun, even if he believes the gun is unloaded and his accomplice has no ammunition, that robbery is inherently dangerous to human life."). This argument, which relies on a pre-Brown case, completely elides Brown's abolition of constructive malice. The Commonwealth's proposed interpretation illustrates how the third-prong malice invites prosecutorial upcharging and raises serious proportionality concerns.

Data from Michigan support the conclusion that even with a malice requirement, the felony-murder rule permits unconstitutionally cruel sentences for people who did not reasonably believe their actions could result in a death. Since 1980, Michigan has had a malice requirement much like third-prong malice in Massachusetts. In Michigan, felony-murder convictions require a "wanton and willful disregard of the likelihood that the natural tendency of the defendant's behavior is to cause death or great bodily harm." Aaron, 409 Mich. at 714 (1980).[8] Yet Michigan (with a population of ten million) currently incarcerates about 1,000 people for felony-murder—a figure roughly comparable to the approximately 1,200 people incarcerated for felony-murder in Pennsylvania (population of thirteen million), where no malice requirement exists.[9] Indeed, according to The Sentencing Project, Michigan prosecutors find it relatively easy to establish third-prong malice.[10]

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[8] In Massachusetts, it is well-established that a "fine line" separates the mental state of third-prong malice from the mental state of "wanton disregard" that applies to involuntary manslaughter. Commonwealth v. Lyons, 444 Mass. 289, 293 (2005). Both crimes require proof that a defendant disregarded risks created by his or her acts. "The difference . . . lies in the degree of risk of physical harm that a reasonable person would recognize was created by particular conduct." Id. Disregarding a plain and strong likelihood of death means a defendant acted with malice, while disregarding a likelihood of substantial harm means a defendant acted wantonly and recklessly. Id.

[9] Ghandnoosh, Stammen & Budaci, supra note 3, at 2.

[10] See id. at 11; see also Aaron, 409 Mich. at 729 (noting abolition of constructive malice "should have little effect on the result of the majority of cases").

In sum, third-prong malice lends itself to interpretations that will continue to result in unconstitutionally disproportionate sentences of mandatory life-without-parole for people who neither killed nor intended to kill. Accordingly, this Court should abandon the felony-murder doctrine, or end the use of third-prong malice for joint venturers in the felony-murder context.

II. This Court's amended felony-murder rule still allows for convictions influenced by impermissible extra-legal factors such as racial bias, contributing to the unconstitutional cruelty of mandatory life-without-parole sentences for people convicted under third-prong malice.

Legal scholars have long acknowledged racial bias in the administration of the felony-murder rule.[11] Indeed, data on felony-murder convictions in Massachusetts before Brown reveal a stark racial disparity, exceeding disparities among other first-degree murder convictions and the state prison population more broadly. As discussed below, research illustrates that such disparities are due in part to the broad prosecutorial discretion afforded by the felony-murder rule, resulting in charging decisions influenced by structural racism and racial bias.

[11] E.g., Rosen, Felony Murder and the Eighth Amendment Jurisprudence of Death, 31 B.C. L. Rev. 1103, 1119-20 (1990); Ziesel, Race Bias in the Administration of the Death Penalty: The Florida Experience, 95 Harv. L. Rev. 456, 460-61 (1981); Bowers & Pierce, Arbitrariness and Discrimination under Post-Furman Capital Statutes, 26 Crime & Delinq. 563, 615 (1980).

Because the felony-murder rule results in life-without-parole sentences influenced by extra-legal factors such as racial bias, those sentences are unconstitutionally cruel and disproportionate, in violation of the Eighth Amendment and article 26 of the Massachusetts Declaration of Rights. Accordingly, this Court should abolish the rule, or end the use of third-prong malice for joint venturers charged with felony-murder.

A. Racial bias in the administration of the felony-murder rule exists in Massachusetts and beyond.

Data from Massachusetts and elsewhere reveal striking racial disparities in the administration of the felony-murder rule. This racialized impact is due in part to the vast discretion the rule affords to prosecutors, leaving room for racial bias to influence charging decisions. The broad scope of the felony-murder rule also commonly criminalizes young people and survivors of gender-based violence which, due to underlying factors connected to structural racism, contributes to overall racial disparities in felony-murder prosecutions.

1. Data from Massachusetts and other jurisdictions illustrate racial bias regarding the administration of the felony-murder rule.

An analysis of pre-Brown first-degree felony-murder convictions illustrates an acute racial disparity regarding the administration of the felony-murder rule in Massachusetts. As detailed in the filings for Commonwealth v. Shepherd, No. SJC-12405, App. Shepherd Br. at *24-30, there are 108 people serving life-without-

parole for first-degree felony-murder. Of these, 82% are people of color; more particularly, 59% are Black, and just 18% are White. Id. By contrast, among people serving life-without-parole for other kinds of first-degree murder, 56% are people of color; 33% are Black, whereas 44% are White. Id.[12] The stark racial disparity among people serving life-without-parole for first-degree felony-murder also exceeds the racial disparity among the state prison population more broadly, where 59% are people of color—30% who are Black, and 40% are White.[13] These figures are illustrated in the table below.

Pre-Brown Data on Racial Disparity in MA Felony-murder Convictions

	1st Degree Felony-murder Convictions	Other 1st Degree Murder Convictions	Criminally-Sentenced population
People of Color (including Black people)	82%	56%	59%
Black People	59%	33%	30%
White People	18%	44%	40%

[12] This group of other first-degree murder convictions includes convictions based on theories of deliberate premeditation, extreme atrocity or cruelty, and post-Brown felony-murder.

[13] These percentages show the criminally sentenced population in custody of the DOC. See Mass. Dep't of Corr., Prison Population Trends 2021 at 18 (2022), https://www.mass.gov/doc/prison-population-trends-2021 (Table: MA DOC Jurisdiction Population by Race/Ethnicity and Commitment Type on January 1, 2022).

These comparisons indicate racial bias that is particular to joint venturers and the felony-murder rule, apart from racism within the criminal legal system more broadly.[14] Investigative journalism by the Boston Globe Spotlight Team has further uncovered the racialized prosecution of felony-murder in Massachusetts through a review of a sample cases dating back to the 1970s.[15]

These stark racial disparities among people convicted of felony-murder in Massachusetts are consistent with research from other jurisdictions. Studies have found similar racial disparities regarding the administration of the felony-murder

[14] This disparity is also particularly striking when compared to the overall racial demographics of the Massachusetts population, of which only 26.3 percent are Black, Latinx, and Asian persons. Mass. Sec. of State, Massachusetts 2020 Census, https://www.sec.state.ma.us/census2020/index.html (click on "Ethnicity and Racial Population Shares – 2010 to 2020" for an interactive map).

[15] See M. Arsenault, Unfinished Justice, Bos. Globe (Mar. 26, 2022), https://apps.bostonglobe.com/metro/investigations/spotlight/2022/03/unfinished-justice/ (analyzing hundreds of first-degree felony-murder convictions pre-Brown, identifying "at least 23 people—all men—sentenced to life without parole despite not having inflicted physical violence on the victim" and finding that "[o]f those whose race can be determined, all but one are Black or Hispanic").

rule in California,[16] Colorado,[17] Illinois,[18] Minnesota,[19] Missouri,[20] and Pennsylvania.[21]

Two factors that contribute to racial bias in the administration of the felony-murder rule include the broad prosecutorial discretion afforded by the rule, and the rule's criminalization of young people and survivors of gender-based violence.

2. Racial bias regarding the administration of the felony-murder rule is due in part to the broad prosecutorial discretion the rule enables.

The racially disparate application of the felony-murder rule in Massachusetts and elsewhere derives from the broad prosecutorial discretion the rule affords. The felony-murder rule gives prosecutors the choice of charging joint venturers with the underlying felony alone, a felony and an unintentional killing (such as involuntary manslaughter), or with a felony and a first-degree murder charge carrying a mandatory sentence of death-in-prison. When "wide-ranging homicidal

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[16] Committee on Revision of the Penal Code, Annual Report and Recommendations 52 (2021).
[17] Binder & Yankah, supra note 4, at 208.
[18] Albrecht, supra note 4.
[19] See Egan, supra note 4; see also L. Turner, Task Force on Aiding and Abetting Felony Murder, Report to the Minnesota Legislature (2022), https://mn.gov/doc/assets/AAFM-LegislativeReport_2-1-22_tcm1089-517039.pdf.
[20] M. L. Parson & A. L. Precythe, Profile of the Institutional and Supervised Offender Population, Mo. Dep't of Corr. (2021), https://doc.mo.gov/media/pdf/offender-profile-fy-20.
[21] Lindsay, supra note 4, at 11-27.

liability . . . exists on strikingly similar facts," it leaves prosecutors with broad discretion that contributes to "inequity in plea negotiations, trials, and sentencings, leaving a system ripe for abuse and incapable of delivering racial equity."[22] Indeed, substantial evidence reflects that "prosecutors' use of discretion—in decisions about which homicides to prosecute as felony-murder and how many people to charge as co-defendants—directly disadvantages people of color."[23] Frequently, prosecutors use felony-murder charges and the extreme sentences they carry in order to exert pressure on defendants in the plea-bargaining process.[24]

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[22] Egan, supra note 4, at 551.

[23] See Ghandnoosh, Stammen & Budaci, supra note 3, at 6; see also R. Subramanian, L. Digard, M. Washington & S. Sorage, Vera Inst. of Just., In the Shadows: A Review of the Research on Plea Bargaining 24 (2020), https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf ("[S]everal studies have found that people of color are often treated less favorably than white people during the plea bargain process."); Binder & Yankah, supra note 4, at 225 ("The strikingly disparate patterns of felony murder charging and conviction recently documented in metropolitan Chicago and Minneapolis, and in Pennsylvania and Colorado, suggest that felony murder is a crime prosecutors have seen little need to punish when committed by whites.").

[24] See Barry, Opinion, Felony Murder Should Be Removed From Maryland Criminal Law, Md. Matters, (Jan. 31, 2023), https://www.marylandmatters.org/2023/01/31/opinion-felony-murder-should-be-removed-from-maryland-criminal-law/#_ftn1(discussing use of felony-murder charges "as a tool for prosecutors to pressure people into pleas"); Glanton, Column: When the Felony Murder Rule Looms Overhead, a Plea Deal Isn't Always a Lifeline., Chi. Trib. (Sept. 23, 2019, 5 AM), https://www.chicagotribune.com/columns/dahleen-glanton/ct-dahleen-glanton-cody-moore-felony-murder-clemency-20190923-y3w5jpmvxfexbdprvuksohv5ay-story.html (describing "complicated and unfair practice of overcharging suspects

The felony murder rule's creation of broad prosecutorial discretion enables racial bias to influence prosecutorial charging decisions through both aversive racism and implicit White favoritism. Aversive racism entails negative beliefs about another racialized group that contribute to negative treatment of that group.[25] For example, research illustrates that unwarranted (conscious and unconscious) associations between Blackness, criminality, and violence, can impact decision-making in policing, prosecution, and sentencing.[26] See Commonwealth v. Sweeting-Bailey, 488 Mass. 741, 770 & n.9 (2021) (Budd, C.J., dissenting), quoting Buck v. Davis, 580 U.S. 100, 121 (2017) (describing "'powerful racial stereotype' that Black men are 'violence prone'"). Implicit White favoritism in the criminal legal context, by contrast, entails the "association of positive stereotypes and attitudes" with White

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under the Illinois felony murder rule and using it as leverage to alleviate the uncertainty and other costs of trying a case in court").

[25] See Gaertner & Dovidio, Understanding and Addressing Contemporary Racism: From Aversive Racism to the Common Ingroup Identity Model, 61 J. Soc. Issues 615, 618 (2005).

[26] See, e.g., Gupta-Kagan, The Intersection Between Young Adult Sentencing and Mass Incarceration, 2018 Wis. L. Rev. 669, 723; Spencer, Charbonneau & Glaser, Implicit Bias and Policing, 10 Soc. & Personality Psych. Compass 50, 55 (2016); Trawalter, Todd, Baird & Richeson, Attending to Threat: Race-Based Patterns of Selective Attention, 44 J. Experimental Soc. Psych. 1322, 1322 (2008); Eberhardt, Purdie, Goff & Davies, Seeing Black: Race, Crime, and Visual Processing, 87 J. Personality & Soc. Psych. 876, 878, 889-891 (2004); Quillian & Pager, Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime, 107 Am. J. Socio. 717, 718 (2001); Steffensmeier, Ulmer & Kramer, The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male, 36 Criminology 763, 769 (1998).

people, resulting in "preferential treatment" of White people that can likewise drive systemic racial disparities.[27] Since prosecutors are predominantly White, this effect can also be understood as "in-group favoritism."[28] One manifestation of implicit White favoritism is "attribution error," which involves "systematically discounting the important social, historical, and situational determinants of behavior (in this case, criminal behavior)" of Black defendants while "correspondingly exaggerating the causal role of dispositional or individual characteristics."[29] The concept of attribution error helps explain how biases shape our understanding of others' behavior—as connected to social circumstances, on the one hand, or as a reflection of individual moral failure and culpability, on the other—and thus bears directly upon prosecutors' charging decisions, contributing to racial bias in the administration of the felony-murder rule.[30]

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[27] Smith, Levinson & Robinson, Implicit White Favoritism in the Criminal Justice System, 66 Ala. L. Rev. 871, 873 (2015).

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

[29] See Lynch & Haney, Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury, 2011 Mich. St. L. Rev. 573, 590; see also Smith, Levinson & Robinson supra note 27, at 899 (discussing social science research that shows "empathy is experienced more for in-group members than out-group members").

[30] Smith, Levinson, & Robinson supra note 27, at 902.

A study of felony-murder charges and convictions in Minnesota highlights the dual influence of aversive racism and implicit White favoritism on prosecutorial charging and plea-bargaining practices. In Minnesota, felony-murder is generally a second-degree murder offense carrying a sentence of up to forty years in prison.[31] The study found that Minnesota's racial disparity among felony-murder convictions is nearly identical to the disparity in Massachusetts.[32] Further, White defendants convicted of second-degree felony-murder were more likely to have pled down to the charge, whereas Black defendants convicted of felony-murder were more likely to have been convicted of the most severe offense with which they were charged.[33]

The study found evidence of racial disparities with respect to both initial charging decisions and plea-bargaining determinations. Using criminal complaints,

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[31] First-degree felony-murder in Minnesota, carrying a mandatory life sentence, is available in a limited set of circumstances where the underlying felony is criminal sexual conduct, child abuse, domestic abuse, or related to terrorism. See Minn. Stat. Ann. § 609.185 (declaring first-degree felony-murder where: underlying felony is criminal sexual conduct with force or violence; felony is child abuse or domestic abuse, there has been a history of abuse, and felony is committed with "extreme indifference to human life"; or felony is in furtherance of terrorism and committed with "extreme indifference to human life"). However, the study discussed here focused on second-degree felony-murder, which is available where someone "causes the death of a human being, without intent to effect the death of any person, while committing or attempting to commit a felony offense other than criminal sexual conduct in the first or second degree with force or violence or a drive-by shooting." Minn. Stat. Ann. § 609.19.

[32] Egan, supra note 4, at 547-48 (footnote omitted) ("Between 2012 and 2018, defendants of color accounted for 80.2% of felony-murder convictions, while White defendants accounted for just 19.8%.").

[33] Id. at 548; Turner, supra note 19.

the study compared the respective facts and outcomes of individual felony-murder cases—including comparisons of co-defendants of different races within the same case—and found that "White defendants are frequently punished leniently, while defendants of color receive harsher treatment even when the facts support opposite outcomes."[34] The study illustrates the dynamics of both overcharging and upcharging: charging more defendants of color in situations where White people would not be charged, and bringing more serious charges for less serious conduct in cases involving people of color.

In Massachusetts, post-Brown, where felony-murder is always a top charge that carries a mandatory life-without-parole sentence, implicit White favoritism would look differently than in Minnesota, where second-degree felony-murder is disparately offered to White defendants as a lesser charge. Here, implicit White favoritism could manifest as a prosecutorial decision declining to charge a White joint venturer with felony-murder in the first place—instead charging only the underlying felony, or charging involuntary manslaughter carrying a maximum sentence of twenty years in prison.[35] As the data from Minnesota illustrate, racial

[34] Egan, supra note 4, at 548-51.

[35] See Binder & Yankah, supra note 4, at 226 ("One reason why felony murder may be little used against white defendants is the availability in most states of other offenses—including involuntary manslaughter and depraved indifference murder—for unintended homicide.").

bias—conscious or unconscious—impacts such exercises of prosecutorial discretion.

Racial bias regarding the felony-murder rule is also illustrated in research that accounts for race-of-victim effects, wherein cases with White victims tend to result in more severe punishments.[36] For example, studies show that California prosecutors are more likely to charge a felony-murder "special circumstances" enhancement, triggering a mandatory life-without-parole sentence, against people of color[37] and the racially disparate impact is particularly pronounced in cases where the victim is White.[38]

In a recent felony-murder case in California, a judge granted an evidentiary hearing under the Racial Justice Act after being presented with research showing racial disparity based on victim and defendant race dyads. Experts used complaints, information from the district attorney's office, and police incident reports to measure racial disparity in special circumstance charging, taking both defendant and victim

[36] Ziesel, supra note 11, at 467-468.
[37] Committee on Revision of the Penal Code, supra note 16, at 51 ("[R]ecently published research . . . has uncovered racial disparities in the application of certain special circumstances—such as those involving gangs and felony murder."); Grosso, Fagan, Laurence, Baldus, Woodworth & Newell, supra note 4, at 1442 ("[T]he combined felony-murder special circumstance for robbery and burglary applies disproportionately in black and Latinx defendant cases").
[38] Committee on Revision of the Penal Code, supra note 16.

race into account.[39] They found that special circumstance enhancements, among them felony-murder, were only charged in 41% of potentially eligible cases, and that special circumstance charges are 2.5 times more likely to be filed when a victim is White.[40] In cases involving youth ages eighteen to twenty-six where special circumstances charges could be filed, the disparity was even more extreme: the filing of such charges was 3.6 times more likely where the victim was White.[41] Similar enhanced racial disparities also existed when examining cases involving a death during a robbery.[42] The race-of-victim effect has long been observed in other jurisdictions as well.[43]

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[39] This calculation was made by analyzing all criminal complaints in San Francisco County (the relevant jurisdiction) with sufficient information and deciding for each case whether the underlying constellation of charges were eligible for special circumstances. The methodology of this report aligns with key studies in the scientific literature, such as those conducted by Baldus, Pulaski, & Woodworth, supra note 4, and Grosso, Fagan, Laurence, Baldus, Woodworth & Newell, supra note 4.

[40] Exhibit A, Analysis of Racial Differences in Life Without the Opportunity of Parole Charges in San Francisco County, People of the State of California v. Fantasy Decuir, 17011544 (on file, available upon request).

[41] Indeed, the felony-murder rule's particular racialized impact on young people, vulnerable to impulsivity and peer pressure due to the fundamental characteristics of adolescent brain development, contributes to the overall racially disparate impact of the rule. See infra at 33-35.

[42] Exhibit A, Analysis of Racial Differences in Life Without the Opportunity of Parole Charges in San Francisco County, supra note 40.

[43] Albrecht, Data Transparency, Compounding Bias, and the Felony Murder Rule, __ Miss. L.J. __ (forthcoming) (on file and available upon request); Radelet & Pierce, supra note 4, at 601 (discussing an analysis of Florida police reports in 1980 showing that prosecutors were most likely to upgrade a homicide charge to the

In sum, substantial research demonstrates the impact of racism on prosecutorial charging practices regarding felony-murder, and thus the mandatory life-without-parole sentences that result from felony-murder convictions. The impermissible but inescapable influence of racial bias on such sentences contributes to their unconstitutional cruelty and disproportionality.

3. Racial bias regarding the administration of the felony-murder rule can also be attributed to the rule's criminalization of young people and survivors of gender-based violence.

Felony-murder laws have especially pronounced impacts on youth and survivors of domestic and sexual violence that, in combination with structural racism throughout the criminal legal system, contribute to overall racial disparities in felony-murder charges and convictions.

As this Court has recognized, young people are vulnerable to impulsivity and peer pressure due to fundamental characteristics of their developing brains. Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 660 (2013). Young people "desire the approval of their peers," and may seek that approval "without weighing the potential consequences that may result from their actions."[44]

capital offense of felony-murder where defendant was Black and victim was White, even where police had not identified aggravating felony circumstances).

[44] Kokkalera, Strah & Bornstein, Too Young for the Crime, Yet Old Enough to do Life: A Critical Review of How State Felony Murder Laws Apply to Juvenile Defendants, 4 J. Crim. Just. & L. 90, 95 (2021).

This drive for peer approval likely contributes to the fact that "[a]pproximately half of all violent crimes committed by juveniles are committed in groups."[45] Moreover, young people simply do not have the same developmental capacity as adults to anticipate the potential remote consequences of their conduct.[46] Given these conditions, it is unsurprising that young people are overrepresented among people charged with and convicted of felony-murder.[47]

[45] Caldwell, The Twice Diminished Culpability of Juvenile Accomplices to Felony Murder, 11 U.C. Irvine L. Rev. 905, 908 (2021).

[46] Ghandnoosh, Stammen & Budaci, supra note 3, at 2 ("Felony murder laws ignore the cognitive vulnerabilities of youth and emerging adults by assuming that they recognize the remote consequences of their own actions—and those of others in their group."); accord Kokkalera, Strah & Bornstein, supra note 44.

[47] Ghandnoosh, Stammen & Budaci, supra note 3, at 2 (stating majority of people serving LWOP for felony murder in Pennsylvania and Minnesota were 25 or younger at time of offense); Kokkalera, Strah & Bornstein, supra note 44, at 103 (concluding that "felony murder rule facilitates the sentencing of adolescents who did not commit nor intend the actual act of murder"); Caldwell, supra note 45, at 907 (noting "felony murder laws are a driving force behind the high numbers of young offenders in the United States who have been sentenced to spend the rest of their lives in prison").

Black and brown youth are disproportionately policed, prosecuted, and punished,[48] and in turn disproportionately exposed to felony-murder convictions.[49] Black and brown youth face criminal charges for youthful misbehavior that is less likely to result in criminal charges for their White peers, leading to longer criminal records.[50] Young people with criminal records may then face higher charges, including felony-murder, than their peers without records for the same conduct.

Once a young person has cycled through the carceral system, they are subjected to negative collateral consequences with respect to housing and

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[48] See Mass. Juv. Just. Pol'y & Data Bd., Racial and Ethnic Disparities at the Front Door of Massachusetts' Juvenile Justice System: Understanding the Factors Leading to Overrepresentation of Black and Latino Youth Entering the System 3-4 (2022), https://www.mass.gov/doc/racial-ethnic-disparities-at-the-front-door-of-massachusetts-juvenile-justice-system-understanding-the-factors-leading-to-overrepresentation-of-black-and-latino-youth-entering-the-system/download (finding that, in Massachusetts, Black and Latino youth are more likely to be referred to Juvenile Court than White youth and are far more likely to experience custodial arrest versus summons).

[49] See Id. at 4 & n.6 (citing studies demonstrating negative long-term impacts of arresting young people).

[50] See NAT'L ACADS. OF SCIS., REDUCING RACIAL INEQUALITY IN CRIME AND JUSTICE: SCIENCE, PRACTICE, AND POLICY 122-23 (2022); see also S. SIRINGIL PERKER & L. CHESTER, HARV. KENNEDY SCH., MALCOLM WIENER CTR. FOR SOC. POL'Y, EMERGING ADULTS: A DISTINCT POPULATION THAT CALLS FOR AN AGE-APPROPRIATE APPROACH BY THE JUSTICE SYSTEM 2 (2017), https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/MA_Emerging_Adult_Justice_Issue_Brief_0.pdf (noting that young person's "[e]xposure to toxic environments such as adult jails and prisons" can have traumatic impact that contributes to further criminalization).

employment.[51] For Black and Latinx youth, that harm is compounded by their racialized exclusion from "high quality education, employment (especially higher income jobs), safe housing, credit, and good health care."[52] Consequently, these young people may face a higher risk of housing insecurity and financial need that can contribute to cycles of incarceration and more serious charges, including felony-murder.

Felony-murder laws also criminalize survivors of domestic and gender-based violence, which contributes to the overall racial disparity among felony-murder prosecutions. Survivors of abuse can be exposed to felony-murder charges by being present during their abusive partner's violence, or in some cases may be coerced into participating in criminal conduct.[53]

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[51] U.S. Comm'n on Civil Rights, Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities 60 (2019), https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf.

[52] C. Insel & S. Tabashneck, Ctr. for Law, Brain & Behavior at Mass. General Hospital, White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys, and Policy Makers 23 (2021), https://clbb.mgh.harvard.edu/wp-content/uploads/CLBB-White-Paper-on-the-Science-of-Late-Adolescence.pdf.

[53] See Jones, Ending Extreme Sentencing Is a Women's Rights Issue, 23 Geo. J. Gender & L. 1, 3-4 (2022), https://www.law.georgetown.edu/gender-journal/wp-content/uploads/sites/20/2022/03/S.-Jones_Ending-Extreme-Sentences-is-a-Womens-Rights-Issue.pdf (noting that women may be coerced to participate in felony-murder offense due to intimate partner, and that women may engage in felony conduct to defend themselves from abuse); Ghandnoosh, Stammen & Budaci, supra note 3, at 6 (citing research from the California Coalition for Women Prisoners, showing that "the majority of their members convicted of felony murder were accomplices navigating intimate partner violence at the time of the offense and were criminalized for acts of survival"); Dichter & Osthoff, Women's Experiences of

Due to racism, Black and brown women face certain systemic and structural barriers to leaving abusive situations, perpetuating conditions that put them at higher risk for felony-murder charges. Research shows that Black and brown survivors of domestic violence have been "routinely objectified, over-looked, experienced overt mistreatment, and had their voices minimized by providers within the very systems that were supposed to assist them."[54] Many survivors report that their ability to leave an abusive situation is impacted "by other forms of violence and abandonment, such as police violence, inadequate social services or lack of resources, other gender-based attacks, and/or lack of community or family support."[55] Studies have illustrated that some police officers "discredit" Black women seeking crisis intervention.[56] Similarly, research regarding emergency shelter systems has revealed evidence of "racist and discriminatory interactions" that prevent Black and

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Abuse as a Risk Factor for Incarceration: A Research Update, Nat'l Online Resource Ctr. on Violence Against Women (2015), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_IncarcerationUpdate.pdf (describing paths from abuse to incarceration, including use of violence in response to abuse or against abusive partner).

[54] See Waller, Harris & Quinn, Caught in the Crossroad: An Intersectional Examination of African American Women Intimate Partner Violence Survivors' Help Seeking, 23 Trauma Violence Abuse 1235, 1244 (2022); see also Survived & Punished, Defending Self Defense: A Call to Action 25 (2022), https://survivedandpunished.org/wp-content/uploads/2022/03/DSD-Report-Mar-21-final.pdf.

[55] Survived & Punished, supra note 54, at 11.

[56] Waller, Harris & Quinn, supra note 54, at 1239, citing Few, The Voices of Black and White Rural Battered Women in Domestic Violence Shelters, 54 Fam. Rels., 488-500 (2005).

brown survivors of domestic violence from using housing services, even if they do not have other housing options available to them.[57]

Racialized structural barriers to leaving abusive situations can contribute to racial disparities in felony-murder prosecutions and convictions since, as discussed above, gender-based violence creates conditions where survivors are compelled to be present during, or participate in, their abuser's criminal conduct.

B. Racially biased felony-murder prosecutions will persist under the current felony-murder rule.

There is every reason to believe that the racially biased administration of the felony-murder rule will persist despite the addition of a malice requirement. As discussed above, third-prong malice is so broad that it invites interpretations that swallow Brown's limiting principle, allowing the felony-murder rule to punish people for unintended deaths simply by virtue of engaging in certain felonious conduct.

The overbreadth of third-prong malice not only enables racial bias to impact prosecutorial charging decisions, but also jury determinations. This Court has long acknowledged the subtle difference between third-prong malice murder and involuntary manslaughter. See, e.g., Commonwealth v. Woodward, 427 Mass. 659, 669 (1998); Commonwealth v. Sires, 413 Mass. 292, 303 n.14 (1992). Requiring

[57] Id. at 1241-42.

jurors to distinguish the two where a joint venturer is charged with felony-murder invites implicit biases to take hold—a fraught prospect given the ample evidence of aversive racism and implicit White favoritism in felony-murder prosecutions detailed above.[58] See Commonwealth v. Rolon, 438 Mass. 808, 824 (2003) ("[T]he doctrines of felony-murder and joint venture may . . . produce a conviction of murder in the first degree that would appear out of proportion to a defendant's culpability.").

This case is a prime example. The Commonwealth overstates Mr. Fisher's participation in the killing, eliding his role in the joint venture. Comm. Br. at 85 ("[I]n the course of their attempted robbery, they shot and killed Sanisha Johnson." (emphasis added)). Yet as discussed above, there was no evidence that Mr. Fisher brought the gun, knew it was loaded, or fired it. App. Fisher Br. at 70-80, 94-97; cf. Commonwealth v. Tillis, 486 Mass. 497, 509 (2020) (defendant entered apartment building armed with knife during home invasion). Against this backdrop, the jury was left to decide if Mr. Fisher's actions were wanton or reckless, or created a plain and strong likelihood of death. This case thus illustrates the potential for implicit bias to influence jury decision-making where a jury is asked to choose between

[58] Notably, in Massachusetts, 79.9% of empaneled jurors statewide are White. Off. of Jury Comm'r, Demographic Survey Results - 1/1/2022-12/31/2022, https://www.mass.gov/doc/office-of-jury-commissioner-2022-demographics-1/download.

involuntary manslaughter and first-degree murder for a joint venturer under third-prong malice.[59]

Scholars have aptly described the felony-murder rule as a "vector of racial subordination," punishing people based on who they associate with,[60] and lacking any deterrent effect.[61] Mr. Fisher's case and the empirical evidence detailed above lay bare these dynamics. It follows that the stark racial disparity among felony-murder convictions in the Commonwealth will continue post-Brown, underscoring the unconstitutional cruelty of the mandatory life-without-parole sentences that the felony-murder rule imposes.[62]

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[59] The risk of racially biased juror decision-making here was also amplified by the concerns about racial discrimination in jury selection detailed in Mr. Fisher's brief. App. Fisher Br. at 40-58.

[60] Binder & Yankah, supra note 4, at 50.

[61] See Garoupa & Klick, Differential Victimization: Efficiency and Fairness Justifications for the Felony Murder Rule, 4 Rev. L. & Econ. 407 (2008); Malani, Does the Felony-Murder Rule Deter? Evidence from FBI Crime Data, Working Paper 14-25 (2002), https://graphics8.nytimes.com/packages/pdf/national/malani.pdf; see also Roth & Sundby, supra note 3, at 452 ("[T]he felony-murder rule can have no deterrent effect if the felon either does not know how the rule works or does not believe a killing will actually result.").

[62] See supra at 22-23 (discussing Commonwealth v. Shepherd, No. SJC-12405, App. Shepherd Br. at *24-30).

CONCLUSION

For these reasons, and consistent with this Court's reasoning in Brown, this Court should abolish the felony-murder doctrine or, in the alternative, end the use of third-prong malice for joint venturers in the felony-murder context.

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Respectfully submitted,

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ADDENDUM A: AMICI CURIAE STATEMENTS OF INTEREST

The **Boston University Center for Antiracist Research** (the "Center") is a nonpartisan, nonprofit university-based center that seeks to promote and facilitate antiracist progress by unifying research, policy, narrative, and advocacy efforts. The Center's animating goal is to eliminate racism through a rigorous, research-based, and integrative approach. Accordingly, the Center has a keen interest in challenging policies of criminalization and punishment that undermine fundamental principles of safety, justice, and healing, and disproportionately harm people of color. The Center joins this brief to emphasize that the felony-murder rule results in unconstitutionally disproportionate and racially biased life-without-parole sentences, and should be abolished. The Center does not, in this brief or otherwise, represent the official views of Boston University.

The **Massachusetts Association of Criminal Defense Lawyers ("MACDL")** is an incorporated association of more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL is dedicated to protecting the rights of the citizens of the Commonwealth guaranteed by the Massachusetts Declaration of Rights and the United States Constitution. MACDL seeks to improve the criminal justice system by supporting policies and procedures to ensure fairness and justice in criminal matters. MACDL devotes much of its

energy to identifying, and attempting to avoid or correct, problems in the criminal justice system. It files amicus curiae briefs in cases raising questions of importance to the administration of justice.

Felony Murder Elimination Project is a non-profit grassroots organization based in California. Led by formerly incarcerated people and family members of individuals suffering under extreme criminal sentencing, we are committed to ending the felony murder rule, an egregious law which imposes life without parole and death penalty sentences on individuals for the actions of others. Felony Murder Elimination Project has interest in this litigation because we seek to expose the devastating impacts of felony murder and restrict the use of felony murder throughout the United States.

The **National Council for Incarcerated and Formerly Incarcerated Women and Girls** is a non-profit organization headquartered in Boston led by formerly incarcerated Black women. It is dedicated to ending the incarceration of women and girls. The National Council engages in community organizing to create safer and more prosperous communities. It also works to bring people in the criminal legal system home through participatory defense, closing prisons, clemency, compassionate release, and traditional litigation. The National Council is a membership organization whose members are deeply impacted by felony murder and conspiracy—which punish one person for the acts of another. Felony murder

rips families apart and destroy communities and disparately impact people of color and those living in poverty. The National Council has interest in this litigation because its members—especially its large membership base in Massachusetts—will benefit from the elimination of felony murder and because it will further the organization's mission of combatting the harm of incarceration.

Professor **Kat Albrecht** is an assistant professor in the criminal justice and criminology department at Georgia State University. Professor Albrecht is a nationally recognized expert on racial disparity in sentencing, quantitative data, and felony-murder special circumstance enhancements. Professor Albrecht has conducted substantial research and teaching on this topic and has been admitted as a computational sociology expert to testify about racial disparity in felony-murder enhancements in the state of California. She is an author of one of the reports described in this brief.

The Sentencing Project is a national nonprofit organization established in 1986 to engage in public policy research, education, and advocacy to promote effective and humane responses to crime. The Sentencing Project has produced a broad range of scholarship assessing the merits of extreme sentences in jurisdictions throughout the United States. Because this case concerns the ability of individuals who did not kill, did not intend to kill, and could not foresee a loss of human life, to

challenge their sentence of life imprisonment without the possibility of parole, it raises questions of fundamental importance to The Sentencing Project.

CERTIFICATION OF COMPLIANCE

I, Caitlin Glass, certify that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including, but not limited to those specified in Rule 16(k), 17, and 20. It complies with the type-volume limitation of Rule 20(2)(C) because it contains 7,253 non-excluded words. It complies with the type-style requirements of Rule 20 because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point, Times New Roman font.

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CERTIFICATE OF SERVICE

On April 14, 2023, I served a copy of this brief on all parties through the e-file system and by electronic mail.

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