COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11591

COMMONWEALTH OF MASSACHUSETTS,

PLAINTIFF - APPELLEE,

v.

AARON MORIN,

DEFENDANT - APPELLANT

ON APPEAL FROM A JUDGMENT OF FELONY-MURDER IN THE FIRST DEGREE ENTERED IN THE BRISTOL DIVISION OF THE SUPERIOR COURT DEPARTMENT

AMICUS CURIAE BRIEF OF MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE DEFENDANT-APPELLANT

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Interest of Amicus Curiae

The Massachusetts Association of Criminal Defense Lawyers (MACDL), as *amicus curiae*, submits this brief in support of defendant-appellant Aaron Morin. MACDL is an incorporated association of more than 1,000 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 correct, problems in the criminal justice system. It files *amicus curiae* briefs in cases raising questions of importance to the administration of justice.

This case presents an issue important to MACDL. The common law felony-murder rule is an exception to the law of joint venture in Massachusetts and to principles of this Court's criminal jurisprudence. MACDL has an interest in advocating its views on the

felony-murder rule because clients represented by the attorneys who constitute MACDL's membership have been and will continue to be directly affected by this doctrine. Furthermore, because MACDL is dedicated to promoting fairness and justice in the criminal justice system, it has an interest in ensuring that the basic principles of criminal jurisprudence are consistently applied and upheld.

Statement of Issues

As it relates to the interests of MACDL, this case raises the following issue:

1. Whether this Court, which has noted that the common law felony-murder rule is an exception to two key principles of its criminal jurisprudence, should abolish the doctrine as other jurisdictions have done.

Statement of the Case and Statement of the Facts

MACDL adopts the statement of the case and statement of the facts set forth in the brief of Defendant-Appellant Aaron Morin. Appellant's Br. at 2-16. Mr. Morin was convicted of murder in the first degree on a theory of felony murder, with unarmed robbery as the predicate felony. *Id.* at 2. He was sentenced to imprisonment for life, without the possibility of parole. *Id.* Mr. Morin's co-defendant,

Nelson Melo, was also convicted of first-degree felony murder. Appellee's Br. at 2.

For purposes of this brief, MACDL highlights the following key facts that bear on Mr. Morin's involvement, or lack thereof, in the death of the victim, Chad Fleming. First, the evidence presented demonstrated that any scheme to rob Mr. Fleming did not include a plan or the intention to kill. Appellant's Br. at 3. Witness testimony indicated that Mr. Melo and Mr. Morin planned to stage a robbery of Mr. Fleming at an apartment owned by Mr. Melo located at 584 Bay Street, where Mr. Melo would leave the back door unlocked and appear to be a victim. Appellee's Br. at 6, 7; Appellant's Br. at 7, 9. Mr. Morin would grab Mr. Melo and another man would grab Mr. Fleming while a third person took Mr. Melo's and Mr. Fleming's drugs and money. Appellant's Br. at 7.

Second, evidence supported Mr. Morin's argument that Mr. Melo unilaterally strangled Mr. Fleming outside of any plan to rob and that Mr. Fleming was still alive and communicative after the other participants in the robbery left the apartment. *Id.* at 3. The medical examiner testified that Mr. Fleming was killed by strangulation, after which Mr. Fleming

would not have been able to speak. *Id.* at 14-15. On the night that Mr. Fleming died, neighbors who lived in the first-floor Bay Street apartment heard footsteps running down the stairs, and one saw a car with three people in it pull away. *Id.* at 10; Appellee's Br. at 9. After the three people left, one of the neighbors heard a voice other than Mr. Melo's coming from the upstairs apartment. Appellant's Br. at 10-11. Additionally, when the tenant who rented the second-floor apartment from Mr. Melo returned home that night, he saw Mr. Melo hunched over a person lying on a bed in one of the bedrooms. *Id.* at 11. Finally, while swabs from the shirt and arm of Mr. Melo produced DNA evidence consistent with the profiles of Mr. Melo and Mr. Fleming, Mr. Morin was excluded. *Id.* at 16.

Introduction and Summary of the Argument

The felony-murder rule has been a feature of the Commonwealth's criminal law for more than 150 years. In a decision reported in 1863, this Court cited seventeenth century English Jurist Michael Dalton for the proposition that where "divers[e] persons come in one company to do any unlawful thing, as to kill, rob or beat a man, or to commit a riot, or to do any other

trespass, and one of them in doing thereof kill a man, this shall be adjudged murder in them all." *Commonwealth v. Campbell*, 89 Mass. 541, 543-44 (1863) (citing 1 Hale P.C. 441). Thirty-six years later, the Court cited the 1701 English case of *Rex v. Plummer* in observing that "an accidental homicide may be made murder if it occurs in the course of an attempt to commit a felony." *Commonwealth v. Chance*, 174 Mass. 245, 253 (1899) (citing *Rex*, J. Kel. 109, 111, 117). From these beginnings, the felony-murder rule took root in Massachusetts and has produced a criminal jurisprudence in which the rule features prominently; since the beginning of 2016 alone, discussion of the rule appeared in twelve of the Court's opinions. *See, e.g.*, *Commonwealth v. Williams*, 475 Mass. 705, 710-712 (2016); *Commonwealth v. Carter*, 475 Mass. 512, 527-530 (2016); Commonwealth v. Mazariego, 474 Mass. 42, 49 (2016).

Despite its prevalence, the felony-murder rule has long been the subject of criticism. The Court's opinion in *Chance*—one of the earliest known references to the rule in Massachusetts—is illustrative. There, the Court observed that rule "has received severe and well known criticism, among

others from Lord Macauley in the notes to his draft of a penal code for India," but concluded that "it would be hard to overrule it."[1] *Chance*, 174 Mass. at 253. More recently, in declining to expand the scope of the rule, the Court has offered criticism of its own. In *Commonwealth v. Matchett*, the Court noted that the felony-murder rule is one "of questionable origin" that—after going unchallenged in early common law, where practically all felonies were punishable by death—was abolished by England in 1957. 386 Mass. 492, 503 n.12 (1982). Similarly, in *Commonwealth v. Tejeda*, the Court described the felony-murder rule as an "unusual doctrine" that tends to "divorc[e] moral culpability from criminal liability" and impose "harsh consequences . . . for unintended or accidental killings." 473 Mass. 269, 277, 277 n.8 (2015) (citing *Matchett*, 386 Mass. at 503 n.12, 506-07).

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[1] Thomas Babington Macauley presided over the Indian Law Commissioners in drafting a penal code for India, which was completed in 1837 and enacted in 1860. Lord Macauley explicitly excluded the felony-murder rule from the code. In his view, to pronounce a man guilty of murder "because a misfortune befell him while he was committing another offense . . . is surely to confound all the boundaries of crime." *See* W. Morgan and A.G. MacPherson, Indian Penal Code (Act XLV of 1860) with Notes (1863), at 268.

Although the *Tejeda* Court declined to reach the issue, it raised the question of "whether our common law of felony murder should continue to be an exception to our basic principles of criminal jurisprudence, or whether we should join those who have abolished or redefined felony-murder." 473 Mass. at 277.

MACDL is filing this *amicus* brief to urge the Court to answer this question and to abolish the felony-murder rule. Abolishing the rule would eliminate the shortcomings identified in *Tejada* by restoring the bedrock principles that have been eroded by the rule—namely, that: (i) in all criminal cases, the Commonwealth must prove the defendant intended to commit the crime charged, and (ii) a criminal defendant should be punished for his own blameworthy conduct, not that of another. *Id.* at 276 (noting that the felony-murder rule is an exception to these "two basic principles of our criminal jurisprudence"). *See infra* at 9-18.

Since its abolition nearly six decades ago in England, application of the felony-murder rule has been significantly curtailed in numerous jurisdictions, including Massachusetts. This Court

has held, for example, that the rule applies only where the homicide is the "natural and probable consequence" of the underlying felony. *Matchett*, 386 Mass. at 505 (citing *Commonwealth v. Devlin*, 335 Mass. 555, 566-67 (1957)). And the Court has further limited the rule's application by holding that certain felonies cannot support a felony-murder conviction unless the defendant demonstrated a conscious disregard of the risk to human life. *See, e.g.*, *Matchett*, 386 Mass. at 508 (extortion); *Commonwealth v. Moran*, 387 Mass. 644, 650 (1982) (unarmed robbery). While these restrictions are appropriate, the *ad hoc* approach of applying the amorphous felony-murder rule on a case-by-case basis adheres unnecessarily to an antiquated and "unusual" doctrine of "questionable origin" that is susceptible to unfair consequences. *See infra* at 20-33.

Abolishing the felony-murder rule would help avoid these potentially unfair consequences without unduly constraining the Commonwealth's ability to prosecute defendants for murder. Proving an intention to commit an inherently dangerous crime could still establish malice sufficient for murder, but would reduce the harshness of the rule by allowing

traditional *mens rea* defenses, avoiding disproportionate punishments, and requiring culpability on the part of joint venturers. *See People v. Aaron*, 409 Mich. 672, 729-733 (1980).

The Court should embrace the approach of the Model Penal Code, Kentucky, Hawaii, and Michigan, all of which have abolished the felony-murder rule, and require that the prosecution establish malice in every murder case.

Argument

I. THE FELONY-MURDER RULE SHOULD BE ABOLISHED BECAUSE IT IS INCONSISTENT WITH SEVERAL FUNDAMENTAL PRINCIPLES OF MASSACHUSETTS JURISPRUDENCE.

A. The Felony-Murder Rule is Inconsistent with Jurisprudence Regarding *Mens Rea*.

"A fundamental tenet of criminal law is that culpability requires a showing that the prohibited conduct (*actus reus*) was committed with the concomitant mental state (*mens rea*) prescribed for the offense." *Commonwealth v. Lopez*, 433 Mass. 722, 725 (2001). This principle is the bedrock of criminal jurisprudence, not only in the Commonwealth but in all common law jurisdictions. *See, e.g., Morissette v. United States*, 342 U.S. 246, 250 (1952) ("The

contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion.").

The felony-murder rule stands in fatal tension with this bedrock principle of criminal culpability. In Massachusetts, the felony-murder rule is a common law rule developed by the courts of the Commonwealth. *Matchett*, 386 Mass. at 502. (The Commonwealth's murder statute, codified at G.L. c. 265, § 1, draws a distinction between first and second-degree murder, but does not define or otherwise explicitly call for a felony-murder rule.) The rule, "imposes criminal liability for homicide on all participants in a certain common criminal enterprise if a death occurred in the course of that enterprise." *Id.* (quoting *Commonwealth v. Watkins*, 375 Mass. 472, 486 (1978)). When prosecuting a case under the felony-murder rule, "the prosecutor need only establish that the defendant committed a homicide while engaged in the commission of a felony." *Id.* The doctrine provides a shortcut around the principle that proving first or second-degree murder requires a showing of specific intent to commit murder. It does so by "substitut[ing] the intent to commit the underlying felony for the malice

aforethought required for murder," making the rule one of "constructive malice." *Id.* (quotation omitted).

As this Court has recognized, "[a] felony-murder rule that punishes all homicides committed in the perpetration of a felony whether the death is intentional, unintentional or accidental, without the necessity of proving the relation of the perpetrator's state of mind to the homicide, violates the most fundamental principle of the criminal law." *Id.* at 506-07. Most recently, when asked to extend the felony-murder rule, this Court declined to do so, instead noting that "the common law of felony-murder is an exception to two basic principles of our criminal jurisprudence"—first, that the Commonwealth must prove a defendant's "intent to commit the crime charged" rather than allowing the jury to "conclusively presume such intent from the intent to commit another crime," and second that "generally, one is punished for his own blameworthy conduct, not that of others." *Tejeda*, 473 Mass. at 276 (quoting *Commonwealth v. Richards*, 363 Mass. 299, 306 (1973)). The effect of these exceptions are often unjust. As Justice Thurgood Marshall observed, when applying the felony-murder rule, "[w]hether death results in the

course of a felony . . . turns on fortuitous events that do not distinguish the intention or moral culpability of the defendants." *Lockett v. Ohio*, 438 U.S. 586, 620 (1978) (Marshall, J., concurring). Consequently, application of the doctrine is often "unfair, unprincipled and inconsistent with other criminal and civil standards." Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 Ariz. St. L.J. 763, 763 (1999).

Recognizing this unfairness, the American Law Institute essentially eliminated the felony-murder rule in the Model Penal Code (MPC). The MPC notes that the felony-murder rule, as adopted in most jurisdictions, is based on an "essential illogic." That illogic cannot be resolved by this Court. *See* Model Penal Code § 210.2 cmt. 6, at 36 (1980). As commentary to the MPC notes,

> Punishment for homicide obtains only when the deed is done with a state of mind that makes it reprehensible as well as unfortunate. Murder is invariably punished as a heinous offense and is the principal crime for which the death penalty is authorized. Sanctions of such gravity demand justification, and their imposition must be premised on the confluence of conduct and culpability. Thus, under the Model Code, as at common law, murder occurs if a person kills purposely, knowingly, or with extreme recklessness. Lesser culpability yields lesser liability, and a person who inadvertently kills another under circumstances not amounting to negligence is

> guilty of no crime at all. The felony-murder rule contradicts this scheme. It bases conviction of murder not on any proven culpability with respect to homicide but on liability for another crime. The underlying felony carries its own penalty and the additional punishment for murder is therefore gratuitous -- gratuitous, at least, in terms of what must have been proved at trial in a court of law.

Id. This commentary holds true today when considering the felony-murder rule in Massachusetts. Indeed, it justifies abolition of the doctrine in the Commonwealth.

B. The Felony-Murder Rule is Inconsistent With Jurisprudence Regarding Joint Venturer liability.

Felony-murder's divide between culpability and liability becomes even more apparent when applied to the law of joint venture. Under the Commonwealth's general joint-venture laws, a defendant cannot be held liable for the additional crimes committed by a co-venturer unless the defendant intended such crimes. *See Richards*, 363 Mass. at 306. Where the "additional crime" results in a death, however, the felony-murder rule establishes an exception to the general joint-venture laws and permits a defendant to be held liable without evidence that the defendant intended to cause the victim's death. *See Tejeda*, 473 Mass. at 271-72; *Commonwealth v. Hanright*, 466 Mass. 303, 307-308

(2013)("Outside the narrow context of joint venture felony-murder, we have held that joint venture liability should not extend to unintended crimes, even if such unintended crimes are the 'natural and probable' consequences of a crime in which a defendant participated as a joint venturer."). *Tejeda* provides an illustrative example of felony-murder's exception to the law of joint venture and the resulting disconnect between culpability and liability:

> Under [Massachusetts'] common law of joint venture, a defendant is guilty of armed robbery if he or she knowingly participated in the commission of the crime with the required intent, and either was armed himself or herself or knew that an accomplice was armed. If, during the course of that robbery, for instance, an accomplice were to shoot at a police officer who arrived on the scene but not kill the officer, the defendant could not be found guilty of the crime of assault with intent to murder a police officer unless the defendant knowingly participated with the accomplice in the shooting with the intent to kill, even if the assault were the natural and probable consequence of the armed robbery. However, if that same accomplice had shot and killed the police officer during the course of the robbery, [Massachusetts'] common law recognizes an exception to the ordinary rule of joint venture criminal liability: the defendant could be found guilty of the police officer's murder on the theory of felony-murder, *even if the defendant did not knowingly participate in the shooting or intend to harm the police officer.*

473 Mass. at 271-72 (2015) (emphasis added) (citations omitted).

In this scenario, if the police officer does not die, the defendant can be convicted of armed robbery and sentenced to a term of imprisonment for "life or for *any term of years*." G.L. c. 265, § 17 (emphasis added). But, if the police officer dies, the defendant can be convicted of felony murder, punishable by life imprisonment without eligibility for parole. *Id.* § 2(a). This difference in outcomes is fundamentally unjust. When the consequence of a murder conviction—that is, life in prison without the possibility of parole—is so much greater than, in this example, a robbery conviction, the intent requirement should be greater, not less. The felony-murder rule, however, turns this principles of fairness on its head. Because the felony-murder doctrine divorces culpability of the underlying felony from liability, the SJC should eliminate the exception to its criminal jurisprudence by requiring malice in all forms of murder.

C. The Felony-Murder Rule Has Outgrown Its Historical Origins.

Courts and commentators have often ascribed the felony-murder rule's origins to English Common Law. *See, e.g.*, *Tejeda*, 473 Mass. at 272; *Aaron*, 409 Mich. at 690-694; *Jenkins v. State*, 230 A.2d 262, 268 (Del. 1967); MPC § 210.2 cmt. 6 at 31 nn. 73-74; Wayne R. LaFave, Criminal Law 671 (3d Ed. 2000); Joshua Dressler, Understanding Criminal Law 515 (3d Ed. 2001). This origin is disputed, with at least one prominent commentator arguing that the felony-murder rule was a nineteenth century development centered in the United States. *See* Guyora Binder, *The Origins of American Felony Murder Rules*, 57 Stan. L. Rev. 59 (2004-2005); *see also, e.g.*, Norval Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. Pa. L. Rev. 50, 58 (1956) (citing the 16th century *Lord Dacre's* Case as an origin point); Recent Development, *Criminal Law: Felony-Murder Rule--Felon's Responsibility for Death of Accomplice*, 65 Colum. L. Rev. 1496, 1496 n.2 (1965) (attributing the origin to a mistake by English jurist Lord Coke).

Just as the felony-murder rule's origins are disputed, so too are its original motivations. "One suggested purpose is that the rule served as a means of more severely punishing incomplete or attempted

felonies, which were only misdemeanors at common law, if a killing occurred." Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 Cornell L. Rev. 446, 450 (1984-1985). This motivation would have little to do with the current scheme of criminal justice law, where certain incomplete or attempted crimes (including attempted robbery and rape) are treated as serious felonies. Another motivation, of questionable origin, is to treat all malicious acts equally since the punishments were largely the same (that is, death). *Id.* (noting scholarship has largely debunked this claim). Even if this were in fact an original concern animating the rule's creation, it is no longer of any relevance: sentences now vary according to the consequences of the offense and culpability of the actor.

In part because of the rule's murky history and inapplicability of the concerns ostensibly motivating the rule's origins, legal scholars almost universally condemn the felony-murder rule.[2] As one commentator

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[2] *See* MPC § 210.2 cmt. 6, at 31-32(Official Draft and Revised Comments 1985); Samuel H. Pillsbury, *Judging Evil* 106-08 (N.Y. U. Press)(1998); Charles Liebert

opined, "The United States . . . remains virtually the only western country still recognizing a rule which makes it possible 'that the most serious sanctions known to law might be imposed for accidental homicide.'" Roth & Sundby, *supra*, at 447-48 (quoting John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L. J. 1325, 1383 (1979)).

Wherever, and whenever, its precise origins, the original motivations for the rules are now anachronisms, and the length of the rule's pedigree should not limit this Court's ability to abolish it.

D. The Felony-Murder Rule is Inconsistent with Massachusetts Constitutional Jurisprudence.

The Supreme Court has emphasized that the "presumption of innocence . . . extends to every

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Crum, *Causal Relations and the Felony-Murder Rule*, 1952 WASH. U. L.Q. 191, 203-10 (1952); George P. Fletcher, *Reflections on Felony-Murder*, 12 Sw. U. L. REv. 413, 415-16 (1981); Martin R. Gardner, *The* Mens Rea *Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 Utah L. Rev. 635, 706-08 (1993); Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84J. Crim. L. & Criminology 679, 695-97 (1994); H.L. Packer, *Criminal Code Revision*, 23 U. TORONTO L.J. 1, 3-4 (1973); Roth & Sundby, *supra*, at 490-91; Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. Pa. L. Rev. 1497, 1498-99 & n.2 (1974).

element of [a] crime," and thus the prosecution must prove every element of a crime. *See Sandstrom v. Montana*, 442 U.S. 510, 522 (1979). By presuming the intent to commit the underlying felony as the "malice aforethought" required for murder, the Commonwealth's use of "constructive malice" in felony-murder is inconsistent with *Sandstrom* and the Due Process clause of the Fourteenth Amendment. *See generally* Roth & Sundby, *supra*, at 460-77.[3] The Supreme Court of New Mexico agreed with this line of reasoning, holding that felony-murder requires an "intent to kill" or "to do an act greatly dangerous to the lives of others or with knowledge that the act creates a strong probability of death or great bodily harm." *See State v. Ortega*, 112 N.M. 554, 565 (1991).[4] Up until this

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[3] This article also argues that felony-murder violates the Eight Amendment and the Due Process clause by imposing severe penalties without establishing culpability. *See generally* Roth & Sundby, *supra*, at 478-91. However, the line of reasoning and main case they rely on, *Solem v. Helm*, 463 U.S. 277 (1983), appears to have been overruled. *See Harmelin v. Mich.*, 501 U.S. 957 (1991).

[4] This holding, however, did not overrule felony murder entirely because a felony can still "create a strong probability of death or great bodily harm" sufficient to find an intent to kill. *See Ortega*, 817 P.2d at 1205 (quotation omitted).

point, the Court has held that malice aforethought is not presumed in the felony-murder context because "the intent to commit the underlying felony is the required malice aforethought," and thus by proving the intent to commit the underlying felony, the Commonwealth also proves malice aforethought. *See Moran*, 387 Mass. at 649-50 (1982); *Commonwealth v. Hanright*, Nos. 120283, MICR2011-00301, 2012 Mass. Super. LEXIS 179, at *28-*31 (July 10, 2012), *rev'd on other grounds* 466 Mass. 303. This line of reasoning stands in fatal tension with *Sandstrom*, violating important principles of culpability that this Court has consistently articulated in nearly every other context.

II. MASSACHUSETTS SHOULD FOLLOW OTHER JURISDICTIONS IN ABOLISHING THE FELONY-MURDER RULE.

Rejection of the felony-murder rule by this Court would not be anomalous, but consistent with actions already taken in other jurisdictions. It would also be a logical next step given the significant limitations this Court has already imposed on the rule. The felony-murder rule has either been explicitly or effectively abolished in three U.S. jurisdictions: judicially in Michigan, and legislatively in Hawaii and Kentucky. As noted above,

the MPC also abolishes it, and several common-law countries have also abandoned the rule.

While this Court's restrictions have moved the felony-murder rule in Massachusetts further from the original common law doctrine, they cannot remedy the "essential illogic" at the heart of the rule and therefore cannot completely avoid unjust results. As the reasoning of these other jurisdictions demonstrates, abolition is the most coherent solution to the problems created by the rule.

A. Michigan Abolished Felony-Murder as a Matter of Common Law.

In *People v. Aaron*, the Michigan Supreme Court judicially abolished Michigan's felony-murder rule[5] by requiring malice, in its traditional form, for any

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[5] Like the Massachusetts murder statute, G.L. c. 265 § 1 ("Murder committed. . . in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree."), the Michigan statute does not "designate[] as murder any *death* occurring in the course of a felony." *Aaron*, 409 Mich. at 717 (1980) (emphasis original). Rather, "the statute. . . makes a *murder* occurring in the course of one of the enumerated felonies a first-degree murder." *Id.* (emphasis original.) Thus, because the statute had not codified the felony-murder rule, the *Aaron* Court found "[t]he use of the term 'murder' in the first-degree statute requires that a murder must first be established before the statute is applied to elevate the degree." *Id.* at 721.

murder. *Aaron*, 409 Mich. at 728 (1980). The court also held that the state must prove the requisite mental state of each co-felon to convict them of murder under a joint-venture theory. *Id.* at 731.

The Michigan court focused on the question of culpability: "[i]f one had to choose the most basic principal of the criminal law in general . . . it would be that 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 708, *quoting* B. E. Gegan, *Criminal Homicide in the Revised New York Penal Law*, N.Y. L. F. 565, 586 (1966). Specifically with regard to joint venture liability, the court found that "[t]he felony-murder rule completely ignores the concept of determination of guilt on the basis of individual misconduct" and "thus 'erodes the relation between criminal liability and moral culpability.'" *Id.* at 708, *quoting People v. Washington*, 62 Cal 2d 777, 783 (1965). The court also found the rule harsher than other forms of murder—including premeditated murder—because the rule precludes "defenses to the mental element of murder (*e.g.*, self-defense, accident)." *Id.* at 709. The court further held that "malice is the intention to

kill, the intention to do great bodily harm, or the wanton and willful disregard of the likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm" and that "malice is an essential element of any murder, as that term is judicially defined, whether the murder occurs in the course of a felony or otherwise." *Id.* at 728.

B. Hawaii and Kentucky have Legislatively Abolished Felony-Murder.

Hawaii and Kentucky have both enacted legislation that either abolishes the felony-murder rule or effectively eliminates it.

Hawaii found that limitations other jurisdictions placed on the rule bring a "heightened awareness of the doctrine's underlying illogic," and decided "the wiser course, it seems, would be to follow the lead of England and India and abolish the felony-murder rule in its entirety" because "[t]he rule certainly is not an indispensable ingredient in a system of criminal justice." Haw. Rev. Stat. § 707-701 commentary. The commentary to the Hawaii murder statute also finds it objectionable to presume culpability without "an independent determination which must rest on the facts of each case." *See Id.*

Kentucky has also abolished felony-murder by altering its murder statutes to require culpability with regards to any death because of difficulties in determining the "natural and probable consequences" of a conspiracy sufficient to establish felony-murder. *See Kruse v. Commonwealth*, 704 S.W.2d 192, 194-95 (Ky. 1985).

C. The Model Penal Code Abolishes Felony-Murder.

Similarly, the MPC effectively eliminated the felony-murder rule nearly forty years ago because the culpability of the underlying felony does not match the liability imposed by murder. The 1980 amendment to the MPC requires that "homicides will only constitute murder if they are committed purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life." MPC § 210.2 cmt. 6 at 29 (Official Draft and Revised Comments 1980).

Although the MPC creates a presumption of recklessness and extreme indifference for a homicide that occurs during the commission or attempted commission of enumerated felonies, this presumption "has the effect of leaving on the prosecution the

burden of persuasion beyond a reasonable doubt that the defendant acted recklessly and with extreme indifference," and may be rebutted by the defendant, thereby enacting the goal of the MPC to "abandon felony murder as a separate basis for establishing liability for homicide." *Id.* at 30. The drafters believed that punishment must be "premised on the confluence of conduct and culpability," that "[l]esser culpability yields lesser liability," and that "[t]he felony-murder rule contradicts this scheme. It bases conviction of murder not on any proven culpability with respect to homicide but on liability for another crime." *Id* at 36.

D. Other Common-Law Countries Have Abolished Felony-Murder.

Numerous common-law jurisdictions such as England, Wales, Canada, India, and New Zealand do not apply the felony-murder rule. England and Wales abolished the doctrine through the Homicide Act of 1957, which states, "[w]here a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought... as is required for a killing to amount to murder when not done in the

course or furtherance of another offence." 5&6 Eliz. 2, c. 11, § 1. A nearly identical statute affecting Northern Ireland was enacted in 1966. Criminal Justice Act (Northern Ireland) 1966 c. 20, §8.

Similarly, felony murder in New Zealand requires an intent to cause grievous bodily injury. Crimes Act 1961, §§ 167, 168 (N.Z.). India's murder statute does not recognize constructive malice and instead requires, at a minimum, that the act causing death be committed by a person who "knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death." Indian Penal Code, No. 45 of 1860, India Code, c. XVI, § 300.

Additionally, in a series of decisions in the late 1980s and early 1990s, the Supreme Court of Canada held that principles of fundamental justice require that a conviction for murder be based upon proof beyond a reasonable doubt of subjective foresight of death. *See R v. Martineau*, [1990] 2 S.C.R. 633 (Can); *R v. Vaillancourt*, [1987] 2 S.C.R. 636 (Can.). Therefore, it held that the provision of

the Criminal Code regarding felony murder was unconstitutional.[6]

E. Like Other Jurisdictions, Massachusetts Has Severely Limited or Significantly Amended the Rule.

Most jurisdictions in the United States impose some limitation on the classic formulation of the felony-murder rule, which "declares that one is guilty of murder if a death results from conduct during the commission or attempted commission of any felony." MPC § 210.2 cmt. 6, at 30. These limitations attempt to address, in a more piecemeal fashion, the same problems—illogic, injustice, and difficulty of application—that led the jurisdictions discussed above to abolish the rule.

Numerous states have attempted to avoid the harms created by the rule of constructive malice by limiting the predicate felonies to which the felony-murder rule applies[7] or by imposing *mens rea* requirements beyond

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[6] Additionally, the Australian Capital Territory has abolished felony murder. *Crimes Act* 1900 (ACT) Pt. 2 § 12 (Austl.)(requiring intent to cause death or serious harm or reckless indifference to the probability of causing the death).

[7] The majority of states that have a statutory felony-murder rule enumerate the felonies included. *See, e.g,* Md. Code Ann., Crim. Law § 2-201(a)(4)(arson,

the intent to commit the predicate felony.[8] States have also attempted to ensure that a defendant acts with

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burglary, carjacking, escape from a correctional facility, kidnapping, mayhem, rape, robbery, sexual offense, sodomy, or a violation of the section of the criminal code prohibiting the manufacture or possession of destructive devices); N.C. Gen. Stat. § 14-17(a)(arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon). Additionally, some states only apply the doctrine for forcible felonies, *see, e.g.*, 720 Ill. Comp. Stat. Ann. 5/9-1 (forcible felony other than second-degree murder), while others require that the underlying felony be clearly or inherently dangerous to human life. *See* Ala. Code § 13A-6-2 (arson, burglary, escape, kidnapping, rape, robbery, sodomy, aggravated child abuse, or "any other felony clearly dangerous to human life"); Kan. Stat. Ann. § 21-5402 ("any inherently dangerous felony" enumerated in the statute); *People v. Robertson*, 34 Cal. 4th 156, 164 (2004)(overruled on other grounds)("Only felonies inherently dangerous to human life are sufficiently indicative of a defendant's culpable *mens rea* to warrant application of the felony-murder rule."); *State v. Stewart*, 663 A.2d 912, 918 (R.I. 1995)("To serve as a predicate felony to a charge of second-degree murder, a felony that is not specifically enumerated in [Rhode Island's murder statute] must therefore be an inherently dangerous felony.").

[8] For example, New Hampshire's capital and first-degree murder statutes require that a person purposely or knowingly cause the death of another, even if the person is engaged in certain enumerated felonies, and its second-degree murder statute requires that a person cause the death of another under circumstances manifesting extreme indifference to the value of human life N.H. Rev. Stat. Ann. §§ 630:1-630:1-b. Delaware imposes, for first-degree felony-murder, a recklessness standard, and, for second-degree felony-murder, a criminal negligence standard. Del. Code Ann. tit. 11, §§ 635, 636.

sufficient culpability in committing the underlying felony by only applying the doctrine when death is reasonably foreseeable.[9] Additionally, states have limited the impact of the felony-murder rule by downgrading the offense from capital or first-degree murder, thereby reducing the relevant punishment[10] and

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[9] For example, under Maine's felony-murder statute, death must be a reasonably foreseeable consequence of the commission of, attempt to commit, or flight from the commission of certain enumerated felonies. Me. Rev. Stat. tit. 17-A, § 202. Additionally, nine states provide by statute an affirmative defense to felony-murder in cases where death was not reasonably foreseeable to the defendant because there was more than one participant in the underlying felony and the defendant: (1) did not commit or otherwise participate in the homicidal act, (2) was not armed with a deadly weapon, (3) had no reasonable grounds to believe that any other participant was armed with a deadly weapon, and (4) had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury. *See* Ark. Code Ann. §5-10-102(b); Colo. Rev. Stat. § 18-3-102(2)(additionally requiring that the defendant endeavored to disengage himself from the commission of the underlying crime or flight therefrom); Conn. Gen. Stat. § 53a-54c; N.J. Stat. § 2C:11-3(a)(3); N.Y. Penal Law § 125.25; N.D. Cent. Code § 12.1-16-01(c); Or. Rev. Stat. Ann. § 163.115(3); Wash. Rev. Code Ann. § 9A.32.030

[10] *See* La. Rev. Stat. Ann. § 14:30.1 (A)(2) (killing committed when the offender is engaged in the perpetration or attempted perpetration enumerated felonies and without intent to kill or inflict great bodily harm is second-degree murder); Minn. Stat. Ann. §§ 609.185, 609.19 (with the exception of causing the death of a human being while committing or attempting to commit criminal sexual conduct in the first or

by declining to apply the doctrine where the killing was committed by a person other than one of the participants in the felony or where the killing was of one of the participants in the felony. *See, e.g.*, Alaska Stat. §§ 11.41.100, 11.41.110; Colo. Rev. Stat. § 18-3-102; Conn. Gen. Stat. § 53a-54c; N.Y. Penal Law § 125.25.

Massachusetts applies some form of several key limitations on the felony-murder rule. For example, it is in the majority of states that follow the agency theory of felony murder under which the act causing death must be committed in furtherance of the joint venture by the defendant or someone acting in concert with him or her. *Tejeda*, 473 Mass. at 275; *see, e.g.*, *State v. Pina*, 149 Idaho 140, 147 (2010)(overruled in part by *Verska v. St. Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889 (2011); *Comer v. State*, 977 A.2d 334, 342 (Del. 2009). It likewise applies the majority merger rule, which requires that the conduct which

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second degree with force or violence, felony murder is murder in the second or third degree); N.Y. Penal Law § 125.25 (felony murder is murder in the second degree); 18 Pa. Cons. Stat. Ann. § 2502 (felony murder is murder in the second degree).

constitutes the felony be separate from the acts that constitute a necessary part of the homicide itself. *Commonwealth v. Quigley*, 391 Mass. 461, 466 (1984)(citation omitted). Additionally, the death must have been the natural and probable consequence of the felony. *See Commonwealth v. Wade*, 428 Mass. 147, 150 n.3 (1998).[11]

Perhaps most importantly, the Massachusetts felony-murder rule also requires that the underlying felony be "inherently dangerous to human life or committed with conscious disregard on the part of the defendant for the risk to human life." *Id.*; *See Matchett*, 386 Mass. 508. Certain felonies are inherently dangerous and may therefore, as a matter of law, support a conviction of felony murder. *Commonwealth v. Scott*, 428 Mass. 362, 364 (1998). Uncontroversially, arson, rape, burglary, kidnapping,

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[11] That the Court has recommended that this language not be used in jury instructions because it is "superfluous" to other elements of felony murder, *Commonwealth v. Rolon*, 438 Mass. 808, 818 n.11 (2003), does not negate this requirement. *See Commonwealth v. Allen*, 430 Mass. 252, 258 (1999) (instruction is necessary "where the evidence raises a legitimate question that a victim's death was proximately caused" by the underlying felony).

and armed robbery are inherently dangerous. *Matchett*, 386 Mass. at 505 n.15. But because courts must determine which felonies meet this requirement on a case-by-case basis, there is no uniform principle guiding those case-by-case judgments, leading to uncertainty and fundamental unfairness. *See Commonwealth v. Jackson*, 432 Mass. 82, 89 (2000); *Commonwealth v. Claudio*, 418 Mass. 103, 109 (1994)(comparing G.L. c. 266, § 14 to statutes and case law in other jurisdictions to determine that armed burglary in dwelling with assault therein is inherently dangerous). Unarmed robbery, *Moran*, 387 Mass. at 651; *Jackson*, 432 Mass. at 89, extortion, *Matchett*, 386 Mass. at 508, and unlawful possession of a firearm, *Commonwealth v. Ortiz*, 408 Mass. 463, 467 (1990), are not inherently dangerous felonies. However, robbery with an accomplice who is carrying a gun is inherently dangerous, even if the defendant believes that the gun is not loaded and that his accomplice has no ammunition. *Commonwealth v. Carter*, 396 Mass. 234, 237 (1985).

Furthermore, any felony, even those that are not inherently dangerous as a matter of law, can still serve as the predicate for a felony murder charge

where the fact finder determines that the defendant committed the felony with a conscious disregard for human life. *See Commonwealth v. Simmons*, 417 Mass. 60, 70 (1994). In *Commonwealth v. Ortiz*, the defendant was convicted of second-degree felony-murder where he unlawfully carried a firearm in a motor vehicle but there was no evidence that he, rather than his joint-venturer, fired the gun. 408 Mass. at 463. In other cases, a defendant's theft of a truck and its contents, *Commonwealth v. Chase*, 42 Mass. App. Ct. 749, 753 (1997), and commission of larceny over $250, *Commonwealth v. Wojcik*, Mass. App. Ct. 758, 761 (2006), served as the underlying felony for second-degree murder convictions. This illustrates that a case-by-case approach can lead to a broad application of the rule, despite the limitations this Court has imposed.

Where, as here, "the rule is defined by common law" *Moran*, 387 Mass. at 648, and "the purpose of [the] murder statute. . . is to gradate punishment and to categorize murder as murder in the first or second degree," *Matchett*, 386 Mass. at 502, this Court can declare a more uniform rule by requiring proof of malice for all murder convictions.

III. THE FELONY-MURDER RULE SHOULD BE ABOLISHED BECAUSE IT IS UNSOUND AS A MATTER OF PUBLIC POLICY.

A. The Felony-Murder Rule Allows for Disproportionate Punishment.

Apart from being unsound as a matter of criminal jurisprudence, the felony murder rule is fundamentally unfair. In Massachusetts, the mandatory punishment for first-degree murder is life in prison without parole. G.L. c. 265, § 2(a). The mandatory punishment for second-degree murder is life in prison with eligibility for parole after a minimum term of not less than 15 nor more than 25 years. G.L. c. 265, § 2(c); G.L. c. 279, §24; *see also Commonwealth v. Okoro*, 471 Mass. 51, 55 n.4 (2015) (discussing effect of 2012 and 2014 legislative amendments to the punishment scheme for murder in the second degree). But under the felony-murder rule, a defendant convicted of felony murder as opposed to the underlying offence will be punished for first-degree murder. *See Carter*, 475 Mass. at 513 n.3, 514, 523.

B. The Felony-Murder Rule Does Not Permit Defenses Normally Available in Murder Cases.

Felony-murder prevents the defendant from establishing defenses that are normally available to a murder charge, thereby making felony-murder harsher

than other types of murder. Normally, a homicide may become manslaughter rather than murder "if there is provocation deemed adequate in law to cause the accused to lose his self-control in the heat of passion, and if the killing followed the provocation before sufficient time had elapsed for the accused's temper to cool." *Commonwealth v. Vinton*, 432 Mass. 180, 189 (2000) (citations and quotations omitted). For example, in *Commonwealth v. Alcequiecz*, the defendant appeared at an ex-girlfriend's house late at night to speak with her while under the influence of cocaine. 465 Mass. 557, 559 (2013). Upon discovering that another man was with her, he broke into the house, hit his ex-girlfriend in the head with a car battery, and confronted his ex's lover. *Id.* at 560. The defendant then left the house, and shortly returned to find the ex-girlfriend and lover locked in her bedroom. *Id.* at 560-61. The defendant attempted to force his way into the bedroom with a kitchen knife by waiving the knife through the cracked door, and the defendant ultimately stabbed and killed the lover. *Id.* at 561. The defendant was convicted of felony-murder with armed burglary as the underlying felony. *Id.* at 558. Although the trial judge gave a provocation

instruction with regard to murder by deliberate premeditation and extreme atrocity or cruelty, the judge did not give the instruction with regard to the felony-murder charge. *Id.* at 563 n.9. The SJC affirmed, holding that "[f]or felony-murder, the intent to commit the predicate felony substitutes for malice. . . . Evidence of provocation would not in any sense detract from evidence that the defendant committed the predicate felony and is not a proper basis on which to reduce a conviction of felony-murder." *Id.* at 563-564; *see also Commonwealth v. Smith*, 459 Mass. 538, 548 (2011) ("Self-defense is inapplicable to a charge of felony-murder."); *Aaron*, 409 Mich. at 709 (felony-murder precludes "certain defenses available to a defendant charged with premeditated murder who may raise defenses to the mental element of murder (e.g., self-defense, accident). Certainly, felony murder is no more reprehensible than premeditated murder.").

The felony-murder rule should be abolished because the operation of the rule treats defendants harshly and unfairly, barring defenses that might otherwise be available.

C. None of the Contemporary Rationales for the Felony-Murder Rule Outweigh the Harm Caused by Application of the Rule.

Apart from the ostensible, and dubious, ancient rationales for the felony-murder rule, contemporary policy rationales fall along the following lines: deterrence, transferred intent, retribution, and general culpability. None of these rationales alleviates the harm caused by ascribing "constructive malice" to an individual defendant where no intent to murder exists, where that individual might already be guilty of another felony, and where ordinary defenses to murder are unavailable.

The deterrence rationale—that a defendant will be less likely to commit a felony from which a death can result knowing that he could later be found guilty of murder—is illogical when one considers that the felony-murder rule can make one guilty of an accidental murder, or that it can make one guilty of the acts not of an accomplice, but of a third-party victim or law enforcement officer. *See A Doctrine at Constitutional Crossroads*, 70 Cornell L. Rev. at 451. This is so even assuming that felons are aware of the strict-liability structure of the felony-murder rule, ignorance of which will blunt any deterrent effect.

The transferred intent rationale is also inapposite because of the structure of the felony-murder rule. In the ordinary case of transferred intent, A intends to harm B, but harms C instead; the intent to harm B is then transferred to C. But this has no place where, as here, the specific *mens rea* required for the act—that is, the intent to kill—does not exist at all. *Id.*

Similarly, the retribution and general culpability rationales assumes that a defendant should be held liable for all bad acts that arise from a person's actions when he acts with general malicious intent. But this, again, is simply re-stating what the felony-murder rule does. As a normative statement, it stands in stark contrast to the central tenet in criminal law that one may only be convicted of that act for which he has the mental state required by law for the crime to have occurred.

In short, there is no good policy reason for permitting the anachronistic felony-murder rule to persist in the Commonwealth. The criminal law has outgrown the need, if any need ever existed, for the rule. It should not be applied in this case, and it should be abolished.

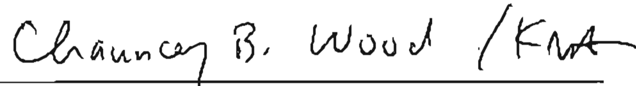
Conclusion

For the foregoing reasons, *amicus* respectfully requests that this Court abolish the felony-murder rule, and find in favor of the Petitioner.

Respectfully submitted,

Massachusetts Association of Criminal Defense Lawyers.

By its attorneys:



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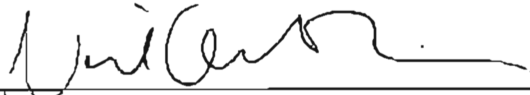

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