

<p><b>COLORADO SUPREME COURT</b>  Ralph L. Carr Judicial Center  2 East 14th Avenue  Denver, Colorado 80203</p>	<p>DATE FILED: September 11, 2023 5:24 PM  FILING ID: 7E0530FF288E9  CASE NUMBER: 2022SC738</p>
<p><b>CERTIORARI TO THE COURT OF APPEALS</b>  Case No. 19CA2033; Division I  Opinion by Tow, J. Dailey, J.,  Hawthorne, J., concurring in judgment</p>	
<p><b>EI PASO COUNTY DISTRICT COURT</b>  Honorable Lin Billings Vela;  Case No. 18CR6275</p>	
<p><b>Petitioner:</b>  WAYNE SELLERS IV  v.  <b>Respondent:</b>  THE PEOPLE OF THE STATE OF COLORADO</p>	<p>▲ COURT USE ONLY ▲</p>
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**BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES  
UNION OF COLORADO, THE BOSTON UNIVERSITY CENTER  
FOR ANTIRACIST RESEARCH, THE SENTENCING PROJECT,  
THE SAM CARY BAR ASSOCIATION, AND THE COLORADO-  
MONTANA-WYOMING AREA CONFERENCE OF THE NATIONAL  
ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE  
IN SUPPORT OF PETITIONER WAYNE SELLERS**

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 28(a)(2) & (3), C.A.R. 32, and C.A.R. 29.

**This brief complies with the word limits set forth in C.A.R. 29(d) (an amicus brief may be no more than one-half the length authorized for a party's principal brief). It contains 4,066 words.**

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28, C.A.R. 32, and C.A.R. 29.

*/s/ Anna I. Kurtz*

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The American Civil Liberties Union (“ACLU”) of Colorado, the Boston University Center for Antiracist Research, The Sentencing Project, the Sam Cary Bar Association, and the Colorado-Montana-Wyoming Area Conference of the National Association for the Advancement of Colored People, respectfully submit this brief of *amici curiae* pursuant to C.A.R. 29.

### **IDENTITY AND INTEREST OF *AMICI CURIAE***

*Amici*, the ACLU of Colorado, the Boston University Center for Antiracist Research,<sup>1</sup> The Sentencing Project, the Sam Cary Bar Association, and the Colorado-Montana-Wyoming Area Conference of the National Association for the Advancement of Colored People, are non-profit organizations that engage in research, education, and/or advocacy related to racism, racial justice, and the criminal legal system.

*Amici* are keenly aware of evidence regarding racial bias in the application of felony murder laws and the data demonstrating the stark racially disparate impact of Colorado’s pre-2021 felony murder law. Accordingly, *amici* submit this brief to emphasize that mandatory LWOP sentences for strict liability felony murder are disproportionate, cruel, and improperly influenced by extralegal factors including racism.

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<sup>1</sup> The Boston University Center for Antiracist Research does not, in this brief or otherwise, represent the official views of Boston University.



## SUMMARY OF ARGUMENT

From 1990 to 2021, Colorado imposed mandatory sentences of life without parole (“LWOP”) on people convicted of strict liability felony murder. Under this strict liability regime, if a person committed a specified felony resulting in a death, prosecutors could choose, at their discretion, to seek a conviction condemning that person to die in prison, even if they never meant to kill anyone. In September 2021, the Colorado General Assembly ended this practice, prospectively, by reclassifying strict liability felony murder from a class 1 felony with a mandatory sentence of LWOP, to a class 2 felony with a sentencing range of 16 to 48 years. *See* Ch. 58, sec. 2 § 18-3-103, 2021 Colo. Sess. Laws 236 (hereinafter “SB 21-124”).

But this change is not retroactive. It leaves behind people, like Petitioner Wayne Sellers, who are condemned to die in prison by virtue of their sentencing dates.

It also leaves behind a legacy of racial injustice. That is because the people against whom prosecutors secured LWOP sentences under the old regime are disproportionately people of color, again including Mr. Sellers. For three reasons summarized below, *amici* submit that that this legacy of racial injustice raises serious concerns about whether the LWOP sentences imposed under the old framework, but still being served right now, are “cruel and unusual” in violation of the Colorado and U.S. Constitutions.

*First*, statistical evidence makes clear that Coloradans of color are disproportionately impacted by Colorado’s pre-SB 21-124 felony murder law and LWOP sentencing scheme—a framework that, before SB 21-124, placed Colorado among the minority of states that mandated LWOP for felony murder convictions. This racial disparity exceeds that among people convicted of other class 1 offenses, suggesting a unique racialized impact that is specific to felony murder. Furthermore, this racialized impact appears to be consistent across states for which statistics are available.

*Second*, the disproportionate imposition of LWOP for strict-liability felony murder on people of color appears to be due in large part to the disparate exercise of the outsized discretion that the felony murder doctrine affords prosecutors. By eliminating the prosecution’s burden of proving the most clearly defined indicia of culpability—a mental state regarding the killing or even an act in furtherance of the killing—Colorado’s pre-2021 felony murder law invited prosecutors and decision-makers to draw inferences based on subjective proxies for culpability that are inherently susceptible to racial bias.

*Third*, considering SB 21-124 together with the prior regime’s legacy of racial injustice, the LWOP sentences imposed under the pre-2021 framework are incompatible with Colorado’s evolving standards of decency and are cruel and

disproportionate, in violation of the Colorado Constitution and the Eighth Amendment.

## ARGUMENT

### I. LWOP SENTENCING IN FELONY MURDER DISPROPORTIONATELY IMPACTS PERSONS OF COLOR

Felony murder prosecution and sentencing has “been discriminatory.”<sup>2</sup> A recent study that sought to “provide a statistical portrait” of Coloradans convicted of felony murder between 1990 and 2021 found that Black individuals were overrepresented among those convicted of felony murder.<sup>3</sup> Specifically, the study found that Black people comprised just 4.4 percent of Colorado’s population but accounted for approximately 35 percent of sentences for felony murder imposed between 2000 and 2021.<sup>4</sup> The racial disparity among those sentenced for felony murder exceeds that among other class 1 felony convictions, where Black people account for only 28 percent of those sentenced.<sup>5</sup> Other data analyses have found that Black Coloradans are 13 times more likely to be convicted of felony murder than

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<sup>2</sup> Guyora Binder & Ekow Yankah, *Police Killings as Felony Murder*, 17 HARV. L. & POL’Y REV. 157, 207–08 (2022).

<sup>3</sup> David C. Pyrooz, *Demographics Trends, and Disparities in Colorado Felony Murder Cases: A Statistical Portrait*, 1, 2, 11 (August 1, 2023), available at SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4527501](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4527501).

<sup>4</sup> *See id.* at 9.

<sup>5</sup> *Id.* at 8.

their White counterparts.<sup>6</sup> Together, these data suggest an especially stark racialized impact of the strict liability felony murder law, even beyond systemic racism affecting criminal cases more broadly.

Conviction and sentencing statistics compiled by Colorado’s Legislative Council Staff before SB 21-124’s passage underscore these disparities. Between 2017 and 2020, 42 individuals in Colorado were convicted and sentenced for class 1 felony charges for first degree murder—under Colorado’s pre-SB 21-124 felony murder law.<sup>7</sup> Of these, 38 percent were persons of color—with 26 percent of the total being Black.<sup>8</sup> In contrast, despite comprising 68 percent of the Colorado population, 52 percent of those convicted under Colorado’s pre-2021 felony murder law during that same period were White.<sup>9</sup>

Charging data reveal similar disparities. Data presented to the Colorado Senate Judiciary Committee during a hearing addressing SB 21-124 show that from 2015 to 2019, White individuals comprised 20 percent of those charged with felony murder and no other class one, two or three felonies, while people of color comprised

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<sup>6</sup> Binder, *supra* note 2 at 208.

<sup>7</sup> See Colorado Legislative Council Staff, Fiscal Note, SB 21-124 (Mar. 1, 2021).

<sup>8</sup> *Id.*

<sup>9</sup> See *id.*; see also Binder, *supra* note 2 at 208.

approximately 80% of such charges.<sup>10</sup> White individuals comprised 7% of people convicted of felony murder after being charged with felony murder as the only theory of first-degree liability, while people of color comprised 93% of this population.<sup>11</sup> Further disaggregating the data by race shows that Black Coloradans are *thirty times* more likely to be charged with felony murder than their White counterparts.<sup>12</sup>

The racially disparate impact of the felony murder doctrine has been documented in other jurisdictions as well. There has long been evidence that Black defendants are more likely to be sentenced to death for felony murder than similarly situated White defendants.<sup>13</sup> Studies have also illustrated the stark racial disparities

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<sup>10</sup> Hearings on S.B. 21-124 before the H. Judiciary Comm., 73rd Gen. Assembly, 1st Sess. (Apr. 7, 2021), at 5:48 (statement of Phil Cherner on behalf of the Sam Cary Bar Association).

<sup>11</sup> *Id.*

<sup>12</sup> See Binder, *supra* note 2 at 208.

<sup>13</sup> See Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1117–20 (1990).

of the felony murder doctrine in California,<sup>14</sup> Illinois,<sup>15</sup> Massachusetts,<sup>16</sup> Minnesota,<sup>17</sup> Missouri,<sup>18</sup> and Pennsylvania.<sup>19</sup> In Massachusetts, these data show that

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<sup>14</sup> Committee on Revision of the Penal Code, Annual Report and Recommendations 51 (2021); Catherine 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).

<sup>15</sup> Kat Albrecht, *The Stickiness of Felony Murder: The Morality of a Murder Charge*, 92 MISS. L.J. 481, 504, 510 (2023) (finding that 80% of the people sentenced under the felony-murder doctrine between 2010 and 2020 in Cook County, IL were Black, and that felony-murder charges more likely to be dropped or pled down than other murder charges).

<sup>16</sup> Amicus Brief of the BU Center for Antiracist Research et al., *Commonwealth v. Fisher*, SJC Dkt. No. 13340 (April 23, 2023), [https://www.maappellatecourts.org/pdf/SJC13340/SJC13340\\_08\\_Amicus\\_Boston\\_University\\_Brief.pdf](https://www.maappellatecourts.org/pdf/SJC13340/SJC13340_08_Amicus_Boston_University_Brief.pdf).

<sup>17</sup> Greg 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(3) LAW & INEQ. 543, 547–56 (2021) (finding 80% of people convicted of second-degree felony-murder between 2012 and 2018 in Ramsey and Hennepin Counties were people of color and that an analysis of individual cases revealed that “White defendants are frequently punished leniently, while defendants of color receive harsher treatment even when the facts support opposite outcomes”); L. Turner, Task Force on Aiding and Abetting Felony Murder, Report to the Minnesota Legislature (2022), [https://mn.gov/doc/assets/AAFM-LegislativeReport\\_2-1-22\\_tcm1089-517039.pdf](https://mn.gov/doc/assets/AAFM-LegislativeReport_2-1-22_tcm1089-517039.pdf) (finding that Black people and young people in Minnesota are disproportionately affected by the felony murder doctrine and concluding that “[t]he adverse consequences of the current aiding and abetting felony murder doctrine outweigh its benefits”).

<sup>18</sup> Nazgol Ghandnoosh, Emma Stammen, and Connie Budaci, *Felony Murder: An On-Ramp for Extreme Sentencing*, The Sentencing Project & Fair and Just Prosecution, 5 (2022), <https://www.sentencingproject.org/app/uploads/2022/10/Felony-Murder-An-On-Ramp-for-Extreme-Sentencing.pdf> (noting that felony murder was among the top 20 offenses for which Black individuals in Missouri were imprisoned in 2020, but not among the top 20 offenses for which White individuals were imprisoned).

the racial disparity among those serving LWOP for felony murder exceeds the racial disparity among those serving LWOP for other murder offenses, and among the Massachusetts prison population overall.<sup>20</sup> This is consistent with the Colorado data showing that the racial disparity among felony murder convictions exceeds that among other class 1 felony convictions, illustrating a particularly stark racialized impact of the felony murder doctrine.<sup>21</sup>

## **II. STARK RACIAL DISPARITIES IN FELONY MURDER LWOP SENTENCING MAY STEM FROM THE WIDE PROSECUTORIAL DISCRETION INVITED BY THE FELONY MURDER RULE**

Racial disparities in felony murder convictions and sentences are due in part to the collision of two factors: the uniquely broad prosecutorial discretion that felony murder affords prosecutors, and the biases (both implicit and explicit) operating throughout the criminal legal system. Contrary to the assertion that racial disparities in felony murder cases can be attributed to racial disparities in criminality,

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<sup>19</sup> Andrea Lindsay and Clare Rawlings, *Life Without Parole for Second-Degree Murder in Pennsylvania: An Objective Assessment of Sentencing*, Philadelphia Lawyers for Social Equity, 11–27 (Apr. 2021), <https://plsephilly.org/wp-content/uploads/2021/01/PLSE-Second-Degree-Murder-Audit-Jan-19-2021.pdf> (finding that 80% of those incarcerated for felony-murder convictions in PA were people of color in 2020, and 70% were Black).

<sup>20</sup> Amicus Brief of the BU Center for Antiracist Research et al., *Commonwealth v. Fisher*, SJC Dkt. No. 13340 (April 23, 2023), [https://www.ma-appellatecourts.org/pdf/SJC-13340/SJC\\_13340\\_08\\_Amicus\\_Boston\\_University\\_Brief.pdf](https://www.ma-appellatecourts.org/pdf/SJC-13340/SJC_13340_08_Amicus_Boston_University_Brief.pdf).

<sup>21</sup> See Pyrooz, *supra* note 3 at 8.

studies illustrate how these two factors—discretion and bias—have created a toxic brew of racial injustice in felony murder prosecutions.

**A. Felony murder is particularly susceptible to the prosecution’s subjective judgments about who deserves to die in prison.**

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*.<sup>22</sup> Under Colorado’s pre-2021 felony murder law, prosecutors did not have to prove “intent” to cause a death—or even the less-culpable mental states of malice or recklessness, nor did they have to prove an action causing a death. This wide discretion and reduced burden leaves significant room for cognitive biases to influence felony murder prosecutions, such that charging determinations are necessarily and uniquely guided by subjective judgments of prosecutors about who *deserves* to die in prison.

The felony murder doctrine also opens the door to racial bias because it presents prosecutors an unusual number of charging options. When multiple people participated in a specified felony resulting in someone’s death, Colorado’s pre-2021 strict liability felony murder law gave prosecutors many options for charging the accomplices: to charge the underlying felony alone, the felony and an unintentional killing, or felony murder carrying mandatory LWOP. Such broad discretion

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<sup>22</sup> Perry Moriearty, Kat Albrecht, and Caitlin Glass, *Race, Racism, and Imputed Culpability*, FORDHAM URBAN L.J. (forthcoming 2024) (on file with authors).



“directly disadvantages persons of color.”<sup>23</sup> Moreover, prosecutors have an incentive to bring the most severe charge available—in this context, felony murder mandating LWOP—in order to exert pressure on defendants in the plea-bargaining process.<sup>24</sup>

**B. The subjective judgments invited by the strict liability felony murder rule result in the racialized administration of justice.**

The particularly broad discretion that felony murder doctrine affords prosecutors makes felony murder prosecutions particularly vulnerable to influence by racial bias. As discussed below, bias can seep into felony murder charging decisions in multiple ways, including racial stereotypes, implicit White favoritism, and de-individualization biases, which together “skew prosecutorial decisions in a range of racially biased ways.”<sup>25</sup>

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<sup>23</sup> Ghandnoosh, *supra* note 18 at 6.

<sup>24</sup> See Margaret Martin Barry, *Opinion, Felony Murder Should Be Removed From Maryland Criminal Law*, MARYLAND MATTERS, (Jan. 31, 2023), <https://www.marylandmatters.org/2023/01/31/opinion-felony-murder-should-be-removed-from-maryland-criminal-law/> (discussing use of felony-murder charges “as a tool for prosecutors to pressure people into pleas”); Dahleen Glanton, *Column: When the Felony Murder Rule Looms Overhead, a Plea Deal Isn’t Always a Lifeline*, CHI. TRIB. (Sept. 23, 2019, 5 AM), <https://www.chicagotribune.com/columns/dahleen-glanton/ct-dahleen-glanton-cody-moore-felony-murder-clemency-20190923-y3w5jpmvxfexbdprvuksohv5ay-story.html> (describing “complicated and unfair practice of overcharging suspects under the Illinois felony murder rule and using it as leverage to alleviate the uncertainty and other costs of trying a case in court”).

<sup>25</sup> Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 797 (2012).

A large volume of research has also shown that implicit racial bias may cause people to “automatically classify members of certain groups, particularly African Americans, as dangerous, aggressive, and hostile.”<sup>26</sup> Because there is “little reason” to believe that prosecutors are immune to these implicit racial biases,<sup>27</sup> the activation of these negative racial stereotypes can cause prosecutors to perceive Black defendants as more dangerous, aggressive, or violent, and accordingly charge Black defendants with more serious crimes.<sup>28</sup> Given the wide discretion prosecutors enjoy, felony murder administration is vulnerable to the influence of unwarranted and unjust negative associations.<sup>29</sup>

As with aversive stereotypes about Black people, positive stereotypes about White people can likewise drive racial disparities in the criminal legal system. For

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<sup>26</sup> *Id.* at 798.

<sup>27</sup> *Id.* at 810.

<sup>28</sup> *See id.* at 812.

<sup>29</sup> *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, 889–891 (2004); Quillian & Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 AM. J. SOCIO. 717, 718 (2001); Steffensmeier, Ulmer & Kramer, *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 CRIMINOLOGY 763, 769 (1998); *see also* *Buck v. Davis*, 580 U.S. 100, 121 (2017) (describing “powerful racial stereotype that Black men are “violence prone”).

example, researchers conducting an implicit association test found that test participants were more likely to associate White individuals with “worth” and Black individuals with “worthless.”<sup>30</sup> The researchers concluded that these associations may “skew prosecutors’ judgments of how harmful they perceive a homicide to be relative to other homicides.”<sup>31</sup>

Finally, by authorizing prosecutors to charge felony murder in cases involving accomplices, the felony murder doctrine implicates specific cognitive biases and racial stereotypes regarding group criminality, which in turn exacerbates its use against people of color. Decision makers may be more likely to assign group culpability in cases involving defendants of color, while viewing White defendants as individuals.<sup>32</sup> In one study of over 500 jury-eligible individuals, the participants were more likely to individualize White defendants, yet associate Black and Latino defendants with a group.”<sup>33</sup> In the context of felony murder, “decision makers [are

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<sup>30</sup> Robert J. Smith, Justin D. Levinson, and Zoe Robinson, *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV., 871, 920–21 (2015).

<sup>31</sup> *Id.* at 921.

<sup>32</sup> See generally G. Ben Cohen, Justin D. Levinson & Koichi 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](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4411658) (explaining that “[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.”).

<sup>33</sup> *Id.* at 43.

invited] to indifferently impute guilt to Black and Latino defendants based upon *mere association*”—for example, association with the person who actually pulled the trigger—which leads inexorably to disparities in felony murder convictions and harsh sentences.<sup>34</sup>

**C. Studies demonstrate that racial injustice is the inevitable byproduct of discretion and bias in the administration of felony murder.**

Several studies indicate how broad discretion, combined with racial biases and judgments about group culpability, appear to have contributed to profound racial injustices in felony murder cases.

A study out of Pennsylvania highlights how de-individualization biases may operate to drive racial disparities in felony murder charging decisions, and ultimately convictions.<sup>35</sup> According to the research, 39.8 percent of Black individuals were prosecuted for second-degree murder with at least one co-defendant as compared to 14.8 percent of White individuals.<sup>36</sup> These figures suggest that the broad application of second degree murder to both principals and accomplices to a felony related to someone’s death “has a greater net-widening effect on Black people overall,” and

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<sup>34</sup> *Id.* at 48 (emphasis added).

<sup>35</sup> Lindsay, *supra* note 19 at 1.

<sup>36</sup> *Id.* at 12. Second-degree murder is sometimes called “felony murder” in Pennsylvania, which is a strict liability crime that imposes a mandatory LWOP sentence. *Id.* at 1.

“ensures that co-defendants with any level of involvement . . . however slight or tangential, can find themselves facing and serving a [LWOP] sentence.”<sup>37</sup> These findings echo Mr. Sellers’ own experience, where his fate was essentially sealed upon a decision to charge him with felony murder despite lacking intent to kill, and without regard to potential mitigating evidence of his lack of involvement in the predicate felony.

A Minnesota study illustrated 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 in Minnesota.<sup>38</sup> Reviewing criminal complaints to compare individuals’ circumstances, the study’s author found that “White defendants are frequently punished leniently, while defendants of color receive harsher treatment even when the facts support opposite outcomes.”<sup>39</sup> The study showed that White defendants convicted of second-degree felony murder were more likely to have pled down to the charge, whereas Black defendants convicted of felony murder were more likely to have been convicted of the most severe offense

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<sup>37</sup> *Id.* at 12–13. Critically, the researchers concluded that “the number of Black people in the second-degree population is not equal to the number of events during which a death occurred, increasing the likelihood that the proportion of accomplices compared to principals may be greater for the Black population than other racial groups.”

<sup>38</sup> Minn. Stat. Ann. § 609.19.

<sup>39</sup> Egan, *supra* note 17 at 545, 547–48.

with which they were charged.<sup>40</sup> This research demonstrates the dynamics of both overcharging and up-charging: charging more defendants of color in situations where White people would not be charged, and bringing more serious charges for less serious conduct in cases involving people of color.

Likewise, a recent expert report filed in connection with a felony murder case in California showed that prosecutors were more likely to charge felony murder as a special circumstance—thereby enhancing the available sentence to life-without-parole—in cases involving Black defendants and White victims.<sup>41</sup> To arrive at this conclusion, experts used complaints, information from the district attorney’s office, and police incident reports to measure racial disparity in special circumstance charging, taking both defendant and victim race into account.<sup>42</sup> They found that special circumstance enhancements, among them felony murder, were only charged in 41% of cases where the underlying conduct could have supported such an enhancement, and that special circumstance charges are 2.5 times more likely to be filed when a victim is White.<sup>43</sup> By accounting for cases where prosecutors could

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<sup>40</sup> *Id.* at 548.

<sup>41</sup> *See* Albrecht, *supra* note 15 at 504, 510. This research echoes other research demonstrating race-of-victim effects on felony murder charges and convictions.

<sup>42</sup> *See* Exhibit A, Analysis of Racial Differences in Life Without the Opportunity of Parole Charges in San Francisco County, *People of the State of California v. Fantasy Decuir*, 17011544 (on file with authors).

<sup>43</sup> *See id.*

have brought a felony murder charge but declined to do so, this study further supports the conclusion that racial disparities in felony murder charges and convictions are driven at least in part by the rule's structural features and amplification of racial bias.

In sum, there is ample evidence to suggest that racial bias impacted pre-2021 felony murder convictions in Colorado and, thus, the LWOP sentences that necessarily followed.

### **III. LWOP SENTENCES FOR STRICT LIABILITY FELONY MURDER ARE AN UNCONSTITUTIONAL LEGACY OF RACIAL INJUSTICE IN COLORADO**

The influence of racial bias on felony murder prosecutions contributes to the cruelty, arbitrariness, and disproportionality of mandatory LWOP sentences imposed under Colorado's pre-2021 felony murder law. This is highly problematic under Colorado's Constitution, which provides greater protection than the United States Constitution, and thus affords this Court the opportunity to correct the legacy of racial injustice that lingers in the remaining LWOP sentences being served by Mr. Sellers and other Coloradans. Paired with SB 21-124, this Court must account for the stark racial disparities in evaluating the continued constitutional viability of LWOP sentences that predate SB 21-124's effective date under both the categorical

approach to Eighth Amendment jurisprudence and Colorado's own proportionality review.<sup>44</sup>

SB 21-124 provides unambiguous evidence that Coloradans no longer tolerate LWOP sentences for felony murder, rendering their continued existence unconstitutionally impermissible. And, the evidence *amici* present *supra* Section II establishes that the broad discretion afforded to prosecutors under the felony murder rule invites implicit racial biases to influence prosecutorial charging decisions, providing a compelling explanation for the racial disparities in LWOP sentences for felony murder. Because Colorado's own felony murder conviction and sentencing statistics demonstrate racial disparities in the law's administration, it necessarily follows that mandatory LWOP sentences imposed under Colorado's pre-2021 strict liability felony murder statute are categorically disproportionate to the conduct.

Mr. Sellers' case is a prime example of the potential for such impermissible influences to lead to a grossly disproportionate LWOP sentence. Mr. Sellers was convicted of felony murder despite not killing anyone.<sup>45</sup> Both his conviction and ultimate LWOP sentence rest upon attempted robbery as the predicate offense.<sup>46</sup> Thus, Mr. Sellers could have been charged with attempted robbery carrying a

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<sup>44</sup> See *Wells-Yates v. People*, 454 P.3d 191, 206 (Colo. 2019).

<sup>45</sup> See Petition for Writ of Certiorari filed by Petitioner Wayne Sellers at 2.

<sup>46</sup> See *id.* at 14.



sentence of 4-16 years,<sup>47</sup> and/or manslaughter, carrying a sentence of 2-6 years.<sup>48</sup> Instead, Mr. Sellers is serving a mandatory sentence of death-in-prison. The unconscionable nature of this disproportionate outcome is amplified where cognitive racial biases may have caused prosecutors to impute culpability for Black defendants at a higher rate for the reasons discussed *supra* Section II.



In *Graham v. Florida*, Justice Stevens trenchantly observed:

Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time; unless we are to abandon the moral commitment embodied in the Eighth Amendment, proportionality review must never become effectively obsolete.<sup>49</sup>

These words perfectly encapsulate what occurred in Colorado with the passage of SB 21-124. But Colorado cannot fully realize the incremental achievement of SB 21-124 while individuals like Mr. Sellers continue to serve mandatory LWOP sentences for the same conduct the legislature now deems undeserving of Colorado's harshest punishment. Absent intervention by this Court, the sordid legacy of

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<sup>47</sup> Under Colorado law, aggravated robbery convictions can carry a sentence of 4 to 16 years. *See* Colo. Rev. Stat. §§ 18-4-301 and 302.

<sup>48</sup> *See* Colo. Rev. Stat. § 18-3-104 (2016); Colo. Rev. Stat. § 18-1.3-401.

<sup>49</sup> *See* 560 U.S. 48, 85 (1985) (Stevens, J., concurring).

Colorado's old sentencing scheme will persist for Mr. Sellers and others until their eventual death in prison.

### **CONCLUSION**

For the reasons set forth above, *amici* ask this Court to hold that mandatory LWOP sentences for strict liability felony murder are categorically unconstitutional and grossly disproportionate, and order resentencing hearings for all those currently condemned to die in prison under Colorado's pre-2021 felony murder law.

Dated: September 11, 2023

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 11, 2023, a true and correct copy of the foregoing **BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION OF COLORADO, THE BU CENTER FOR ANTIRACIST RESEARCH, THE SENTENCING PROJECT, THE SAM CARY BAR ASSOCIATION IN SUPPORT OF PETITIONER WAYNE SELLERS, AND THE COLORADO-MONTANA-WYOMING AREA CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE**, was electronically filed and served via Colorado Courts E-Filing on the following counsel of record:

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