SJC-12405

Commonwealth of Massachusetts
Supreme Judicial Court

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,

v.

RASHAD A. SHEPHERD,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT
OF THE ESSEX SUPERIOR COURT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, INC., AS *AMICUS CURIAE* IN SUPPORT OF THE DEFENDANT AND REVERSAL

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PREPARATION OF AMICUS CURIAE BRIEF

Pursuant to Appellate Rule 17(c)(5), the amicus and its counsel declares that:

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

(b) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief;

(c) no person or entity—other than the amicus or its counsel—contributed money that was intended to fund preparing or submitting the brief; and

(d) neither the amicus nor its counsel represent or have represented any of the parties to the present appeal in another proceeding involving similar issues, or were a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

STATEMENT OF INTEREST

The **American Civil Liberties Union of Massachusetts, Inc. (ACLUM)** is a statewide nonprofit membership organization dedicated to the principles of liberty and equality embodied in the constitutions and laws of the Commonwealth and the United States. ACLUM has a strong and longstanding interest in addressing persistent racial inequities in the Commonwealth's criminal legal system. *See, e.g.*, *Commonwealth v. Cuffee*, 492 Mass. 25 (2023) (amicus); *Commonwealth v. Long*, 485 Mass. 711 (2020) (amicus); *Commonwealth v. Buckley*, 478 Mass. 861 (2018) (amicus); *Commonwealth v. Warren*, 475 Mass. 530 (2016) (amicus); *Commonwealth v. Laltaprasad*, 475 Mass. 692 (2016) (amicus).

ISSUE PRESENTED

In *Commonwealth v. Brown*, 477 Mass. 805 (2017), this Court prospectively narrowed the scope of the felony-murder rule by requiring the Commonwealth to prove actual malice in future cases. Given the substantial evidence now before the Court regarding the stark racial disparities under the former felony-murder rule, should this Court now apply *Brown*'s actual-malice requirement retroactively?

INTRODUCTION

In Massachusetts, 108 people are currently serving life-without-parole sentences for felony murder where the Commonwealth has never demonstrated that they intended to take a life. The overwhelming majority of these individuals—almost 60%—are Black, and more than 82% are people of color. Only 18% are White. Placed alongside the numerous other racial disparities in the criminal system, this extreme contrast stands out as especially stark.

These numbers were neither presented when the *Brown* Court limited the application of the actual-malice requirement for felony murder to prospective cases, nor were they presented by defendants in any of the cases in which this Court has since rejected a retroactive application of *Brown*.[1] Mr. Shepherd now points to this

[1] While Mr. Shepherd's case has been pending before this Court, an amicus brief cited the data in Mr. Shepherd's brief in another case where the issue of *Brown*'s

data to argue in detail that a continued failure to apply *Brown* retroactively violates state constitutional equal protection principles. *See* Def. Br. at 24-39; *see also* Boston Univ. Ctr. For Antiracist Research et al. Amicus Br. at 6, 20-24 (hereinafter "B.U. Amicus Br.") (arguing that "allowing strict-liability felony-murder convictions and their attendant LWOP sentences to stand" in light of these racial disparities "raises serious equal protection concerns"). ACLUM submits this brief to address one additional point. Namely, even if this Court ultimately does not hold that retroactivity is *required* because the prospective-only application of *Brown* is unconstitutional, it can and should exercise its *discretion* to retroactively apply the actual-malice requirement.

As this Court has repeatedly articulated, its discretion regarding how to apply new common-law rules is grounded in considerations of fairness. *Cf. Brown,* 477 Mass. at 834 (Gants, C.J., concurring); *Commonwealth v. Martin*, 484 Mass. 634, 646 (2020). Now that this Court is squarely presented with the significant racial disparities borne out under the former felony-murder rule, that fairness counsels in favor of the retroactive application of *Brown*.

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retroactivity was raised. *See* Brief for New England Innocence Proj. et al. as Amici Curiae Supporting Defendant-Appellee at 37-38, *Commonwealth v. Pfeiffer*, 492 Mass. 400 (2023) (No. SJC-13355). The defendant in that case did not present this data, nor did the Court reference or address this data in its decision. *See Commonwealth v. Pfeiffer*, 492 Mass. 400 (2023).

ARGUMENT

I. There are stark racial disparities under the former felony-murder rule.

As Mr. Shepherd has extensively detailed, data on felony murder within the Commonwealth and across the country reveal significant racial disparities in administration of the doctrine. *See* Def. Br. at 24-30; *see also* B.U. Amicus Br. at 7-20. According to the Executive Office of Health and Human Services, as of 2020, the Commonwealth's population was 69% White and 6.8% Black; overall, 31% of the Commonwealth's population identified as non-White.[2] Yet in Massachusetts today, among the 108 people serving life without parole sentences for pre-*Brown* felony murder, 82% are people of color, 59% are Black, and only 18% are White. *See* Def. Br. at 24-30; B.U. Amicus Br. at 8-9. Critically, 32 of these 108 people were between the ages of 18 and 20 at the time of their conviction; 87.5% of whom are people of color, 53% of whom are Black and 12.5% of whom are White. *See* B.U. Amicus Br. at 14-16.

Notably, in a criminal legal system that is rife with racial disparities, *cf.* Comm. Br. at 46-47, the data for pre-*Brown* felony murder convictions still stands out. For example, among those people who are incarcerated in state prison, 59% are people of color, 30% are Black, and 40% are White. *See* Def. Br. at 28; B.U. Amicus Br. at 8. Similarly, among those people who are serving life-without-parole sentences for other

[2] Exec. Off. Health & Hum. Servs., *Massachusetts Population by Race/Ethnicity* (2020), https://www.mass.gov/info-details/massachusetts-population-by-raceethnicity.

first-degree murder offenses, 56% are people of color, 33% are Black, and 44% are White. *See* Def. Br. at 25-30; B.U. Amicus Br at 8. These numbers, while significant, still do not reveal the same kind of disparities demonstrated in pre-*Brown* felony murder convictions. Simply put, even set against the racial disparities that exist within other criminal contexts, the contrasts under the former felony-murder rule are exceptionally striking.

II. To avoid perpetuating these racial disparities, this Court should exercise its discretion to apply *Brown* retroactively.

Even if this Court does not adopt the argument that the numbers detailed above reveal a constitutional violation that requires retroactive application of *Brown*, it can and should exercise its discretion to retroactively impose the actual-malice requirement.

Where this Court announces a new common-law rule, it is "free to determine whether it should be applied only prospectively." *Commonwealth v. Dagley*, 442 Mass. 713, 721 n.10 (2004), cert. denied, 544 U.S. 930 (2005). It follows that where the Court has the discretion to limit the application of a new common-law rule to future cases, it also retains the discretion to make such rules retroactive even absent a constitutional violation. Indeed, the Commonwealth itself agrees that this Court has the "flexibility to make new rules prospective or retroactive as occasion may demand and as it sees fit[.]" Comm. Br. at 51. That discretion is typically guided by considerations of fairness. *Cf. Martin*, 484 Mass. at 646.

Without the benefit of data demonstrating the racially disparate impact of the former felony-murder rule, *Brown* and its progeny's earlier retroactivity analyses considered only the lack of fairness to the Commonwealth, who, the Court reasoned, might have tried the case "very differently if the prosecutor had known that liability for murder would need to rest on proof of actual malice." *Brown*, 477 Mass. at 834 (Gants, C.J., concurring); *see Martin*, 484 Mass. at 646 (noting that retroactive application of *Brown* "would have been unfair to the Commonwealth" due to trial strategy). Yet if fairness animated the Court then, fairness should now equally guide the Court to reach the opposite conclusion.

No defendant has previously provided this Court with the extensive data provided here by Mr. Shepherd demonstrating the pernicious impact of the pre-*Brown* felony-murder rule. *See* Def. Br. at 21-31; B.U. Amicus Br. at 8-20. The square presentation of this data meaningfully alters any balancing of equities, as recognition of the Commonwealth's previous trial strategy must now be weighed against the reality of these stark racial disparities. Critically, this Court has repeatedly lauded the collection and use of data to identify and address racial disparities that exist within the criminal system in the Commonwealth.[3] The data now presented in this case does just

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[3] *See, e.g., Long*, 485 Mass. at 748 ("We urge the Legislature to require the collection and analysis of officer-specific data [on traffic stops] . . . . This type of data collection

that, confirming that the racial disparities that pervade the criminal system in the Commonwealth are not merely present in the context of the former felony-murder rule, but are extreme. This information should tip the fairness determination in favor of retroactivity.

The Commonwealth neither disputes that the disparities highlighted by Mr. Shepherd exist, *see* Comm. Br. at 35, nor suggests that these disparities are fair. Instead, it argues that giving *Brown* retroactive effect will open the floodgates, stating "to grant relief on the present claim would effectively compel retroactive application of *all* new rules." Comm. Br. at 47 (emphasis in original). The Commonwealth's concern, however, is misplaced.

The Court's decision to retroactively apply *Brown* need not mandate the manner in which it exercises its discretion to retroactively apply new common-law rules in the future. By its very terms, the exercise of discretion remains discretionary. What is more, several critical factors especially counsel in favor of retroactive application here. First, the racial disparities under the application of the pre-*Brown* felony-murder rule

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would help protect drivers from racially discriminatory traffic stops[.]"); *Commonwealth v. Williams*, 481 Mass. 443, 451 & n.6 (2019) (noting the "ample empirical evidence to support" the conclusion that "African-American males receive disparate treatment in the criminal justice system" and citing studies); *Commonwealth v. Rossetti*, 489 Mass. 589, 627 (2022) (Wendlandt, J., dissenting) ("Significantly, th[is] decision . . . comes at a time when the available data show that stripping judges of discretion in sentencing has resulted in Black and brown defendants being disproportionately represented in the Commonwealth's population of incarcerated people.").

are extreme even compared to those found elsewhere in the criminal system. *See supra* Part I; Def. Br. at 25-30; B.U. Amicus Br. at 8. Second, the number of individuals incarcerated under the former felony murder rule is small—only just exceeding 100—creating a known and limited universe that would be impacted by a retroactive ruling. This Court can choose to exercise its discretion at least where such factors are present without predetermining how it will exercise its discretion under a different set of circumstances in future cases.

Finally, any questions regarding prosecutorial and judicial resources do not suggest otherwise. A recent decision by the United States Sentencing Commission is instructive in this regard. In April of this year, the U.S. Sentencing Commission decreased the impact of status points on sentencing guidelines based on research which revealed that they "add[ed] little to the overall predictive value."[4] In August, the Commission approved the retroactive application of this rule change, reasoning that "it was wrong to allow new sentences to be untethered from the latest data" and "it is wrong to allow sentences still being served to have their length based on outdated research."[5] In reaching this determination, the Commission expressly considered "the time judges will have to spend dealing with new filings," but ultimately held that this

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[4] Transcript of Public Meeting, U.S. Sentencing Comm. 11 (Aug. 24, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230824/transcript.pdf.

[5] *Id.* at 12.

was outweighed by the fairness considerations of people incarcerated under the old rule, concluding "[w]hat is unjustified in the future was unjustified in the past, and must be rectified now."[6] The same conclusion governs here, especially given the relatively low number of people incarcerated under the former felony-murder rule. While a retroactive application of *Brown* will have an extraordinary impact on the lives of each of those people—and their loved ones—it will not have an unmanageable impact on the Commonwealth or the judiciary.

* * * *

Fairness is an important consideration, but it runs both ways. At their root, the Commonwealth's interests are in maintaining the public's faith in the integrity of the legal system. These interests are undermined—not advanced—by preserving racially disparate sentences that diminish public trust. In light of the data now presented to the Court, it is clear that the retroactive application of *Brown*'s actual-malice requirement is a matter of fundamental fairness that is not outweighed by the Commonwealth's interests in finality.

CONCLUSION

Because the evidence now before the Court makes clear that the former felony-murder rule has contributed to a regime that subjects Black defendants and other defendants of color to disproportionate rates of life-without-parole sentences, this

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[6] *Id.* at 16.

Court should exercise its discretion to give the actual-malice requirement announced in *Brown* retroactive application.

Respectfully submitted,

/s/ Jessie J. Rossman
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CERTIFICATE OF COMPLIANCE

I 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 2,109 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 Garamond font.

October 17, 2023 */s/ Jessie J. Rossman*

CERTIFICATE OF SERVICE

Pursuant to Massachusetts Appellate Rule of Procedure 13(2), I certify that on October 17, 2023, I made service of this brief upon the attorneys of record for each party via the Electronic Filing System and via email.

October 17, 2023 */s/ Jessie J. Rossman*