IN THE SUPREME COURT OF THE STATE OF OREGON

PEDRO MARTINEZ, Petitioner-Appellant, Petitioner on Review, v. BRAD CAIN, Superintendent, Snake River Correctional Institution, Defendant-Respondent, Respondent on Review.	Umatilla County Circuit Court Case No. CV160282 CA A163992 SC S066253

BRIEF OF *AMICUS CURIAE* OREGON JUSTICE RESOURCE CENTER IN SUPPORT OF BRIEF OF THE MERITS OF PETITIONER ON REVIEW

Review of the Decision of the Court of Appeals
on Appeal from the Judgment
of the Circuit Court for Umatilla County
Honorable Eva J. Temple, Judge

Court of Appeals Decision Filed: August 15, 2018
Before: Ortega, Presiding Judge, Powers, Judge, and Brewer, Senior Judge
Per Curiam, Brewer, S.J., dissenting

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BRIEF ON THE MERITS OF *AMICUS CURIAE*

INTRODUCTION

Amicus Curiae, Oregon Justice Resource Center, works to "promote civil rights and improve legal representation for communities that have often been underserved in the past." *OJRC Mission Statement,* http://ojrc.info/about-us. The interests of *Amicus Curiae* are aligned with the interests of petitioner-appellant Pedro Martinez.

Amicus Curiae agrees with petitioner's question presented, proposed rule of law, and statement of facts. *Amicus curiae* supplements the petitioner's argument.

SUMMARY OF ARGUMENT

The issue on review is whether a predicate conviction for first-degree robbery, ORS 164.415,[1] merges into a conviction for attempted aggravated murder (attempted "felony murder"), ORS 163.115(1)(b).[2] *Amicus Curiae* addresses three

[1] ORS 164.415 provides that a person commits first-degree robbery if the person commits third-degree robbery and is "armed with a deadly weapon," "[u]ses or attempts to use a dangerous weapon," or "[c]auses or attempts to cause a serious physical injury to any person."

[2] ORS 163.115(b)(G) provides that criminal homicide constitutes murder when

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matters relevant to petitioner's argument. First, the operation of the felony-murder rule is inconsistent with modern criminal jurisprudence in Oregon and elsewhere. Second, the felony-murder rule disproportionately affects vulnerable members of our society. And third, correctly holding that a predicate-felony conviction merges with a felony-murder conviction reduces the possibility of courts compounding the undesired harm that the felony-murder rule creates.

ARGUMENT

I. The felony-murder rule is inconsistent with evolving criminal jurisprudence, both in Oregon and nationwide.

The felony-murder rule provides that a defendant is guilty of murder if a homicide occurs during the person's commission or attempted commission of a felony. *State v. Blair*, 348 Or 72, 78, 228 P3d 564 (2010). Unlike other forms of murder, it does not require that a defendant have acted with a mental state with regards to the homicide; the homicide is a strict-liability element for which *mens rea* is established as a matter of law. *Id*. at 80. The defendant does not need to

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> "it is committed by a person, acting either alone or with one or more persons, who commits or attempts to commit [first-degree robbery] and in the course of and in furtherance of the crime the person is committing or attempting to commit, or during immediate flight therefrom, the person, or another participant if there be any, causes the death of a person other than one of the participants[.]"

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have personally caused the murder; felony murder applies even when "another participant" causes the death of a person. ORS 163.115(1)(b).[3]

The broad reach of felony murder upends bedrock principles of modern Oregon criminal jurisprudence. "In Oregon, criminal liability generally requires an act that is combined with a particular mental state." *State v. Simonov*, 358 Or 531, 537, 368 P3d 11 (2016). Felony murder does not. It requires only that a defendant have participated in a qualifying felony that leads to the death of another. Likewise, accomplice liability requires proof that a defendant had the "specific intent" "to promote or facilitate the commission of the crime committed by another." *State v. Lopez-Minjarez*, 350 Or 576, 582, 260 P3d 439 (2011). A person is not "criminally responsible for 'any act or other crime' that was the 'natural and probable consequence' of the intended crime." *Id*. at 583 (quoting UCrJI 1051 (2011)).

A common misperception of the felony-murder rule is that it is a vestigial component from the English common law. Guyora Binder, *The Origins of*

[3] *Aggravated* felony murder and attempted *aggravated* felony murder, require that a defendant "personally and intentionally committed the homicide." ORS 163.095. Although this case concerns attempted aggravated murder, the merger rule at issue applies to non-aggravated felony murder as well. Pet BOM at 10-15.

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American Felony Murder Rules, 57 Stan L Rev 59, 68 (2004). However, the origins of the rule are likely American, dating back to the early nineteenth century. *Id*. And "it is deeply misleading to say that early felony murder rules imposed strict liability." *Id*. Rather, felony murder was initially predicated on transferring intent from the malignancy inherent in the common-law doctrine of general intent and on the recklessness inherent in certain dangerous felonies. *Id.* at 127-31. [4] And it was not without criticism even at the time. Holmes explained that the felony-murder rule seemed inconsistent with principles of blameworthiness and harm prevention, but that the rule could be "intelligible" if viewed as a foreseeable consequence of dangerous felonies.[5] Oliver Wendell Holmes, *The Common Law*,

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[4] Binder observes that "[b]y mischaracterizing the origins of American felony murder rules, legal scholars may actually contribute to broadening the very rules they inveigh against." 57 Stan L Rev at 68.

[5] Holmes explained:

> "It would seem, at first sight, that the above analysis ought to exhaust the whole subject of murder. But it does not without some further explanation. If a man forcibly resists an officer lawfully making an arrest, and kills him, knowing him to be an officer, it may be murder, although no act is done which, but for his official function, would be criminal at all. So, if a man does an act with intent to commit a felony, and thereby accidentally kills another; for instance, if he fires at chickens, intending to steal them, and accidentally kills the owner, whom he does not see. Such a case as this last seems hardly to be reconcilable with the general principles which have been

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57-58 (1881), *available at* https://www.gutenberg.org/files/2449/2449-h/2449-h.htm (accessed Mar 20, 2019).

The Model Penal Code modernized felony murder, predicating liability upon a finding that a defendant acted "recklessly under circumstances manifesting extreme indifference to the value of human life." *State v. Blair*, 230 Or App 36, 53, 214 P3d 47 (2009), *aff'd*, 348 Or 72 (2010) (quoting Model Penal Code § 210.2(1)(b) (Proposed Official Draft 1962)). However, despite adopting much of the Model Penal Code in the 1971 Oregon Criminal Code, when the Criminal Law Revision Commission drafted ORS 163.115 it rejected the Model Penal Code's understanding of felony murder. *Id*. at 57-58. Instead, ORS 163.115 more closely tracks traditional Oregon case law that held that a person could commit first-degree (felony) murder despite a lack of proof of an intent to kill because "intent to kill

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> laid down. It has been argued somewhat as follows: The only blameworthy act is firing at the chickens, knowing them to belong to another. It is neither more nor less so because an accident happens afterwards; and hitting a man, whose presence could not have been suspected, is an accident. The fact that the shooting is felonious does not make it any more likely to kill people. If the object of the rule is to prevent such accidents, it should make accidental killing with firearms murder, not accidental killing in the effort to steal; while, if its object is to prevent stealing, it would do better to hang one thief in every thousand by lot.

Holmes, *The Common Law* at 57-58.

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and the deliberate and premeditated malice are incontrovertibly implied." *State v. Brown*, 7 Or 186, 294 (1879).

Meanwhile, the rest of the nation has been progressing away from strict-liability felony-murder rules. The Michigan Supreme Court abolished felony murder, which had existed as a judicial doctrine. *People v. Aaron*, 409 Mich 672, 723, 299 NW2d 304 (1980). It described felony murder as "an anachronistic remnant, 'a historic survivor for which there is no logical or practical basis for existence in modern law.'" *Id*. at 689 (quoting Moreland, *Kentucky Homicide Law with Recommendations*, 51 Ky L J 59, 82 (1962)). The Massachusetts Supreme Court abrogated prior case law to hold that "a conviction of felony-murder will require a finding of actual malice, not merely constructive malice." *Commonwealth v. Brown*, 477 Mass 805, 825, 81 NE3d 1173 (2017) (Gants, CJ, concurring (joined by a majority of the court)), *cert den sub nom*, *Brown v. Massachusetts*, 139 S Ct 54, 202 L Ed 2d 41 (2018). The Ohio Supreme Court ruled that attempted felony murder is not a crime because one may not attempt—which requires a purposeful mental state—an unintended murder. *State v. Nolan*, 141 Ohio St 3d 454, 456, 25 NE3d 1016 (2014). Hawaii,[6] Kentucky, and Arkansas

[6] The Legislative Commentary to Hawaii's Criminal Code provides the following explanation for eliminating Hawaii's felony-murder rule:

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have either abolished the rule entirely or required that the defendant personally

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> "Even in its limited [Model Penal Code] formulation the felony-murder rule is still objectionable. It is not sound principle to convert an accidental, negligent, or reckless homicide into a murder simply because, without more, the killing was in furtherance of a criminal objective of some defined class. Engaging in certain penally-prohibited behavior may, of course, evidence a recklessness sufficient to establish manslaughter, or a practical certainty or intent, with respect to causing death, sufficient to establish murder, but such a finding is an independent determination which must rest on the facts of each case. Limited empirical data discloses that the ratio of homicides in the course of specific felonies to the total number of those felonies does not justify a presumption of culpability with respect to the homicide result sufficient to establish murder. There appears to be no logical base for the felony-murder rule which presumes, either conclusively or subject to rebuttal, culpability sufficient to establish murder.
>
> "Nor does the felony-murder rule serve a legitimate deterrent function. The actor has already disregarded the presumably sufficient penalties imposed for the underlying felony. If the murder penalty is to be used to reinforce the deterrent effect of penalties imposed for certain felonies (by converting an accidental, negligent, or reckless killing into a murder), it would be more effective, and hardly more fortuitous, to select a certain ratio of convicted felons for the murder penalty by lot.
>
> "In recognition of the trend toward, and the substantial body of criticism supporting, the abolition of the felony-murder rule, and because of the extremely questionable results which the rule has worked in other jurisdictions, the Code has eliminated from our law the felony-murder rule."

Commentary to Haw Rev Stat Ann § 707-701 (citations omitted).

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cause the murder with a requisite mental state. *See* Haw Rev Stat Ann § 707-701; Ark Code Ann § 5-10-101; *Bennett v. Commonwealth*, 978 SW2d 322, 327 (Ky 1998) ("With the adoption of the penal code, the felony murder doctrine was abandoned as an independent basis for establishing an offense of homicide in Kentucky." (citing KRS 507.020 (1974 Commentary))). Last year, California enacted Senate Bill (SB) 1437 "to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." Stats 2018, ch 1015, § 1, subd (f).

II. The felony-murder rule disproportionately affects marginalized groups.

The broad reach of the felony-murder rule—especially in its application to co-participants who neither intended nor participated in the homicide—sweeps up less-culpable defendants, leading to disparate impacts on different groups of defendants.

A 2018 survey from the Anti-Recidivism Coalition, the Youth Justice Coalition, and Restore Justice found that that in California, 72% of women serving a life sentence for felony murder did not commit the homicide. Abbie VanSickle, *If He Didn't Kill Anyone, Why is it Murder?*, NY Times A13, June 27, 2018, https://www.nytimes.com/2018/06/27/us/california-felony-murder.html (accessed

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Mar 20, 2019). The average age of people charged and sentenced under the California felony-murder statute was 20. Jazmine Ulloa, *California Sets New Limits on who can be Charged with Felony Murder*, Los Angeles Times, Sept 30, 2018, https://www.latimes.com/politics/la-pol-ca-felony-murder-signed-jerry-brown-20180930-story.html (accessed Mar 20, 2019). Indeed, part of the impetus for California curtailing the law was that it "disproportionately affect[s] women and young black and Latino men" who may have used bad judgment but did not intend to commit a homicide. VanSickle at A13.

The disproportionate effect of the felony-murder rule on minorities is unsurprising. It is a fact of American life that minorities are overrepresented in our criminal justice system. Radley Balko, *There's Overwhelming Evidence that the Criminal Justice System is Racist. Here's the Proof*, Wash Post, Sept 18, 2018, https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/?noredirect=on&utm_term=.b6c41fae411c (accessed Mar 20, 2019). And the felony-murder rule dramatically raises the stakes of plea negotiations, where a vastly disproportionate amount of innocent minority defendants plead guilty. *See* Samuel Gross et al., *Race and Wrongful Convictions in the United States*, National Registry of Exonerations, ii-iv (Mar 7, 2017), *available at*,

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http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf (accessed Mar 20, 2019) (observing that African-Americans represent 13 percent of the American population and 47 percent of the 1,700 exonerations listed in the National Registry of Exonerations).

That the felony-murder rule disproportionately affects youthful offenders should be equally unsurprising. Courts have already recognized that less-developed brains may not consider the ramifications of their conduct, and for that reason, courts may not impose the death penalty or life-without-parole sentences on juvenile offenders. *See Miller v. Alabama*, 567 US 460, 472 n 5, 132 S Ct 2455, 183 L Ed 2d 407 (2012) (noting that scientific evidence increasingly demonstrates adolescent brains lack fully developed capacities to perform "impulse-control, planning ahead, and risk-avoidance"). Because felony murder permits convictions of persons who were mere participants in a felony in which co-participants performed an unexpected homicide, it is likely to yield convictions of people who, either as a result of social circumstances or less-developed mental faculties, misjudge the people with whom they associate or are unaware of the possible ramifications of their conduct.

III. This court should interpret the felony-murder rule narrowly to avoid compounding its harms.

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As the foregoing demonstrates, the felony-murder rule was ill-conceived at its inception and has not aged well over time. It is an anachronism completely at odds with core tenets of modern criminal jurisprudence. As one pair of authors stated: "Perhaps the most that can be said for the rule is that it provides commentators with an extreme example that makes it easy to illustrate the injustice of various legal propositions." Nelson E. Roth and Scott E. Sundby, *Felony-Murder Rule a Doctrine at Constitutional Crossroads*, 70 Cornell L Rev 446, 446 (1985). This court should join the growing chorus of judicial and legislative voices in resolving questions against any expansion of the felony-murder rule or its effects.

That said, *Amicus Curiae* understands that this case does not present this court with an opportunity to confront the felony-murder rule directly. And the task of relegating felony murder into the dustbin of history seems like a policy choice that the legislature should make, not the courts. But interpreting the felony-murder rule is squarely within this court's duties. And this court can fill in any grey areas of the rule with a modern understanding of criminal culpability that befits the public's understanding of criminal justice.

Viewed narrowly, the felony-murder rule acts almost as a sentencing enhancement that applies to certain enumerated completed and attempted felonies.

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Whenever that felony leads to a death, the person is subject to a felony-murder conviction and the enhanced penalties that that conviction may carry. The death element enhances—or to use the words of ORS 163.095, "aggravates"—the predicate felony.

Of course, felony murder is not an enhancement. It does not merely lead to a higher sentence but yields a substantive conviction under ORS 163.115(1)(b). Felony murder acts as a greater offense to the lesser-included predicate felony because felony murder subsumes the predicate felony entirely and the predicate felony contains no elements that the felony murder does not. *See* ORS 161.067(1) (defining separate offenses as existing "[w]hen the same conduct or criminal episode violates two or more statutory provisions and each provision requires proof of an element that the others do not, there are as many separately punishable offenses as there are separate statutory violations). Thus, findings of guilt for felony murder and the predicate felony should yield a single murder conviction. The same is true for aggravated murder because it merely adds an additional element to felony murder—that the defendant did, in fact, cause and intend the death of another. The predicate felony does not require proof of any element that aggravated felony murder does not.

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State v. Barrett, 331 Or 27, 35, 10 P3d 901 (2000), suggests in a footnote that, under a former version of the merger statute, a defendant could be separately convicted of aggravated murder. *Barret* notes:

> "[A] separate conviction could be entered on the robbery charge on remand. Robbery and aggravated murder clearly are set out in two different statutory provisions, ORS 164.415 and ORS 163.095. Moreover, in light of our conclusion that the various aggravating circumstances are not 'elements' for purposes of *former* ORS 161.062(1) but, rather, alternative ways of proving the element of aggravation, the statutory provisions penalizing robbery and aggravated murder each involve an element that the other does not and address separate legislative concerns. Accordingly, for purposes of *former* ORS 161.062(1), we do not view robbery as a lesser-included offense to the aggravated-murder charge."

Barrett, 331 Or at 37.

But, as petitioner explains in greater detail in his brief on the merits, *Barrett*'s note is incorrect as applied to the merger issues here. *See* Pet BOM at 18-20. First, the issue in *Barrett* was whether the trial court could enter multiple convictions for aggravated murder of a single victim. 331 Or at 29. Thus, the footnote was *dicta*. Second, the fact that robbery and aggravated murder "are set out in two different statutory provisions" has little bearing on merger analysis because ORS 161.067(1) contemplates that separate offenses could nonetheless act as greater- and lesser-included offenses. Were it otherwise, ORS 161.067 could simply state "conduct that violates two or more separate statutory provisions are

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separate offenses." And third, *Barrett's* recognition that the two offenses address separate legislative concerns is not part of the element matching that ORS 161.067(1) requires. Rather, it is judicial gloss that predates the current merger statutory regime. *See State v. Crotsley*, 308 Or 272, 278, 779 P2d 600 (1989) (interpreting *former* ORS 161.062 to require, as one of three elements to *prevent* merger, that the statutory prohibitions "address separate and distinct legislative concerns").

This court should adopt a narrow view of felony murder in order to bring modern criminal justice principles to felony murder while still aligning itself with the roots of the felony-murder rule. As discussed, the felony-murder rule grew from doctrines that already required the state to prove something akin to premeditation and purposefulness in the form of general intent, and sought to capture the general harmfulness of engaging in certain dangerous felonies. The predicate felony and the murder were inextricably linked, and culpability for both derived from the same malignant intent. Felony murder was not and is not a stand-alone offense. By disallowing separate convictions, this court will at least maintain a minimum (historical) link between a mental state and a felony-murder conviction. While that falls short of the proof of *mens rea* that criminal

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jurisprudence should require, it at least does not offend modern principles further by permitting an entirely separate conviction for strict-liability felony murder.

Finally, requiring merger would curtail some of the negative effects of the felony-murder rule. For example, if the predicate-felony conviction does not merge with the felony-murder conviction, a defendant could theoretically receive consecutive sentences for the two. *See* ORS 137.123(5)(b) (permitting consecutive sentences when "[t]he criminal offense for which a consecutive sentence is contemplated caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim or caused or created a risk of causing loss, injury or harm to a different victim than was caused or threatened by the other offense"). Thus, a person who neither intended nor personally committed a homicide could receive a consecutive sentence for felony murder and a predicate felony that is longer than someone who is convicted of non-felony intentional murder. Similarly, a consecutive sentence for attempted aggravated murder and a predicate attempted felony may exceed the sentence for attempted aggravated murder based other aggravating circumstances. Furthermore, the sentencing possibilities that could arise from separate convictions for felony murder and a predicate offense would almost certainly impact plea bargaining, and could cause innocent defendants to plead guilty.

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The felony-murder rule is unfair, discriminatory, and out-of-step with modern notions of justice. While this court must adhere to legislative intent and cannot eliminate the felony-murder rule today, it should at least construe the rule as narrowly as possible to mitigate its disparate harms. This court should hold that convictions for attempted aggravated felony murder and attempted robbery merge into a single conviction.

CONCLUSION

Amicus Curiae respectfully requests that this court reverse the decisions of the Court of Appeals and trial court and remand to allow the petitioner to litigate whether his trial counsel rendered ineffective assistance under the state and federal constitutions for failing to seek merger of his convictions.

DATED March 20, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.02(b) and (2) that the word-count of this brief is 3,450 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on March 20, 2019, I filed the original of this *Amicus* Brief on the Merits with the State Court Administrator by the eFiling system.

I further certify that upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this *Amicus* Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on the following:

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