SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

No. SJC-12405

COMMONWEALTH,
APPELLEE,
v.
RASHAD A. SHEPHERD
APPELLANT.

ON APPEAL FROM THE ESSEX SUPERIOR COURT

BRIEF OF AMICI CURIAE BOSTON UNIVERSITY CENTER FOR ANTIRACIST RESEARCH, MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, FAMILIES FOR JUSTICE AS HEALING, FELONY MURDER ELIMINATION PROJECT, THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, NATIONAL COUNCIL FOR INCARCERATED AND FORMERLY INCARCERATED WOMEN AND GIRLS, PROFESSOR KAT ALBRECHT, AND THE SENTENCING PROJECT IN SUPPORT OF APPELLANT RASHAD A. SHEPHERD

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, the Boston University Center for Antiracist Research, the Massachusetts Association of Criminal Defense Lawyers, Families for Justice as Healing, Felony Murder Elimination Project, the Fred T. Korematsu Center for Law and Equality, The National Council for Incarcerated and Formerly Incarcerated Women and Girls, and The Sentencing Project 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, Families for Justice as Healing, Felony Murder Elimination Project, the Fred T. Korematsu Center for Law and Equality, 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 submit this brief to emphasize that life-without-parole sentences for strict-liability felony murder are disproportionate, cruel, and improperly influenced by extralegal factors such as racism. As such, these sentences raise serious equal protection concerns and violate the Eighth Amendment and Article 26 of the Massachusetts Declaration of Rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

The felony-murder doctrine is a stark exception to the basic criminal-law principle that someone's culpability depends on their actions and state of mind.[2]

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

[2] See Binder, The Culpability of Felony Murder, 83 Notre Dame L. Rev. 965, 981 (2008) (explaining "criminal law theorists have almost unanimously condemned felony murder as a form of strict liability, imposing undeserved punishment for causing death without culpability"); Tomkovicz, The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law, 51 Wash. & Lee L. Rev. 1429, 1431 (1994) ("[T]he major complaint about the felony-murder rule is that it violates generally accepted principles of culpability."); Paul H. Robinson, A

Courts and scholars have long criticized felony murder for violating proportionality in sentencing,[3] calling it "injudicious and unprincipled"[4] and a "modern monstrosity."[5] Indeed, felony murder has been abolished in every other common-law country, as well as Kentucky and Hawaii.[6]

Increasingly, scholars have also recognized the felony-murder doctrine as constitutionally infirm because of its susceptibility to racial bias and its imposition of disproportionately severe punishments.[7] Data analyses have demonstrated the

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Brief History of Distinctions in Criminal Culpability, 31 Hastings L.J. 815 (1980) (tracing the "guilty mind" requirement to the 13th century).

[3] 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."); see also, e.g., 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); Ghandnoosh, Stammen & Budaci, The Sentencing Project & Fair and Just Prosecution, Felony Murder: An On-Ramp for Extreme Sentencing 1 (2022), https://www.sentencingproject.org/app/uploads/2022/10/Felony-Murder-An-On-Ramp-for-Extreme-Sentencing.pdf.

[4] People v. Aaron, 299 N.W.2d 304, 334 (Mich. 1980).

[5] Lanham, Felony Murder--Ancient and Modern, 7 Crim. L.J. 90, 90-91 (1983).

[6] Binder & Yankah, Police Killings as Felony Murder, 17 Harv. L. & Pol'y Rev. 157, 206; Ky. Rev. Stat. Ann. § 507.020 (1984); Haw. Rev. Stat. § 707-701 (1972).

[7] E.g., Moriearty, Albrecht & Glass, Race, Racism and Implied Culpability, Fordham Urban L.J. (forthcoming 2024), Cohen, Levinson & Hioki, Racial Bias, Accomplice Liability, and The Felony Murder Rule: a National Empirical Study, Denver L. Rev. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4411658; Serota, Proportional Mens Rea and the Future of Criminal Code Reform, 52 Wake Forest L. Rev. 1201 (2017); Gerber, The Felony Murder Rule: Conundrum Without Principle, 31 Ariz. St. L.J. 763 (1999); Rosen, Felony Murder and the Eighth Amendment Jurisprudence of Death, 31 B.C. L. Rev. 1103, 1119-20 (1990); Roth &

stark, racially disparate impact of the felony-murder doctrine in at least eight states, including Massachusetts, and research indicates that these disparities are due to the wide charging discretion and low burden of proof that the doctrine affords prosecutors.[8] Accordingly, the doctrine has aptly been criticized as a "vector of racial subordination," punishing people based on who they associate with,[9] and lacking any proven deterrent effect.[10]

Until 2017, Massachusetts imposed mandatory life-without-parole (LWOP) for so-called "strict-liability" first-degree felony murder—meaning felony murder that requires no *mens rea* related to the killing. Under Massachusetts's strict-liability felony-murder rule, someone who participated in a felony where a death occurred could automatically be condemned to die in prison even if they did not kill anyone,

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Sundby, supra note 3 at 446 (1985); 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). See also Ghandnoosh, et al., supra note 3, at 9-10.

[8] See infra Part I.

[9] Binder & Yankah, supra note 6, at 206.

[10] 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://tinyurl.com/3wv252bc; 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.").

intend to kill anyone, or foresee the death.[11] Only nine states currently mandate such an extreme sentence for strict liability felony murder.[12]

But in Commonwealth v. Brown, 477 Mass. 805 (2017), this Court recognized the disproportionality of such sentences and held that no one could be sentenced to LWOP for felony murder absent a finding of malice. This means that to convict someone of first-degree felony murder post-Brown, the jury must find that the person had intent to kill, cause grievous bodily harm, or commit an act that reasonably creates a plain and strong likelihood of death. Id. at 825 (Gants, C.J. concurring).

While Brown sought to ameliorate unjust applications of the felony-murder doctrine, the decision was applied only prospectively, leaving many—like Mr. Shepherd—to die in prison for strict-liability felony-murder convictions based solely on their conviction date. Brown's non-retroactivity also perpetuates a legacy of

[11] Notably, Hawaii and Kentucky have abolished their felony murder laws entirely, and California and Minnesota have significantly restricted theirs. Ky. Rev. Stat. Ann. § 507.020 (West 1984); Haw. Rev. Stat. § 707-701 (1972); Cal. SB-1437 (2018), https://tinyurl.com/zyvfue75; Minn. H.F. No. 2890/S.F. No. 2909 (2023), https://tinyurl.com/fhc9dttm.

[12] Arizona Rev. Stat. Ann. § 13-1105; Iowa Code Ann. § 902.1; La. Stat. Ann. § 14:30(C); Miss. Code. Ann. § 97-3-21; Neb. Rev. Stat. Ann. § 28-105; N.C. Gen. Stat. Ann. § 14-17; 18 Pa. Stat. and Cons. Stat. Ann. § 1102; Wyo. Stat. Ann. § 6-2-101. In 2017, Colorado also imposed mandatory life-without-parole for strict-liability felony murder but, like Massachusetts, has since changed its felony-murder law. Col. Rev. Stat. § 18-3-102; S.B. 21-124, 73rd Gen. Ass., 2021 Reg. Sess. (Co., 2021).

racial injustice that bears directly upon the constitutional questions before this Court. To assist the Court's consideration of these important issues, amici address the following points.

First, amici contextualize the data presented by Mr. Shepherd showing especially stark racial disparities in the imposition of LWOP sentences for strict-liability felony murder in Massachusetts. Social science research suggests that such disparities are due at least in part to impermissible extralegal factors such as racial bias in the felony-murder doctrine's application. See infra Part I.

Second, amici discuss how this evidence of racial bias suggests selective prosecution of strict-liability felony-murder cases. As a result, allowing strict-liability felony-murder convictions and their attendant LWOP sentences to stand raises serious equal protection concerns. See infra Part II.

Third, amici illustrate that mandatory LWOP sentences for felony-murder convictions are cruel and disproportionate in violation of the Eighth Amendment and Article 26 of the Massachusetts Declaration of Rights, in part because of the felony-murder doctrine's susceptibility to racism. See infra Part III.

To avoid perpetuating the racially disparate impact of the strict-liability felony-murder rule and the constitutional infirmities inherent in LWOP sentences for such convictions, this Court should create a presumption of a sentence reduction via Rule of Criminal Procedure 25(b)(2) or 30(a) for anyone serving such a sentence.

In the alternative, this Court should automatically reduce strict-liability first-degree felony-murder verdicts to second-degree murder, thereby reducing the applicable sentence to life *with* the possibility of parole.

ARGUMENT

I. For decades, Massachusetts imposed mandatory life-without-parole sentences for strict-liability felony murder—a doctrine shown to be infected with racial bias.

The data Mr. Shepherd has presented reveal an extreme racial disparity among those sentenced to mandatory LWOP for strict-liability felony-murder convictions in Massachusetts. Such disparities illustrate the felony-murder doctrine's susceptibility to racism, which derives in part from its low burden of proof and the especially broad discretion it affords prosecutors—dynamics that are especially pronounced when it comes to strict-liability felony-murder laws. By eliminating the Commonwealth's burden of proving the most clearly defined indicia of culpability—*actus reus* and *mens rea*—Massachusetts's strict-liability felony-murder rule invited prosecutors and decision-makers to draw inferences based on subjective, non-legal proxies for culpability that are inherently susceptible to racial bias. The influence of racial bias on LWOP sentences for strict-liability felony-murder convictions renders those sentences unconstitutional.

A. Data illustrate racial bias in the application of the felony-murder doctrine.

The data Mr. Shepherd presents show an acute racial disparity regarding the administration of the felony-murder doctrine in Massachusetts, even apart from structural racism within the broader criminal legal system. There are 108 people serving LWOP for first-degree strict-liability felony murder. Of these, 82% are people of color; 59% are Black, and just 18% are White. Def. Br. at 24-30.

That stark racial disparity exceeds the racial disparity among people serving LWOP for other first-degree murder offenses: 56% are people of color (33% Black), while 44% are White. Id.[13] It also exceeds the racial disparity among the state prison population writ large, where 59% are people of color (30% Black), and 40% are White.[14] These figures are illustrated in the table below.[15]

[13] Other first-degree murder convictions include convictions based on theories of deliberate premeditation, extreme atrocity or cruelty, and malice.

[14] These percentages show the criminally-sentenced population in DOC custody. 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).

[15] This disparity is even more striking given the 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).

Racial Disparity Among People Serving LWOP for Felony Murder			
	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%

Investigative journalism by the *Boston Globe* Spotlight Team has further uncovered the racialized prosecution of felony murder in Massachusetts by reviewing a sample of cases dating back to the 1970s.[16] Data show similar disparities

[16] See 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 "[o]f those whose race can be determined, all but one are Black or Hispanic").

in other jurisdictions, including California,[17] Colorado,[18] Illinois,[19] Minnesota,[20] Missouri,[21] and Pennsylvania.[22]

B. The racialized impact of the strict-liability felony-murder rule stems in part from the low burden of proof it imposes and the broad prosecutorial discretion it affords.

Research illustrates that cognitive racial biases—conscious or unconscious—impact charging and sentencing determinations. For example, deep-seated narratives falsely associating Blackness, violence, and criminality endure as a legacy of slavery and convict leasing and are further reinforced through persistent racial inequity in the criminal legal system.[23] These narratives produce cognitive biases

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[17] Committee on Revision of the Penal Code, Annual Report and Recommendations, 51 (2021); Grosso, et al., Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement, 66 UCLA L. Rev. 1394, 1442 (2019).

[18] Pyrooz, Demographics, Trends, and Disparities in Colorado Felony Murder Cases: A Statistical Portrait (August 1, 2023), https://ssrn.com/abstract=4527501.

[19] Albrecht, The Stickiness of Felony Murder: The Morality of a Murder Charge, 92 Miss. L.J. 481, 504 & 510 (2023).

[20] See 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); 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.

[21] Ghandnoosh, supra note 3, at 5.

[22] 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.

[23] See, e.g., Muhammad, The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America 4 (2010); Hinton & Cook, The Mass Criminalization of Black Americans: A Historical Overview, 4 Ann. Rev.

that impact decision-making in policing, prosecution, and sentencing.[24] 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'")). Similarly, the "association of positive stereotypes and attitudes" with White people result in "preferential treatment" of White people within the criminal legal system that drive racial disparities.[25]

The felony-murder doctrine is especially susceptible to racial bias because it reduces the prosecution's burden to prove the most clearly defined indicators of culpability: *actus reus* and *mens rea*.[26] Cognitive biases are most likely to influence outcomes when decision makers have wide discretion and minimal accountability.[27]

Criminology 261, 270 (2021), https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-060520-033306.

[24] See, e.g., 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, 889-91 (2004).

[25] Lynch & Haney, Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury, 2011 Mich. St. L. Rev. 573, 590 (2011); see also Smith & Levinson, The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion, 35 Seattle L. Rev. 795, 899 (2012) (discussing social science research that shows "empathy is experienced more for in-group members than out-group members").

[26] See generally Moriearty, Albrecht & Glass, supra note 7.

[27] See Smith & Levinson, supra note 25 (undertaking a step-by-step consideration of how prosecutorial discretion may be fraught with implicit bias).

Under the strict-liability felony-murder rule, the Commonwealth did not have to prove "intent" to cause a death—or even the less-culpable mental states of malice or recklessness. Nor did it have to prove that the defendant killed anyone or aided in a killing. Accordingly, charging determinations were guided by fewer legal factors and thus less likely to track the strength of the evidence. In this context, prosecutors' evaluations of culpability were inherently vulnerable to racial biases.

The felony-murder doctrine also amplifies racial bias because it gives prosecutors a particularly wide range of charging options for offenses involving more than one defendant. Under Massachusetts's strict-liability felony-murder doctrine, prosecutors could choose to charge joint venturers with the underlying felony alone, a felony and an unintentional killing (such as involuntary manslaughter), a felony and second-degree felony murder carrying a life sentence, or a felony and first-degree felony murder carrying a mandatory sentence of death-in-prison. When "wide-ranging homicidal liability . . . exists on strikingly similar facts," the resulting broad prosecutorial discretion contributes to "inequity in plea negotiations, trials, and sentencings, leaving a system ripe for abuse and incapable of delivering racial equity."[28] 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

[28] Egan, supra note 20, at 551.

disadvantages people of color."[29] As put by some scholars, "[t]he strikingly disparate patterns of felony murder charging and conviction ... suggest that felony murder is a crime prosecutors have seen little need to punish when committed by whites."[30]

The cognitive biases impacting felony-murder charges and convictions derive in part from racial stereotypes regarding group criminality. A recent empirical study shows that decision-makers are more likely to infer group liability in cases involving defendants of color, yet more likely to treat White defendants as individuals.[31] The study involved an Implicit Association Test of over 500 jury-eligible participants, showing that participants were more likely to individualize White defendants, yet associate "Black" and "Latino" defendants with a group. The study's authors concluded that decision-makers "may possess a psychological baseline whereby Black and Latino defendants are less likely to be viewed as individuals and more

[29] Ghandnoosh, Stammen & Budaci, supra note 3, at 6; see also Subramanian, Digard, Washington & 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.").

[30] Binder & Yankah, supra note 6, at 225.

[31] Cohen, supra note 7 ("A national empirical study the authors conducted supports the claim of racialized group liability in the felony murder rule, demonstrating that Americans automatically individualize white men, yet automatically perceive Black and Latino men as group members.").

likely to be automatically perceived as group members," which leads "decision makers to indifferently impute guilt to Black and Latino defendants based upon mere association."[32] This automatic "individuation" of White defendants and "de-individuation" of Black defendants undoubtedly has influenced prosecutors' charging decisions in felony-murder cases.[33]

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

The felony-murder doctrine has especially pronounced impacts on young people and survivors of domestic and sexual violence that, combined with structural racism throughout the criminal legal system, contribute to overall racial disparities in felony-murder charges and convictions.

Data show that 30% of people serving LWOP for felony-murder convictions in Massachusetts were 18-20 years old at the time of their conviction. See Addendum B, Letter from Committee for Public Counsel Services Parole Advocacy Unit (showing that 32 of the 108 people serving LWOP for felony murder were

[32] Id. at 48.

[33] Smith, Levinson & Robinson, Implicit White Favoritism in the Criminal Justice System, 66 Ala. L. Rev. 871, 873 (2015) ("Once activated, these implicit associations can color the real-world behavior of judges and jurors, prosecutors and police, commutation boards, and defense counsel as they make countless decisions across the spectrum of discretionary points in the criminal justice system").

within that age group at the time of offense).[34] This data aligns with research showing that felony-murder prosecutions target young people, who, as this Court has recognized, are vulnerable to impulsivity and peer pressure and are less likely than older adults to understand the possible consequences of their actions. Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 660 (2013).[35]

[34] Notably, these 32 people would be affected by the outcome of Commonwealth v. Mattis, No. SJC-11693 and Commonwealth v. Robinson, No. SJC-09625, which are currently pending before this Court.

[35] Trautfield, UCLA Center for the Study of Women/Streisand Center Special Circumstances Conviction Project, Life Without Parole and Felony Murder Sentencing in California 9 (2023), https://csw.ucla.edu/wp-content/uploads/2023/07/SCCP_Life_Without_Parole_Sentencing.pdf (finding, in California, "[t]he most common age at offense for individuals convicted through felony murder and sentenced to LWOP is 18"); Ghandnoosh, Stammen & Budaci, supra note 3, at 2 (stating most people serving LWOP for felony-murder in Pennsylvania and Minnesota were 25 or younger at time of offense); 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, 103 (2021) (concluding the "felony murder rule facilitates the sentencing of adolescents who did not commit nor intend the actual act of murder"); Caldwell, The Twice Diminished Culpability of Juvenile Accomplices to Felony Murder, 11 U.C. Irvine L. Rev. 905, 907 (2021) (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,[36] and in turn disproportionately exposed to felony-murder convictions.[37] Among the thirty-two people serving LWOP for strict-liability felony-murder whose offenses occurred when they were 18-20 years old, records indicate that nineteen are Black, one is Black and Hispanic, seven are Hispanic, one is Asian, and four are White. See Addendum B. This means 87.5% of this group are Black, Hispanic, or Asian, 53% are Black, and 12.5% are White.

Black and brown youth face criminal charges for youthful misbehavior that is less likely to result in criminal charges for their White peers,[38] leading to longer

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[36] 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, 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).

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

[38] See Development Services Group, Inc. Office of Juvenile Justice and Delinquency Prevention, Racial and Ethnic Disparity in Juvenile Justice Processing (2022), https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/racial-and-ethnic-disparity ("Data have shown that youths of color are more likely than white youths to be arrested and subsequently go deeper into the juvenile justice system"); Nat'l Acads. of Scis., Reducing Racial Inequality in Crime and Justice: Science, Practice, and Policy 153-55 (2023) (discussing research on the relationship between racial segregation and early exposure to criminalization).

criminal records.[39] Once a young person has cycled through the carceral system, they may face higher charges, including felony-murder, than their peers without records for the same conduct. See Commonwealth. v. Humberto H., 466 Mass. 562, 573 (2013) ("Prior records or lack thereof may be significant in the initial decision whether to charge a juvenile with a crime."). Youth with criminal records are also subjected to negative collateral consequences in housing and employment,[40] which for Black and Latinx youth are compounded by their racialized exclusion from "high quality education, employment (especially higher income jobs), safe housing, credit, and good health care."[41] Consequently, these young people 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 sexual violence, who may be present during—or forced to participate in—their abusive

[39] See Siringil Perker & 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://tinyurl.com/un2pa5fn (noting that young person's "[e]xposure to toxic environments such as adult jails and prisons" can have traumatic impact contributing to further criminalization).

[40] 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.

[41] Insel & 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.

partner's violence. Because survivors are frequently not believed about their experiences—or not seen as victims of violence because they did not leave their abusers—they end up further victimized by the state when charged and convicted of felony murder. A survey study conducted by the California Coalition for Women Prisoners found "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."[42] Then, due to racism, Black and brown women face additional barriers to leaving abusive situations, putting them at higher risk for felony-murder charges.[43] These barriers include "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."[44] Studies have illustrated that some police officers "discredit" Black

[42] Ghandnoosh, Stammen & Budaci, supra note 3, at 6; see also Jones, Ending Extreme Sentencing Is a Women's Rights Issue, 23 Geo. J. Gender & L. 1, 3-4 (2022), https://tinyurl.com/y4xu8xan (describing how women may engage in felony conduct to defend themselves from abuse); Dichter & Osthoff, Nat'l Online Resource Ctr. on Violence Against Women, Women's Experiences of Abuse as a Risk Factor for Incarceration: A Research Update (2015), https://tinyurl.com/3rz6ybtp (describing paths from abuse to incarceration, including use of violence in response to abuse).

[43] 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).

[44] Survived & Punished, Defending Self Defense: A Call to Action 11 (2022), https://survivedandpunished.org/wp-content/uploads/2022/03/DSD-Report-Mar-21-final.pdf.

women seeking crisis intervention.[45] These racialized barriers to leaving abusive situations can contribute to racial disparities in felony-murder prosecutions.

D. Research refutes the claim that the racially disparate impact of the felony-murder doctrine can be explained by differences in behavior.

Research regarding the felony-murder doctrine belies any claim that its racially disparate impact is explained by racial differences in behavior giving rise to felony-murder charges.

For example, a Minnesota study found differential treatment of White and Black defendants when it came to second-degree felony murder, which carries a sentence of up to forty years in prison.[46] That study used criminal complaints to compare the respective facts and outcomes of individual felony-murder cases—including comparisons of co-defendants of different races within the same case—and found "White defendants are frequently punished leniently, while defendants of color receive harsher treatment even when the facts support opposite outcomes."[47] The study found White defendants convicted of second-degree felony murder were more likely to have pled down to the charge, whereas Black defendants convicted of

[45] Waller, Harris & Quinn, supra note 43, at 1239 (citing Few, The Voices of Black and White Rural Battered Women in Domestic Violence Shelters, 54 Fam. Rels., 488-500 (2005)).
[46] Minn. Stat. Ann. § 609.19.
[47] Egan, supra note 20, at 548-51.

felony murder were more likely to have been convicted of the most severe offense with which they were charged.[48]

The Minnesota study illustrates the dynamics of both overcharging and upcharging: charging defendants of color more frequently in situations where White people would not be charged, and bringing more serious charges for less serious conduct in cases involving people of color. This study further supports the conclusion that racial disparities in felony-murder prosecutions are due to the rule's structural features and amplification of racial bias.

* * *

In sum, ample evidence establishes that racial bias impacted strict-liability felony-murder convictions and thus the LWOP sentences imposed in those cases.

II. Application of the strict-liability felony-murder rule in Massachusetts violates equal protection.

Evidence of racial bias in the application of the strict-liability felony-murder rule supports a finding that convictions obtained under the rule violate the Equal Protection Clause of the Fourteenth Amendment, which "prohibit[s] discriminatory application of impartial laws." Commonwealth v. Lora, 451 Mass. 425, 436 (2008) (quoting Commonwealth v. Franklin Fruit Co., 388 Mass. 228, 229–230 (1983)).

[48] Egan, supra note 20, at 548; Turner, supra note 20.

See also Commonwealth v. King, 374 Mass. 5, 20 (1977) ("prosecution based on impermissible standards" must be dismissed).

An equal protection claim may be established by a showing of selective prosecution. While some selectivity or discretion must be tolerated in criminal law enforcement, that selectivity is permissible only so long as it "is not based on 'an unjustifiable standard such as race, religion or other arbitrary classification.'" Lora, 451 Mass. at 437 (quoting King, 374 Mass. at 20). See also Oyler v. Boles, 368 U.S. 448, 456 (1962). To make a selective-prosecution claim, a criminal defendant bears the initial burden to present evidence demonstrating "at least a reasonable inference of impermissible discrimination." Commonwealth v. Franklin, 376 Mass. 885, 894 (1978). That inference requires "a broader class of persons than those prosecuted has violated the law, ... failure to prosecute was either consistent or deliberate, ... and the decision not to prosecute was based on an impermissible classification such as race, religion, or sex." Id. (citations omitted). This *prima facie* showing can be made through statistical data. See, e.g., Commonwealth v. Long, 485 Mass. 711, 717 (2020). The burden then shifts to the Commonwealth to rebut the inference. Commonwealth v. Wilbur W., 479 Mass. 397, 409 (2018).

Here, the statistical data Mr. Shepherd presented demonstrates the particularly extreme racialized imposition of the strict-liability felony-murder rule in Massachusetts. See supra Part I.A. Research demonstrates these observed racial

disparities are likely not due to a neutral application of the law. On the contrary, empirical studies have shown cognitive biases—including biases associating Black and brown people with group criminality—influence prosecutorial decision-making and are most likely to do so under the circumstances presented by the strict-liability felony-murder rule, which offered maximum discretion and minimal accountability. See supra Part I.B. Research also illustrates the particular racialized impact of the felony-murder rule on young people and survivors of gender-based violence. See supra Part I.C. Finally, studies like the one conducted in Minnesota suggest the racial disparity in felony murder charges and convictions cannot be explained solely by any racial disparity in offense rates. See supra Part I.D.

District attorneys' offices are generally not required to maintain or publish detailed data regarding their charging practices, making it difficult—if not impossible—for researchers to isolate racial bias as a variable when analyzing felony murder charges and convictions. However, even descriptive statistical analyses of racial disparities provide a strong indication of racial bias that should not be ignored. To disregard evidence of racial disparity is to assert that the systematic overrepresentation of Black people among those convicted of felony murder in Massachusetts and across the country is due fully to reasonable and legitimate explanations. The normalization of these racial disparities is derived from a long

history of racialized oppression in the criminal legal system and resulting racial stereotypes.[49]

But members of this Court have committed to root out systemic racism in Massachusetts's criminal legal system:

> As judges, we must look afresh at what we are doing, or failing to do, to root out any conscious and unconscious bias in our courtrooms; to ensure that the justice provided to African-Americans is the same that is provided to white Americans; to create in our courtrooms, our corner of the world, a place where all are truly equal.

Letter from the Seven Justices of the Supreme Judicial Court to Members of the Judiciary and the Bar (June 3, 2020). This commitment has been echoed by the U.S. Supreme Court. See, e.g., Pena-Rodriguez v. Colorado, 580 U.S. 206, 221 (2017) (noting "imperative to purge racial prejudice from the administration of justice"); Buck, 580 U.S. at 124 ("Discrimination on the basis of race, odious in all aspects, is

[49] See, e.g., Muhammad, supra note 23, at 4 (noting that in the early twentieth century, "African American criminality became one of the most widely accepted bases for justifying prejudicial thinking, discriminatory treatment, and/or acceptance of racial violence as an instrument of public safety"); Hinton & Cook, supra note 23, at 270 (noting that "statistical discourses about black criminality shaped the strategies urban law enforcement authorities deployed in black neighborhoods" even as "[t]he alarming racial disparities in arrest and incarceration rates led W.E.B. Du Bois and other prominent civil rights activists to vociferously critique racism in the justice system"); Hetey & Eberhardt, The Numbers Don't Speak for Themselves: Racial Disparities and the Persistence of Inequality in the Criminal Justice System, 27 Current Directions in Psych. Sci. 183, 184 (May 2018) ("Ironically, researchers have found that being presented with evidence of extreme racial disparities in the criminal justice system can cause the public to become more, not less, supportive of the punitive criminal justice policies that produce those disparities.").

especially pernicious in the administration of justice." (quoting Rose v. Mitchell, 443 U.S. 545 (1979)).

Addressing systemic racism requires acting on data of stark racial disparity and research suggesting selective prosecution, such as presented here. Failing to act on this equal protection violation would result in the continued lifetime incarceration of 108 people whose sentences were likely influenced by racial bias. This outcome is untenable in a legal system that promises equal justice.

III. Mandatory life-without-parole sentences for strict-liability felony murder are cruel and unusual, violating the Eighth Amendment and Article 26.

Both the Massachusetts Declaration of Rights and the U.S. Constitution prohibit disproportionate punishments. The Eighth Amendment's prohibition on cruel *and* unusual punishments is similar to—but narrower than—Article 26's prohibition on cruel *or* unusual punishments. See art. 26 of the Massachusetts Declaration of Rights; Commonwealth v. Concepcion, 487 Mass. 77, 86 (2021) (citing Diatchenko, 466 Mass. at 668). The "touchstone" of this prohibition is "proportionality." Concepcion, 487 Mass. at 86 (quoting Commonwealth v. Perez, 477 Mass. 677, 683 (2017)).

A proportionality analysis requires (1) an "inquiry into the nature of the offense and the offender in light of the degree of harm to society," (2) "a comparison between the sentence imposed here and punishments prescribed for the commission

of more serious crimes in the Commonwealth," and (3) "a comparison of the challenged penalty with the penalties prescribed for the same offense in other jurisdictions." Concepcion, 487 Mass. at 86 (quoting Cepulonis v. Commonwealth, 384 Mass. 495, 497–98 (1981)). The U.S. Supreme Court has adopted categorical bans on LWOP and death sentences where there is a mismatch between "the culpability of a class of offenders and the severity of a penalty." Miller v. Alabama, 567 U.S. 460, 470 (2012). Significantly, when applying this categorical ban in the context of juvenile life-without-parole sentences, the Court recognized the rule to be retroactive. Montgomery v. Louisiana, 577 U.S. 190 (2016). Though this Court in Brown announced a prospective rule, persons like Mr. Shepherd were not parties in Brown. Mr. Shepherd now raises whether continued imposition of a death-in-prison sentence passes constitutional muster in light of data demonstrating stark racial disproportionality among the population serving LWOP for strict liability felony murder.

Notably, the Brown court did not have before it the data this Court now has, nor the research suggesting racially biased application of the felony-murder doctrine. See supra Part I. Given that data and the proportionality analysis set forth below, this Court should hold that mandatory LWOP sentences for strict-liability felony-

murder convictions are cruel and unusual under both the Eighth Amendment and Article 26 and order those sentences reduced.[50]

A. Life-without-parole is a disproportionately severe punishment for strict-liability felony murder.

"[L]ife without parole is 'the second most severe penalty permitted by law,'" and it shares "some characteristics with death sentences that are shared by no other sentences," including relegation to death-in-prison. Graham v. Florida, 560 U.S. 48, 69 (2010). Yet the strict-liability felony-murder rule imposed this penalty on those who neither killed nor intended to kill, despite U.S. Supreme Court case law establishing that lack of intent diminishes culpability. See, e.g., Miller, 567 U.S. at 490 (Breyer, J. concurring) ("Graham recognized that lack of intent normally diminishes the 'moral culpability' that attaches to the crime in question");[51] Enmund v. Florida, 458 U.S. 782, 798, 801 (1982) ("It is fundamental that causing harm intentionally must be punished more severely than causing the same harm unintentionally" (quotation & citation omitted)).

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[50] This is not to say Brown's malice requirement protects against disproportionate punishments. See Amici Brief of Boston University Center for Antiracist Research et al., Commonwealth v. Fisher, Dkt. No. SJC-13340 (Mass. Apr. 14, 2023). But this Court need not address that issue since the instant case addresses the circumstances of Mr. Shepherd and the 107 other individuals currently serving LWOP for pre-Brown convictions.

[51] While Miller addressed mandatory LWOP sentences for juveniles convicted of felony murder, the opinion's reasoning addressed both the youthful status of the offenders and the nature of the felony murder offense.

This Court has already recognized that strict-liability felony murder can result in disproportionate sentences. Chief Justice Gants underscored in Brown that the felony murder doctrine may "produce a conviction of murder in the first degree that would appear out of proportion to a defendant's culpability" such that a mandatory LWOP sentence "is not consonant with justice" under certain circumstances. Brown, 477 Mass. at 826 n.1 (Gants, C.J., concurring). Justice Gaziano likewise recognized "the problem of a disproportionate conviction of murder in the first degree," but would have relied on statutory authority (G. L. c. 278, § 33E) to reduce verdicts on a case-by-case basis. 477 Mass. at 842 (Gaziano, J. concurring).

Since strict-liability felony murder inherently involves lesser culpability than premeditated or intentional murder, this Court should find LWOP sentences for strict-liability felony-murder convictions are categorically disproportionate and must be reduced.

B. The felony-murder doctrine's susceptibility to racial bias contributes to the cruelty and disproportionality of LWOP sentences for felony murder.

The mandatory LWOP sentences imposed for strict-liability felony murder also violate Article 26 and the Eighth Amendment because evidence demonstrates they were influenced by racial bias. As discussed above, the racially disparate impact of the strict-liability felony-murder rule is due in part to the broad discretion and low burden of proof the doctrine affords prosecutors. See supra Part I. This

evidence of racial bias highlights the arbitrariness, punitiveness, and cruelty of mandatory LWOP sentences for strict-liability felony murder. Indeed, such evidence suggests people of color are more likely to be sentenced based on systemic racism and implicit bias than based on the unique characteristics of their offense—including their *mens rea*—and their individual histories. Where mandatory LWOP sentences are imposed based on race, these sentences are disproportionate and violate the Eighth Amendment and Article 26. C.f. Miller, 567 U.S. at 470.

C. There is a growing consensus that LWOP sentences for felony murder are disproportionately severe.

The Brown decision aligns with a growing consensus about the disproportionality of mandatory life-without-parole sentences for strict-liability felony murder. Indeed, only nine states mandate such a sentence today.[52]

Over ten years ago, one Massachusetts court noted evolving standards with respect to felony murder, recognizing that the felony-murder rule "has been legislatively or judicially abolished in some jurisdictions, limited in others (including ours), and criticized in many more." Commonwealth v. Hanright, No. CRIM.A. 11-301, 2012 WL 3031467, at *11 (Mass. Super. July 10, 2012). Since then, many more states have limited the scope of their felony-murder laws or reduced the sentencing exposure associated with them.

[52] See supra note 12.

In 2018, California redefined felony murder for accomplices to require the 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. See Cal. SB-1437. In 2021, Colorado eliminated its mandatory LWOP sentence for felony murder, substituting in its place a sentence of sixteen to forty-eight years in prison. Colo. Rev. Stat. § 18-3-102; Colo. S.B. 21-124. 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. Minn. H.F. No. 2890/S.F. No. 2909 (2023). In contrast to Brown, the California and Minnesota changes to felony murder were made retroactive, allowing people convicted under the prior law to petition for relief.[53]

* * *

For these reasons, the disproportionate and racially disparate mandatory LWOP sentences imposed for first-degree, strict-liability felony murder are unconstitutional and must be reduced.[54]

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[53] See infra Part IV.

[54] While the Massachusetts Supreme Judicial Court rejected Eighth Amendment and Article 26 challenges to mandatory LWOP sentences for felony-murder 45 years ago, Commonwealth v. Watkins, 375 Mass. 472, 487 (1978), the evolving standards demonstrated by these changes distinguish that holding. Indeed, Article 26 "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society," Commonwealth v. Okoro, 471 Mass. 51, 61 (2015) (quotation &

IV. The unconstitutional sentences imposed for strict-liability felony murder can be remedied through resentencing hearings or parole eligibility without imposing an undue burden on the courts.

This case presents an opportunity to remedy the Eighth Amendment, Article 26, and Equal Protection Clause violations wrought by the strict-liability felony-murder rule. See Montgomery, 577 U.S. at 202 (requiring retroactive application of Miller's invalidation of LWOP for juveniles, explaining "when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful").

This Court has the authority to fashion appropriate relief for the 108 people currently serving mandatory LWOP for strict-liability felony murder by either (i) allowing resentencing hearings with a presumption of a sentence reduction or (ii) automatically reducing all strict-liability, felony-murder LWOP convictions to convictions of second-degree murder with the possibility of parole.

A. Resentencing hearings are required and will not present a significant burden on the judicial system.

This Court and the trial courts have authority under G.L. c. 278, § 33E and Mass. R. Crim. P. 25(b)(2) and 30(a), respectively, to fashion appropriate postconviction relief. "The postconviction powers granted by the Legislature to the courts at both trial and appellate levels reflect the evolution of legislative policy

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citation omitted), such that sentencing regimes upheld nearly two generations ago nevertheless may be "constitutionally suspect" today. Diatchenko, 466 Mass. at 664.

promoting judicial responsibility to ensure that the result in every criminal case is consonant with justice." Commonwealth v. Woodward, 427 Mass. 659, 666 (1998). These rules "offer[] a means to rectify a disproportionate verdict . . . short of granting a new trial." Id. at 667. Accordingly, these rules provide an appropriate mechanism for reducing the disproportionate sentences at issue here.

This Court could provide trial courts with guidance for considering petitions for relief regarding mandatory LWOP sentences for strict-liability felony murder—including a presumption that a sentence reduction is required. Rule 25(b)(2) or Rule 30(a) hearings, as appropriate, would allow trial courts to evaluate each case based on principles of proportionality and equal justice. The constitutional infirmities identified mandate relief, and other states have implemented similar resentencing procedures, proving their feasibility.

As described above, in 2018, the California legislature retroactively changed its felony-murder law, limiting felony-murder convictions for accomplices. Cal. SB-1437. A person convicted of felony murder under the old law may petition for relief in their sentencing court if they were convicted of murder, attempted murder, or manslaughter based on a theory of felony murder, and could not have been convicted of murder or attempted murder under the new law. Cal. Penal Code § 1172.6(a). If the petitioner alleges eligibility for relief, the court holds a hearing to determine whether to vacate the conviction and resentence the petitioner to a term "not greater

than the initial sentence." Id. § 1172.6(d)(1). At that hearing, it is the prosecution's burden to show that the petitioner is ineligible for relief. Id. § 1172.6(d)(3). The parties may also stipulate to a reduced verdict. Id. § 1172.6(d)(2). Minnesota's similar legislative changes to felony murder also apply retroactively.[55]

Other states' approaches to the retroactivity of felony-murder reforms demonstrate that judicial hearings are feasible mechanisms for relief from disproportionate sentences. In California, "at least 602 people ... had their prison sentences reduced between 2019 and 2022," which "erased an estimated 11,353 years from their combined terms and saved taxpayers between $94 million and $1.2 billion in prison cost."[56] A petition process for the 108 people serving LWOP for strict-liability felony murder in Massachusetts would be much smaller in scope than the process that has successfully unfolded in California. Any burden on the courts will be limited and finite, whereas the burden of inaction will involve the lifetime incarceration of those serving unconstitutional sentences.

[55] Minn. H.F. No. 2890/S.F. No. 2909 (2023).

[56] Rector, How 600-Plus California Inmates Got More Than 11,000 Years Cut Off Their Prison Sentences, L.A. Times, Aug. 3, 2023, https://www.latimes.com/california/story/2023-08-03/california-criminal-justice-reform-reduced-prison-terms-felony-murder.

B. In the alternative, this Court should reduce all life-without-parole sentences for strict-liability felony murder to second-degree murder carrying a life sentence with the possibility of parole.

In the alternative, this Court can automatically reduce the verdicts of all 108 people serving LWOP for strict-liability felony-murder convictions to second-degree murder carrying a life sentence with the possibility of parole. This Court has the authority to order such a remedy under Section 33E, G.L. ch. 278, § 33E.

CONCLUSION

For these reasons, this Court should allow all people serving death-in-prison sentences for strict-liability felony-murder convictions to petition for sentencing relief and set forth guidance establishing a presumption of a reduction. In the alternative, this Court should automatically reduce their sentences to life with the possibility of parole.

Dated: October 16, 2023

Respectfully submitted,

/s/ Caitlin Glass

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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 engages in research, policy, narrative, and advocacy initiatives. 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 safety, justice, and healing, and disproportionately harm people of color. The Center joins this brief to share critical context about the racially biased application of the felony-murder rule, and to emphasize that life-without-parole sentences for felony murder are unconstitutional. 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.

Families for Justice as Healing ("**FJAH**") is a nonprofit organization headquartered in Roxbury, Massachusetts. Its membership is composed of incarcerated and formerly incarcerated women, and it is a sister organization of The National Council for Incarcerated and Formerly Incarcerated Women and Girls. Part of FJAH's mission to end the incarceration of women in Massachusetts involves challenging long sentences for currently incarcerated people. Its interest in this litigation stems from the potential of retroactive relief from long sentences currently imposed on FJAH's members through felony murder and joint venture charges. FJAH believes such decarceration is essential to building reimagined communities that invest in people, not incarceration.

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 **Fred T. Korematsu Center for Law and Equality** ("Korematsu Center") is a non-profit organization based at the Seattle University School of Law. Inspired by the legacy of Fred Korematsu, who defied military orders during World War II that ultimately led to the unlawful incarceration of over 120,000 Japanese Americans, the Korematsu Center works to advance social justice for all. It has a special interest in ensuring fair treatment in our nation's courts. It has filed amicus briefs in state and federal courts to inform courts about race disproportionality in the treatment and punishment of Black people in the criminal legal system. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

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 retroactive sentencing relief for people convicted 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.

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.

Addendum B

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October 16, 2023

Caitlin Glass
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Sent via Email

Re: Mattis and Robinson Data Request

Dear Ms. Glass:

I am providing this letter in response to your request for data involving individuals who may be impacted by a favorable decision in the Mattis and Robinson cases. We arrived at this data by comparing the list provided by Attorney Claudia Bolgen from the case record in Commonwealth v. Shepherd, SJC-12405, of people serving felony murder life without parole ("LWOP") sentences to the list that we have of people serving LWOP sentences who were 18, 19, or 20 at the time they committed the crime.

The data comparison indicates that, out of the 108 individuals serving felony murder LWOP sentences, 32 of those individuals were aged 18, 19, or 20 years old at the time of the offense. Utilizing Attorney Bolgen's data, which included racial demographics, we conclude the following regarding the racial breakdown of the cohort:

Race	**Number of Individuals**
Black	19
Black/Hispanic	1
Hispanic	7
Asian	1
White	4

Sincerely,

Mara Voukydis, Esq.
Director of Parole Advocacy
Private Counsel Division, Committee for Public Counsel Services

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 7,443 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 October 16, 2023, I served a copy of this brief on all parties through the e-file system and by electronic mail.

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