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# **Task Force on Aiding and Abetting Felony Murder**

Report to the Minnesota Legislature

02/14/2024

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## **Task Force on Aiding and Abetting Felony Murder**

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## Executive summary

A critical guiding question in any work related to Minnesota’s criminal justice system should be: Does the punishment fit the crime? Members of the most recent Aiding and Abetting Felony Murder Task Force discussed this and other questions with regard to equity in two specific legal doctrines: aiding and abetting liability for premeditated and intentional murder, and second-degree felony murder liability based on unjust predicate felonies.

The Task Force was first enacted in 2021 and looked at the intersection of the two legal doctrines—aiding and abetting liability and felony murder liability. The result of that work was a 2022 legislative report with several recommendations, including a mandate to look more broadly at the two doctrines (aiding and abetting homicide and felony murder) separately (rather than their intersection).

Given this broader scope provided by the current legislative mandate, the Task Force<sup>1</sup> had some discretion in deciding where to focus. Due to the short time frame available for the work, early meetings included discussions about how to focus research and recommendations on areas where there is a strong policy consensus among the Task Force members, and that also have the best chances of receiving strong support from the Legislature and the governor. These areas include:

- 1) Disparities between accomplices and principal actors in terms of the level of intent required for first-degree premeditated murder and second-degree intentional murder.
- 2) Inequities in second-degree felony murder as a result of an overly broad allowance of predicate felonies.

Existing statutes related to both doctrines raise fundamental concerns about fairness, disproportionate punishment, foreseeability of death, and a disregard for whether the person(s) responsible intended to do harm.

## Findings

### *Accomplice intent in first-degree premeditated and second-degree intentional murder*

Concerns about the existing Minnesota aiding and abetting statute (Minnesota Statutes § 609.05) arise under subdivision 2, known as “expansive liability,” a provision that allows a secondary party to be found guilty of intentional or even premeditated murder *without proof* that the secondary party premeditated or even intended death.

A review of existing case law and statutes by the Legal Research Subcommittee found that expansive liability has been strongly criticized by criminal law scholars (Dressler, 2018; Heyman, 2010, 2013) and has been rejected in the Model Penal Code (1962) and by the drafters of a proposed new federal criminal code (LaFave, 2023). At least 14 jurisdictions—Alaska, Arizona, Colorado, Maryland, Massachusetts, Missouri, Montana, Nevada, New Mexico, Oregon, Pennsylvania, Vermont, Washington, and Washington D.C.—have rejected such expansive liability rules

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<sup>1</sup> Eleven Task Force members, with varying perspectives and areas of expertise, met as a large group to discuss these issues and related recommendations. Similar to the 2021 Task Force, the current Task Force was organized into three subcommittees—Data, Legal Research, and Outreach—to carry out this work. Each subcommittee wrote a summary report of their work, included herein as Appendices.

(see appended Legal Research Subcommittee report). Expansive liability rules open the door for disproportionate and excessive punishment, including mandatory life without parole. A listening session coordinated by the Outreach Subcommittee in January 2024 illustrates the real-world implications of expanded liability. In one case (see Elijah’s story highlighted in the report below), the secondary actor received a life sentence without the possibility of release, while his codefendants (including the shooter) accepted plea deals and received lesser sentences of 25 and 40 years.<sup>2</sup>

In addition to the listening session, the Data Subcommittee asked a team of student researchers to look at historical cases in which someone had been sentenced for either first-degree premeditated murder (Minnesota Statutes § 609.185(a)(1) or second-degree intentional murder (Minnesota Statutes § 609.19, subd. 1(1)) *and* find those who appeared to have acted as an accomplice to the principal but without intent to cause death.<sup>3</sup>

A few important limitations affect this analysis: the number of cases is small, and there may be cases missing, either because the case was not coded correctly or because cases were excluded. In addition, student researchers were, in each case, asked to make some difficult judgment calls—chief among them, “Did the defendant intend to kill?”—with limited information. This is an imprecise undertaking, and different researchers may interpret the same court documents differently.

That being said, this was the best method the Task Force could use to find this information in the time allotted. (For detailed methodology, including limitations, please see the appended Data Subcommittee report.)

Within the cases sampled, student researchers found 38 intentional murder cases where the defendant sentenced was a true accomplice, having apparently not been the one to cause the death. **Of these 38 cases, in which the defendant was apparently imprisoned for having been an accomplice to intentional murder, the student researchers found that 29% (11 people) had apparently *not* intended to kill.** Again, remembering that this is a small sample size with research limitations, it is nonetheless noteworthy that 29% of accomplices may have been imprisoned for premeditated or intentional murder *without* intent to kill. While these accomplices may be in some ways blameworthy, their punishment should be proportionate to their crime.

### *Predicate felonies in second-degree murder cases*

In Minnesota, felony murder (being charged with murder regardless of one’s intent with respect to the death) can apply to either first- or second-degree murder. A primary focus of this Task Force was examining second-degree felony murder cases and their applicable predicate felonies. Predicate felonies are lower level felony crimes. By mechanical legal operation, intent to commit a predicate felony stands in to provide intent for the murder. This is known as imputed intent. This legal fiction can, in some cases, even impute the homicidal intent when the predicate felony does not itself require intent (Egan, 2021). In practical terms, the felony murder doctrine is premised on a counterintuitive legal construction whereby the offender need not intend the death. This leads to the term under which second-degree felony murder is formally codified in statute, “unintentional murder” (Minnesota

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<sup>2</sup> The subcommittee also made outreach efforts focused on soliciting input from families of victims. The subcommittee did not engage in a comprehensive, objective review of each file. Time and resources precluded this. The scope of the subcommittee’s work was providing individual stories.

<sup>3</sup> Attempted murder was excluded from this data analysis. To focus the inquiry on accomplices, the subcommittee examined only those cases for which Department of Corrections (DOC) records reflected a General Offense Code (GOC) of “Aid/Abet” (or, rarely, “Liability for”).

Statutes § 609.19, subd. 2). Unlike the first-degree murder statute, which includes a detailed list of viable predicate felonies, the second-degree murder statute in Minnesota does *not* include an exclusive list of predicate felonies.

In a review of existing case law, the Legal Research Subcommittee found that “almost all jurisdictions, with rules comparable to Minnesota’s second-degree felony murder statute, agree that not every felony-level crime qualifies as a predicate for felony murder liability. However, jurisdictions take one of three approaches in defining qualified felony murder predicates:

- 1) Limit predicates to specific felonies identified by statute (“list-only jurisdictions”)
- 2) Use both a statutory list of qualifying felonies and a standard defining how dangerous a felony must be to qualify; courts then apply that standard to each proposed additional predicate felony (“dangerous felony standards”)
- 3) Rely solely (or almost solely) on a case-law-based dangerous-felony standard, with very few if any qualifying predicate felonies specified by statute” (see appended Legal Research Subcommittee report).

The Legal Research Subcommittee found that, out of 43 “true felony murder rule jurisdictions,”<sup>4</sup> more than half (N=26) use an exhaustive predicate-felony list (#1 above) and 12 use a combination of lists and dangerous-felony standards (#2 above). The remaining five—including Minnesota, Georgia, Missouri, South Carolina, and Texas—use the less-defined approach of relying solely on dangerous-felony standards.

To look more closely at predicate felonies in Minnesota, the Data Subcommittee reviewed 290 second-degree felony murder cases sentenced between 2011 and 2022.<sup>5</sup> An analysis of these cases showed that:

- Assault, of any kind, was the most common class<sup>6</sup> of predicate felony (68%), with second-degree assault being the most common discrete predicate felony (47%).
- The 4th (Hennepin County) and 2nd (Ramsey County) judicial districts account for more than half of people sentenced with second-degree felony murder; 37% and 25% respectively. Both districts have much higher proportions of people sentenced with second-degree felony murder than either the proportion of adults or the felony population in those districts (Figure 1).

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<sup>4</sup> A “true felony murder rule” imposes murder liability based solely on the commission of a qualifying felony that caused death, with no required proof of intent to kill, extreme indifference to human life, or any other form of mental culpability (e.g., recklessness; criminal negligence) related to causing or risking death. Such a rule is embodied in Minnesota’s second-degree murder statute, which was the focus of the Task Force’s research and policy discussions in 2023-2024 concerning felony murder. By contrast, the list of predicate felonies contained in Minnesota’s first-degree murder statute, Minnesota Statutes § 609.185(a)(3), does not embody a true felony murder rule because proof of intent to cause death is required.

<sup>5</sup> The original data pull resulted in 296 cases; however, a thorough review of cases found that 6 had been incorrectly classified. Criminal sexual conduct in the first or second-degree with force or violence (Minnesota Statutes § 609.185(a)(2)) and drive-by shooting (Minnesota Statutes § 609.19, subd. 1(2)) were excluded from the data analysis, as they are statutorily defined as ground for felony murder liability.

<sup>6</sup> The subcommittee divided predicate felonies into three classes: 1) “Listed,” meaning one of those listed in Minnesota Statutes § 609.185(a)(3) (first-degree felony murder), 2) “Assault, of any kind,” and 3) “Other.”

**1. Minnesota Judicial Districts, by adult population, felony sentences, prison inmates, and felony murder (FM) sentences**

Judicial district	Largest city	In 2021			2011-2022	
		Minnesota adults (N=4,389,823)	People sentenced with a felony (N=14,429)	People serving time in prison (N=7,369)	People sentenced with 2nd degree FM (N=290)	
1st	Lakeville	14%	14%	9%	18	6%
2nd	St. Paul	10%	9%	11%	71	25%
3rd	Rochester	9%	7%	8%	10	3%
4th	Minneapolis	23%	18%	26%	106	37%
5th	Mankato	5%	7%	5%	4	1%
6th	Duluth	5%	5%	5%	10	3%
7th	St. Cloud	9%	12%	11%	23	8%
8th	Willmar	3%	4%	3%	6	2%
9th	Bemidji	6%	10%	10%	16	6%
10th	Woodbury	18%	15%	10%	26	9%

Source of 2021 data. Minnesota Sentencing Guidelines Commission. (2023). *Demographic Impact Statement: House File 2651-0*. [https://mn.gov/sentencing-guidelines/assets/DIS\\_HF2651\\_0\\_AssaultPolicePenaltyEnhanced\\_tcm30-569991.pdf](https://mn.gov/sentencing-guidelines/assets/DIS_HF2651_0_AssaultPolicePenaltyEnhanced_tcm30-569991.pdf) (PDF file will open).

Source of second-degree felony murder data. Minnesota Sentencing Guidelines Commission data, pulled by Task Force data committee members.

Note. Second-degree felony murder data represents a more-than-10-year span, versus felony sentence and prison inmate data, which represent one year.

- Black defendants (54%) are charged with second-degree felony murder in much higher proportions than other racial groups, and in higher proportions than the overall Black prison population (36%) or Black sentenced felony population (27%; Minnesota Sentencing Guidelines Commission, 2023).
- Younger Minnesotans, particularly those under 25 years old (47%) are disproportionately represented in second-degree felony murder sentences.

Because Minnesota does not rely on a statutory list or codified standards to define predicate felonies for second-degree felony murder, there is more room for subjectivity in the court system. Within subjectivity is room for disparity and bias, as illustrated in the second-degree felony murder data. If judges are asked to determine whether a predicate felony poses a “special danger to human life,” history, and a great deal of research, shows that Black Americans will bear the brunt of that subjective call. “Our criminal justice system’s violence and inequality toward Black Americans is fueled by a long history of racism that frames Black people as inherently dangerous criminals” (Harvard Library, n.d.). Clarifying rules and statutes may help to reduce abuse of discretion on the part of all criminal justice participants, creating a more equitable criminal justice system.

## Recommendations

Based on the information presented throughout this report, and after multiple in-depth conversations among members, the Task Force presents the following recommendations to the Minnesota Legislature. Please note that the opinions and votes of the members reflect their own views and not necessarily those of their appointing agencies.

- 1) Revise existing Minnesota statutes to require that accomplices have a comparable state of mind (*mens rea*) as required of principals, for first-degree premeditated murder and second-degree intentional murder.
- 2) Incorporate an exclusive list structure for the felony murder in the second-degree statute. (This would make the second-degree felony murder statute akin in its construction to the statutory list provided in the first-degree felony murder statute.)
- 3) Exclude general assaults (first degree through fifth degree) from such an exclusive list of predicate felonies for second-degree felony murder (outlined in recommendation #2), which would effectively represent adoption of a merger limitation.
- 4) Codify the common law Anderson statute, which requires that predicate felony be dangerous in the abstract and dangerous in the circumstances under which the felony was committed. (Adopting an exclusive list of predicate felonies, outlined in recommendation #2, would obviate the need for codification of the first Anderson prong: dangerous in the abstract.)
- 5) Retroactively apply recommendation #1—with respect to requiring a comparable state of mind for accomplices and principals—to people who have been convicted of first-degree premeditated murder. At this time, the Task Force is not making a recommendation with regard to retroactivity for aiding and abetting second-degree intentional murder or inequitable predicate felonies; however, a future Task Force could discuss this issue further.
- 6) Expand the Task Force mandate and authorize an 18-24-month timeline to undertake similar work on felony murder, aiding and abetting liability generally, and other implicated issues. Ideally, the subsequent Task Force would be authorized from August 1, 2024 to February 1, 2026 with a report due to the Legislature at that time.

## Project background and context

In 2021, the Minnesota Legislature established the Aiding and Abetting Felony Murder Task Force (Task Force) (Laws of Minnesota 2021, 1<sup>st</sup> Spec. Sess. Chapter 11, H.F. 63) to look at the intersection of accomplice liability and felony murder in Minnesota and to make data-driven recommendations for improvement to existing systems.

The work and recommendations of that Task Force are outlined in a report, titled [\*Task Force on Aiding and Abetting Felony Murder: Report to the Minnesota Legislature\*](#) (PDF file will open). High-level recommendations at that time included:

- 1) Revising relevant statutes to limit aiding and abetting felony murder liability
- 2) Revising relevant statutes such that those previously convicted may petition for limited relief
- 3) Implementing reforms beyond mere adoption of an affirmative defense
- 4) Expanding the Task Force’s mandate and timeline to undertake similar work on felony murder and/or aiding and abetting liability generally

## The Aiding and Abetting Felony Murder Task Force

In 2023, the Minnesota Legislature reenacted the Aiding and Abetting Felony Murder Task Force and voted to expand the work “beyond the intersection of felony murder and aiding and abetting liability...to the broader issues regarding the state’s felony murder doctrine and aiding and abetting liability schemes” (S. 2909-4, Sec. 23, 2023), directly addressing the fourth recommendation. The 2023 Task Force builds off the legislative successes of the 2021 Task Force. All recommendations of the 2021 Task Force were adopted by statute, including the curtailing of aiding and abetting felony murder liability through the adoption of more equitable accomplice culpability requirements. As the 2021 Task Force had recommended, this reform went beyond the mere adaptation of an affirmative defense. The legislature decided to apply all of the adopted reforms retroactively, as the 2021 Task Force recommended.<sup>7</sup>

### *Issues addressed by the Task Force*

Rather than looking again at the intersection of the two doctrines, the 2023 Task Force examined problematic aspects of aiding and abetting and felony murder liability separately.

- 1) Liability for crimes of another** (Minnesota Statutes § 609.05, subd. 1), also known as “aiding and abetting liability,” states in subdivision 1 that, “A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.” However, subdivision 2 of the same statute, entitled “Expansive liability,” provides that such an accomplice may be liable for additional crimes (committed by the primary party) without proof that the accomplice intended those further crimes to be committed. The current Task Force has focused on accomplice liability as it intersects with first-degree premeditated murder and second-degree intentional murder.

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<sup>7</sup> Session Law 2904-4, sec. 4

- 2) Felony murder.** Under this doctrine, it is possible for a person to be charged with murder without proof of: 1) intent to kill, 2) extreme indifference to human life, or 3) any other form of mental culpability for causing or risking death. The current Task Force focused on which predicate felonies are properly used to support a conviction for unintentional, second-degree felony murder.

### *Task Force members*

The 2023 Task Force consisted of 11 members with a variety of connections to and expertise relevant to the issue (Figure 2).

## **2. Members of the 2023 Aiding and Abetting Felony Murder Task Force**

<b>Required role</b>	<b>Member</b>
Employee of the Department of Corrections	Zack Gahm
Director of the Minnesota Sentencing Guidelines Commission	Nate Reitz
State public defender	Bill Ward
Statewide coordinator of the Violent Crime Coordinating Council	Ken Sass
Defense attorney appointed by the Minnesota Association of Criminal Defense Lawyers	Greg Egan (chair)
Metro-area county attorney	Kathy Keena (vice-chair)
Rural Minnesota county attorney	Pat McDermott
Police officer familiar with felony murder appointed by the Minnesota Sheriffs' Association and the Minnesota Chiefs of Police Association	Jeremiah Carlson
One person representing a victims' rights organization appointed by the senate majority leader	Bobbi Holtberg
One impacted person directly related to a person convicted of felony murder appointed by the governor	Molly Evans
One person with expertise about the laws and practices of other states appointed by the governor	Richard Frase

Note. The opinions and votes expressed by Task Force members are their own and do not necessarily reflect the opinions or position of the organizations for which they work (or any other organization with which members are affiliated).

## Subcommittees

As they did in 2021, the Task Force met as a large group to discuss issues and recommendations; it was also organized into three subcommittees to carry out the work. These committees are described below.

- **Data Subcommittee:** Chaired by Nate Reitz. The purpose of this subcommittee was to collect and analyze data related to charges, convictions, and sentences for aiding and abetting first-degree premeditated murder and second-degree intentional murder. The Data Subcommittee also collected and analyzed data related to predicate felonies for second-degree felony murder.
- **Statutes and Case Law (Legal Research) Subcommittee:** Chaired by Professor Richard Frase. The purpose of this subcommittee was to research and review relevant statutes and case law pertaining to aiding and abetting liability for first-degree premeditated murder and second-degree intentional murder. The subcommittee separately conducted legal research on predicate felonies used in second-degree felony murder cases, which most frequently involved individual actors.
- **Outreach Subcommittee:** Chaired by Bobbi Holtberg. The purpose of this subcommittee was to hear the perspectives of people who have been convicted and sentenced for aiding and abetting first-degree premeditated murder and aiding and abetting second-degree intentional murder. The subcommittee facilitated a listening session with five participants on January 5, 2024, and also gathered stories through written documents, including court filings.

A detailed summary from each Task Force subcommittee is appended to this report, as well as a description of the overall Task Force's work, including meeting dates. Task Force meeting minutes and relevant documents can be found on the [Department of Corrections website](#).

## Why these issues matter

As identified in the previous legislative report, the primary concerns related to both existing aiding and abetting doctrine and existing felony murder doctrines are:

- 1) A lack of fairness
- 2) Possibility for disproportionate punishment
- 3) A lack of predictability (that death would occur as the result of a crime)
- 4) A disregard for whether the person(s) responsible intended to do harm

Current application of *aiding and abetting liability* raises all four concerns. A key question is whether it is equitable for a person to be punished for murder when they, themselves, did not cause the death and when their intent with respect to death did not parallel the intent of the principal killer. "Under Minnesota's aiding and abetting liability statutes, someone who contributes to a scheme can be punished as if they were the principal or sole contributor to the harm. ... Someone who is hundreds of feet away from acts causing death – indeed, someone who is not even aware those acts are happening – can be punished for murder just the same as the person who factually caused death... (O'Herron, 2010)" (Turner, 2022, p. 7). Minnesota's current second-degree felony murder statute likewise permits unfairly severe punishment for responsible parties, operates on an illogical and inequitable

common law scheme, disregards intent to harm, and raises concerns about the ability for a person to predict death as a result of their actions.

Another key question is whether it is equitable to hold someone accountable for second-degree felony murder, punishable by 40 years imprisonment, when the requisite intent is less than that required for lesser crimes, such as third-degree murder, punishable by 25 years imprisonment, or even second-degree manslaughter, punishable by only 10 years imprisonment. In essence, does the punishment fit the crime under both of these scenarios, and are the punishments proportional with those in other areas of the penal code? As discussed in the 2022 Legislative report, a fundamental principle of criminal law is to hold people liable for the harms they caused intentionally, knowingly, or recklessly (Frase, 2021). Minnesota's felony murder doctrine allows all those who contribute to a scheme where someone dies to be liable for murder, irrespective of their mental state. Defendants in Minnesota have been charged with felony murder on the basis of an accidental discharge of a firearm (Egan, 2021) or a single punch to the face, which by fluke of unforeseen circumstance, resulted in a death.

As for *liability* under Minnesota's second-degree felony murder statute, there are at least three fundamental problems: 1) current law imposes murder liability without proof that parties intended to kill or had any other form of mental culpability as to causing or risking death; 2) the text of the second-degree felony murder statute permits almost any felony to serve as a predicate for felony murder, regardless of how low the risk of death may be when committing such a felony; and 3) the case law standards under *State v. Anderson* (2003), purporting to limit such predicate felonies to those posing a "special danger to human life" both in the abstract and as committed by the defendant(s), are not currently codified in statute. This third point raises concerns that someone who could not foresee that a given predicate felony could lead to murder, could nonetheless face murder liability. A death may occur during the course of a felony that neither seems dangerous nor has been held by judges to be "dangerous in the abstract" in the past. Occurrence of such a death may be enough to convince any given judge to include this new predicate felony on the "dangerous in the abstract" list and subject the defendant to homicidal liability.

The issues highlighted above and examined more fully below—Minnesota's incongruent culpability requirements for accomplices to premeditated and intentional murder, and Minnesota's broad standards determining which felonies qualify as predicates for second-degree felony murder—have in common that, in both areas, current Minnesota law violates fundamental principles of criminal law: that offense grading and punishment should be proportionate to the offender's degree of blameworthiness, as measured by his or her role in the offense and mental culpability.

## About this report

Given this broader scope provided by the current Legislative mandate, the Task Force had discretion in deciding where to focus its efforts. As discussed at the first several Task Force meetings, several possible criminal law reform recommendations fall within the expanded mandate. To facilitate discussion Professor Frase compiled a list of possible criminal law reform recommendations:

- 1) Adopting a merger limitation to second-degree felony murder
- 2) Incorporating an exclusive list of predicate felonies, not to include assaults, into the second-degree felony murder statute, making it akin to the structure of first-degree felony murder
- 3) Codifying a foreseeability requirement
- 4) Codifying the *State v. Anderson* common law standard, which requires that the predicate felony be dangerous in the abstract and dangerous under circumstances under which the predicate was committed.
- 5) Amending the first-degree felony murder criminal sexual assault provision to require some level of intent with respect to death (609.185(a)(2))
- 6) Accomplice liability for premeditated and intentional murders
- 7) Exploring the potential for enacting a negligent homicide statute, clarifying the culpability requirements for second-degree manslaughter, and/or amending the scope of third-degree murder
- 8) Abolishing felony murder

Ultimately, due to the short time frame available for the work, the Task Force chose to focus its research, discussions, and recommendations on possible reforms for which there is a strong policy consensus among the Task Force members, and that also have the best chances of receiving strong support from the Legislature and the governor. Those reforms correspond to items 1, 2, 4, and 6 in the list above. This does not mean that other areas are unimportant or should no longer be considered. The Task Force agrees that each area needs further exploration under a longer time frame; see recommendations.

This report was written in collaboration between Wilder Research, the Minnesota Department of Corrections, and Task Force members. It is structured around the two areas where the Task Force focused its legal research, data analysis, and community outreach efforts: 1) the low level of intent required for accomplices to first-degree premeditated murder and second-degree intentional murder, and 2) inequities in second-degree felony murder as a result of an overly broad allowance of predicate felonies. The audience for this report is the Minnesota Legislature.

## Accomplice intent in first-degree premeditated and second-degree intentional murder

A major area of focus for the 2023 Task Force was exploring the requirements around accomplice liability and intent (or *mens rea*) for people charged with:

- First-degree murder, based on premeditation and intent to kill (Minnesota Statutes § Sec. 609.185 (a)(1)), and
- Second-degree murder, based on intent to kill without premeditation Minnesota Statutes § Sec. 609.19, subd. (1)(1)).

If two people (A and B) are involved in a crime that results in death, what was the intent of each individual involved? Furthermore, who should be held liable and to what degree?

### Legal definitions of murder, by degrees

The following definitions are simplified from Minnesota Statutes to highlight that degrees of murder are determined largely by *intent and premeditation*.

**First-degree premeditated:** Defined in [Minnesota Statutes 609.185\(a\)\(1\)](#) as causing “the death of a human being with premeditation and with intent [to kill]...”

**First-degree felony:** Defined in Minnesota Statute 609.185(a)(3) as causing “the death of a human being with intent to effect the death of the person” while committing an enumerated felony.

**Second-degree intentional:** Defined in [Minnesota Statutes 609.19, subd. 1\(1\)](#), this classification of murder involves intent but without premeditation.

**Second-degree felony:** Defined in Minnesota Statute 609.19, subd. 2(1) as causing the death of a human without intent to kill, while committing a felony.

**Third-degree:** Defined in [Minnesota Statutes 609.195](#), this classification of murder involves the causing of death of another person “by an act evidencing a depraved mind, without regard for human life.”

## Expansive liability

According to Minnesota aiding and abetting statute (Minnesota Statutes § 609.05, subd. 1), “a person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.” This provision is rarely problematic in first-degree premeditated murder or second-degree intentional cases since it requires proof that the secondary party intended the primary party to kill the victim. Secondary parties who intentionally assist and/or encourage primary parties to kill have usually done so with sufficient advance thought or planning to constitute premeditation or lethal intent. However, more serious problems of aiding and abetting liability arise under subdivision 2 (called expansive liability), described below with bracketed language added to clarify the meaning of the statutory language:

**Expansive liability. A person liable [for a crime committed by a primary party whom the secondary party assisted or encouraged] is also liable for any other crime committed [by the primary party] in pursuance of the intended**

**crime if [that other crime was] reasonably foreseeable by [the secondary party] as a probable consequence of [the primary party] committing or attempting to commit the crime intended [by the secondary party].**

This provision permits a secondary party to be found guilty of intentional or even premeditated murder, without proof that the secondary party premeditated or even intended death. Moreover, the requirements of reasonable foreseeability and probable consequence are objective standards; there is no requirement that the secondary party have actually been aware of a risk of death. One of the cases noted in the Task Force's previous legislative report illustrates the inequities of the current expansive liability provision:

*Leila drove her partner to a drug deal, during which the partner killed someone with premeditation and intent; she was found guilty of premeditated first-degree murder and received the mandatory sentence of life without parole. There was no proof that she intended anyone's death or even thought it might happen (Turner, 2022).*

A listening session, coordinated by the Outreach Subcommittee, further demonstrates the inequity of expansive liability; a summary of one case is below, as well as a quote from the defendant in another case:

*Elijah [and both of his nephews] walked into the alley next to a house where they had encountered the victim. Elijah stood outside the alley and walked in front of the house while his nephews were in the alley. He states that he did not see the physical assault but heard a gunshot but wasn't sure where it had come from. Elijah began running away from the location as he believed someone had shot at him. It was later discovered that his nephew ... was the shooter. Elijah states that he did not know his nephew had a firearm and if he had known, he would have taken it away. Elijah was offered a plea deal that would allow him to plead guilty to aiding and abetting after the fact, and serve 10 years. He knew there was no physical evidence connecting him to the assault or shooting ... Elijah went to trial and was found guilty of first-degree premeditated murder (Minnesota Statutes § 609.185(a)(1) (2014)) and first-degree felony murder during the commission of an aggravated robbery (Minnesota Statutes § 609.185(a)(3). Elijah was sentenced to life in prison without the possibility of release.*

Listening session testimony from a third defendant further illustrates the injustice of holding offenders who do not intend to kill liable *at the same level as those who actually commit the killing, often unbeknownst to the supposed accomplice.*

*I didn't think I had a voice. Throughout the days that I was in the house, I showed as much compassion as I could toward the victim. I gave pain pills, food, showers, and killing the victim was never talked about. I had no idea that that was going to happen.*  
– Gary

Minnesota’s expansive liability clause is not an anomaly; many other states have similar statutory and case law rules (Binder, 2011). For a more detailed review of state and federal laws on expansive liability, see the appended Legal Research Subcommittee report.

However, these laws open the door for disproportionate and excessive punishment, including mandatory life without parole. Expansive liability rules have been strongly criticized by criminal law scholars (Dressler, 2018; Heyman, 2010, 2013) and have been rejected in the Model Penal Code (1962) and by the drafters of a proposed new federal criminal code (LaFave, 2023). At least 14 jurisdictions—Alaska, Arizona, Colorado, Maryland, Massachusetts, Missouri, Montana, Nevada, New Mexico, Oregon, Pennsylvania, Vermont, Washington, and Washington D.C.—have rejected such expansive liability rules (see appended Legal Research Subcommittee report).

## **Prevalence of imprisonment for accomplices who do not intend to kill**

The Task Force wanted to look at existing data to understand how often secondary parties, or accomplices, are imprisoned for premeditated or intentional murder but did not intend to cause death. It is very difficult to answer this question with existing data systems. However, the Data Subcommittee asked a team of student researchers to look at cases in which someone had been sentenced for either first-degree premeditated murder (Minnesota Statutes 609.185(a)(1)) or second-degree intentional murder (Minnesota Statutes § 609.19, subd. 1(1)) *and* who appeared to have acted as an accomplice to the principal but without intent to cause death.<sup>8</sup>

There are a few important limitations of this analysis: the number of cases is small, and there may be cases missing, either because the case was not coded correctly or because cases were excluded. In addition, student researchers were, in each case, asked to make some difficult judgment calls—chief among them, “Did the defendant intend to kill?”—with limited information. This is an imprecise undertaking, and different researchers may interpret the same court documents differently. (For detailed methodology, including limitations, please see the appended Data Subcommittee report.)

Initially, subcommittee members found 108 cases prior to 2022<sup>9</sup> that met the parameters (77 first-degree premeditated murder cases and 31 second-degree intentional murder cases). After reviewing these cases, the student researchers found only 38 where the defendant was truly only an accomplice, thus limiting the data further (in 58 cases the defendant appeared to have caused the death and in 12 cases there were insufficient facts available).

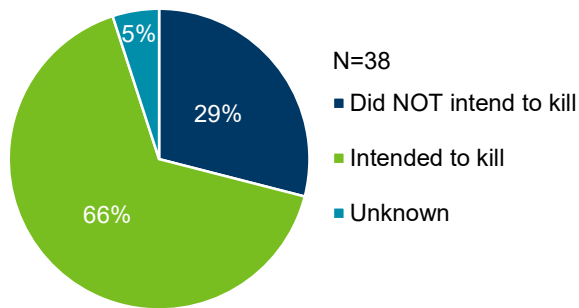
Student researchers reviewed the 38 true aiding and abetting murder cases to look for people who had been imprisoned, but lacked an intent to kill. Of the 38 cases in which the defendant was apparently imprisoned for having been an accomplice to intentional murder, researchers found that 29% (11 people) did *not* intend to kill (Figure 3). More information about each of these 11 cases can be found in the Data Subcommittee’s report.

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<sup>8</sup> Attempted murder was excluded from this data analysis. To focus the inquiry on accomplices, the subcommittee examined only those cases for which Department of Corrections records reflected a General Offense Code (GOC) of “Aid/Abet” (or, rarely, “Liability for”).

<sup>9</sup> Department of Corrections staff questioned the reliability of GOC data prior to 2018; therefore, only five years of second-degree intentional murder cases were examined (2018-2022). Since first-degree premeditated murder is less common, the subcommittee did not apply the same restriction to these cases; the dataset included cases from 1986 to 2022.

### 3. Defendant's intent to kill in 38 cases of aiding and abetting intentional murder



Source. Minnesota Sentencing Guidelines Commission and Department of Corrections data, analyzed by Task Force data committee members with assistance from Augsburg University legal students.

While the numbers in this analysis are small, they represent real lives that are impacted by aiding and abetting liability. The overall question in these cases remains: Given the accomplices' lack of premeditation or intent to kill, is the sentence of imprisonment for premeditated or intentional murder appropriate?

### Predicate felonies in second-degree murder cases

In Minnesota, the felony murder doctrine can apply to either first- or second-degree murder.

In the first-degree murder statute there is a detailed list of predicate felonies that permit conviction at that level (Minnesota Statutes § 609.185(a)(3)). In a recent article in *The New Yorker*, Sarah Stillman describes several felony murder cases, including one from Minneapolis in which “a sixteen-year-old girl ... sat in the car while two older men killed someone in a robbery ... [she] was charged with felony murder” even though she did not cause or intend the death (2023). In this case, the predicate felony was aggravated robbery. Second-degree murder statute, on the other hand, does *not* define viable predicate felonies. It is much vaguer, opening the door for inconsistency and disparity in sentencing.

In a review of existing case law, the Legal Research Subcommittee found that “almost all jurisdictions, with rules comparable to Minnesota’s second-degree felony murder statute, agree that not every felony-level crime qualifies as a predicate for felony murder liability. Jurisdictions take one of three approaches in defining viable felony murder predicates:

- 1) Limit predicates to specific felonies identified by statute (“list-only jurisdictions”)
- 2) Use both a statutory list of qualifying felonies and a standard defining how dangerous a felony must be, thereby limiting which unlisted felonies can qualify (“dangerous felony standards”)
- 3) Rely solely (or almost solely) on a case-law-based dangerous-felony standard, with very few if any qualifying predicate felonies specified by statute” (see appended Legal Research Subcommittee report).

The Legal Research Subcommittee found that, out of 43 “true felony murder jurisdictions,” more than half (N=26) used an exhaustive predicate-felony list (#1 above) and 12 used a combination of lists and dangerous-felony standards (#2 above). The remaining five—including Minnesota, Georgia, Missouri, South Carolina, and Texas—used the less-defined approach of relying almost entirely on dangerous-felony standards.

Given the vagueness of Minnesota’s current statutory language, Task Force members agreed that this was an issue that needs deeper examination. Specifically, members wanted to know: **What are the predicate felonies in second-degree murder cases?**

## Prevalence and types of predicate felonies

To look more closely at predicate felonies in Minnesota, the Data Subcommittee pulled court records from the Minnesota Sentencing Guidelines Commission. Looking specifically at second-degree murder cases,<sup>10</sup> Data Subcommittee members found 290 second-degree felony murder cases sentenced between 2011 and 2022.<sup>11</sup>

In nearly all of these cases (n=289), subcommittee members could identify predicate felonies. Within those cases, “Assault, of any kind” was the most common class<sup>12</sup> of predicate felony (68%), with second-degree assault being the most common predicate felony (47%; Figure 4).

### 4. Predicate felonies for second-degree murder cases between 2011 and 2022, by class

Predicate felonies (N=289)	N	%
<b>Assault</b>		
Second-degree	137	47%
First-degree (death of an adult)	23	8%
Third-degree (death of an adult)	17	6%
Third-degree (death of a child)	9	3%
First-degree (death of a child)	8	3%
Domestic strangulation (death of an adult)	2	1%
Domestic strangulation (death of a child)	1	<1%

<sup>10</sup> Criminal sexual conduct in the first- or second-degree with force or violence (Minnesota Statutes § 609.185(a)(2)) and drive-by shooting (Minnesota Statutes § 609.19, subd. 1(2)) were excluded from the data analysis, because those predicate offenses are statutorily defined as grounds for felony murder liability.

<sup>11</sup> The original data pull resulted in 296 cases; however, a thorough review of cases found that 6 had been incorrectly classified.

<sup>12</sup> The subcommittee divided predicate felonies into three classes: 1) “Listed,” meaning one of those listed in Minnesota Statutes § 609.185(a)(3) (first-degree felony murder), 2) “Assault, of any kind,” and 3) “Other.”

Predicate felonies (N=289)	N	%
<b>Listed</b>		
Aggravated robbery – first degree	51	18%
Burglary – first degree	9	3%
Arson – first degree	4	1%
Kidnapping	1	<1%
<b>Other</b>		
Malicious punishment	13	4%
Child neglect or endangerment	9	3%
Benefit of gang	4	1%
Theft of a motor vehicle	1	<1%

Source. Minnesota Sentencing Guidelines Commission data, pulled by Task Force data committee members.

Second-degree felony murder cases vary by judicial district. Minnesota is divided into 10 judicial districts (see a detailed district map at <https://www.mncourts.gov/find-courts.aspx>), with the 4<sup>th</sup> Judicial District (Hennepin County) accounting for nearly a quarter of the state’s adult population, followed by the 10<sup>th</sup> district (18% of Minnesota’s adults), the 1<sup>st</sup> district (14%), and 2<sup>nd</sup> district (10%; Figure 5).

According the most recent Demographic Impact Statement by the Minnesota Sentencing Guidelines Commission, the proportions of people sentenced with a felony or serving time in prison are roughly aligned with the proportion of adults living in each judicial district (Figure 5). One notable difference is Hennepin County where the proportion of people sentenced with a felony (18%) is lower than the overall adult population (23%), but the proportion of prison inmates (26%) is higher than the adult population.

When it comes to second-degree felony murder, the 4<sup>th</sup> (Hennepin County) and 2<sup>nd</sup> (Ramsey County) Judicial Districts account for much higher proportions of people sentenced than any other district (and more than half of second-degree felony murder sentences in the state). While Hennepin County accounts for 18% of people sentenced with a felony, it accounts for 37% of people sentenced with second-degree felony murder. Ramsey County accounts for 9% of people sentenced with a felony, yet a quarter of people sentenced with second-degree felony murder (Figure 5). (It is important to note that second-degree felony murder data represents a more-than-10-year span, versus felony sentence and prison inmate data, which represents one year.)

**5. Minnesota Judicial Districts, by adult population, felony sentences, prison inmates, and felony murder (FM) sentences**

Judicial district	Largest city	In 2021			2011-2022	
		Minnesota adults (N=4,389,823)	People sentenced with a felony (N=14,429)	People serving time in prison (N=7,369)	People sentenced with 2nd degree FM (N=290)	
1st	Lakeville	14%	14%	9%	18	6%
2nd	St. Paul	10%	9%	11%	71	25%
3rd	Rochester	9%	7%	8%	10	3%
4th	Minneapolis	23%	18%	26%	106	37%
5th	Mankato	5%	7%	5%	4	1%
6th	Duluth	5%	5%	5%	10	3%
7th	St. Cloud	9%	12%	11%	23	8%
8th	Willmar	3%	4%	3%	6	2%
9th	Bemidji	6%	10%	10%	16	6%
10th	Woodbury	18%	15%	10%	26	9%

Source of 2021 data. Minnesota Sentencing Guidelines Commission. (2023). *Demographic Impact Statement: House File 2651-0*. [https://mn.gov/sentencing-guidelines/assets/DIS\\_HF2651\\_0\\_AssaultPolicePenaltyEnhanced\\_tcm30-569991.pdf](https://mn.gov/sentencing-guidelines/assets/DIS_HF2651_0_AssaultPolicePenaltyEnhanced_tcm30-569991.pdf) (PDF file will open)

Source of second-degree felony murder data. Minnesota Sentencing Guidelines Commission data, pulled by Task Force data committee members.

Note. It is important to note that second-degree felony murder data represents a more-than-10-year span, versus felony sentence and prison inmate data, which represents one year.

In general, the number of people sentenced with second-degree felony murder is a small proportion of people sentenced with a felony overall; however, the impact on those who have been convicted is enormous.

### **Why should the Legislature incorporate an exclusive list construction of felony murder in the second-degree statute?**

Almost all of the 43 jurisdictions with felony murder rules comparable to Minnesota's second-degree felony murder statute agree that not every felony-level crime qualifies as a predicate for felony murder liability. Twenty-six jurisdictions limit such predicates to specific felonies identified in exclusive list statutes. Twelve jurisdictions use both a statutory list of qualifying felonies and a standard defining how dangerous a felony must be, thereby limiting

which unlisted felonies can qualify. Minnesota is one of only five jurisdictions that relies almost entirely on a case-law-based dangerous-felony standard, with very few, if any, qualifying predicate felonies specified by statute.

The Task Force unanimously recommends that the Legislature adopt the exclusive-list approach used by the majority of other felony murder jurisdictions. Such lists promote uniformity, predictability, and transparency. Attorneys, judges, offenders, and other members of the public are informed of which felonies will be subject to felony murder charges if death results. By contrast, dangerous-felony standards may be interpreted differently by different judges and different courts, leading to unpredictable results, disparity, and greater potential for racial bias. Application of an after-the-fact standard is also more likely to produce disproportionately severe criminal liability and punishment, because when death has occurred, there is a natural tendency to assume that the felony in question was sufficiently life threatening to justify murder charges, even though the felony might not have seemed so dangerous at the time it was committed.

When the Legislature decides which felonies to place on such a list, it can assess felony dangerousness with less risk of hindsight bias. It can also view this list-making task in the context of the full range of homicide crimes in Minnesota. In order to maintain proportionality across those crimes, the Legislature can seek to ensure that all offenders convicted of felony murder are culpable enough to merit conviction for murder, not just manslaughter. In Minnesota, it is also important to consider the culpability of offenders convicted of second-degree felony murder relative to the other major group of second-degree murderers: those convicted of intending to kill without premeditation (Minnesota Statutes § 609.19, subd. 1). Likewise, offenders convicted of second-degree felony murders should also have manifested greater culpability than offenders convicted of third-degree murder based on commission of “an act eminently dangerous to others and evincing a depraved mind without regard for human life” (Minnesota Statutes § 609.195(a)).

If the Legislature chooses to adopt the exclusive-list approach, it may wish to take the following research findings into consideration when selecting felonies to place on such a list. First, with respect to practices in other state and federal jurisdictions, there is strong consensus about which felonies are sufficiently dangerous to justify murder charges without specific proof of culpability as to causing or risking death:

- Five felony crimes or crime clusters<sup>13</sup> are virtually always on statutory lists of qualified felony murder predicates. These crimes are: arson, burglary, kidnapping, rape, and robbery.
- Escape or flight from custody are included by almost two-thirds of the 38 jurisdictions using a predicate-felony list.

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<sup>13</sup> Listed felonies must be consolidated in order to permit comparability across jurisdictions. Terminology varies even when the underlying offenses are similar (e.g., burglary, breaking and entering, and housebreaking; rape and criminal sexual conduct). Also, specialized versions of generic crimes exist in some jurisdictions but not others; where such specialized crimes do not exist they of course cannot be listed, and cases must be charged under generally-applicable statutes. Thus, carjacking and airline piracy have been grouped with robbery and counted as one crime even if both are listed; felonious restraint and false imprisonment is grouped with kidnapping; fleeing from police is grouped with escape; and multiple listed specialized assault crimes are grouped together and counted once.

- One or more specialized assault crimes are included by over half of those 38 jurisdictions. (Such crimes include assault against children, assault against the elderly, or assault against public officials, and drive-by shooting.)
- Drug crimes are also frequently listed by those jurisdictions.

Second, the Legislature may wish to take note of the striking similarity between the most-commonly listed felonies and felony clusters, noted above, and the crimes listed in Minnesota's first-degree murder statute. The nine listed Minnesota first-degree murder felonies and felony clusters are:

- Criminal sexual conduct in the first or second-degree with force or violence
- Burglary
- Aggravated robbery or carjacking in the first or second-degree (which is a form of aggravated robbery)
- Kidnapping
- Arson in the first or second-degree
- Drive-by shooting or tampering with a witness in the first-degree (both are specialized assaults)
- Escape from custody
- Any felony violation of chapter 152 involving the unlawful sale of a controlled substance
- Felony crimes to further terrorism

The finding above suggests that the Legislature may wish to consider listing all or most of the same felonies under second-degree murder as are listed in the first-degree murder statute, but without the mental culpability elements of intent to kill or extreme indifference to human life specified in the first-degree statute. When such culpability is proved the murder would continue to be first-degree murder; without such proof of intent, it would be second-degree murder. Using the existing first-degree murder predicate felonies, or most of them, for second-degree felony murder makes sense from a policy perspective: by listing these felonies in the first-degree murder statute, the Legislature has in effect already found that these crimes are particularly culpable.

The Legislature may of course choose to have a longer exclusive list of predicate felonies for second-degree felony murder. The average number of felonies listed by other states is eight. As noted earlier, it is important to maintain proportionality of liability and punishment across the varying degrees of criminal homicide in Minnesota. Thus, a qualifying predicate felony for second-degree felony murder should manifest a degree of culpability greater than is required for third-degree murder.

Minnesota case law has long recognized that predicate felonies should be especially dangerous to human life both inherently and as committed by this defendant. The Legislature may wish to consider making these standards more precise; it may also wish to make the standards more restrictive (allowing fewer felonies to qualify) than they are under current interpretive case law.

With regard to the "inherent danger" requirement, the Legislature may wish to list only those felonies that cannot, by their very nature, be committed without creating a very substantial risk of death (or manifesting extreme

indifference to human life). As for the “as committed” standard, the Legislature may wish to specify in each case that there must be a finding that the defendant did in fact create a very substantial risk of death (or did manifest extreme indifference to human life). Stricter as-committed standards will be especially important if the chosen list includes a large number of qualifying felonies.

An exclusive list construction of predicate felonies for second-degree felony murder would be good public policy. It would ensure clarity and proportionality in punishment and be in step with what the majority of other states have done. The Task Force discussed a list akin to the list already provided for in the first-degree felony murder statute as a starting point, but discussion was brief, and no consensus was reached with regard to which predicate offenses should be listed. There was unanimous agreement, however, regarding the merits of a list based construction. There was also unanimous agreement that the common law requirement that the predicate felony be dangerous as committed be maintained and codified. The requirement that the offense be inherently dangerous would be reflected by its inclusion on the statutory list of viable predicate felonies and would, therefore, need not be adjudicated on a case-by-case basis. That element of uniformity marks another benefit of an exclusive list standard, which is now the preference of the majority of felony murder states. If adopted, the Task Force recommendation for an exclusive list-based model of predicate felonies for felony murder in the second-degree would provide clarity, uniformity, and greater equity in assessing culpability for unintended deaths flowing from the dangerous predicate felonies to be listed in statute.

## Why would the effective adoption of a merger limitation make for good public policy?

As discussed above, the Task Force unanimously recommends a construction whereby an exclusive list of viable predicate felonies be written into the second-degree felony murder statute. This construction is already present in the first-degree felony murder statute. The list of predicate felonies in the first-degree felony murder statute does not include any general assaults.<sup>14</sup> The Task Force, by a 7-3 majority vote, recommends that the second-degree felony murder statute likewise not include any general assault crimes as predicate felonies. The merger limitation, adopted in an overwhelming majority of felony murder jurisdictions, provides that general assaults cannot serve as viable predicate felonies. Therefore, by excluding general assaults from an exhaustive list of viable predicate felonies for second-degree felony murder, Minnesota would effectively adopt a merger limitation.

A long history of Minnesota cases chronicles the inequities of general assaults predicating second-degree felony murder charges. These cases follow a familiar pattern involving a low level of violence and limited criminal intent. Often, offenders are imprisoned based on strict liability with respect to the wholly unintended—and usually unforeseeable—consequences of an assault. Situations where a comparable level of assaultive conduct results in death are extremely rare; often so is any appreciable measure of bodily harm. In the case of assault in the second-degree, a general assault crime, no intent to cause physical pain or injury of any kind is required. Neither is an actual physical injury. A threat of harm is enough, so long as it is accompanied by a dangerous weapon (Minnesota Statutes § 609.222, subd. 1). Elevating this level of conduct to murder is inconsistent with general principals of criminal law and expands the scope of the already questionable felony murder doctrine. These defects represent important reasons to limit the scope of felony murder by effectively adopting a merger limitation.

Statistics reflect how the inequities of the second-degree felony murder doctrine are disproportionately affecting people of color and young people. More than two-thirds of people sentenced to second-degree felony murder are people of color; half are 30 years old or younger (see appended Data Subcommittee reports).

Second-degree felony murder convictions predicated on general assaults are frequently derived from “one punch” cases. While a single blow typically results in a misdemeanor level assault, or even a conviction for disorderly conduct, the felony murder doctrine in place in Minnesota elevates the crime to murder, punishable not by 90 days incarceration, but up to 40 years, just by fluke of circumstance where a fist fight turns into a completely unexpected death.

These “one punch” cases often come to the courts as a result of bar fights. An individual currently in the custody of the Minnesota Department of Corrections was, according to the criminal complaint, confronted in a bar by the victim, who walked over to the assailant. According to the criminal complaint, the assailant then head-butted the victim a single time in the forehead (State v. Kravchuk, 2020). This is normally far from a fatal blow and often the type of confrontation people walk away from. Tragically, that was not the case for this victim and this assailant. The victim, by an unfortunate chance occurrence, landed poorly on the back of his head and fractured the back of his skull.

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<sup>14</sup> “General” assault crimes are those that, like the felony-level provisions of Minnesota’s five degrees of “assault,” apply to a wide variety of behaviors and/or in a wide variety of contexts. After robust discussion among Task Force members, it was agreed that while the Task Force would recommend that general assaults be excluded as viable predicate felonies, no recommendation as to merger would be made with regard to more specialized or narrowly-applicable felony assault crimes, such as those involving child victims, the elderly, strangulation, and drive-by shootings.

He was hospitalized for a month then died of injuries resulting from the fall. Prosecutors did not allege that the assailant intended to cause the victim's death. They did not allege that the assailant even intended bodily harm. Under the current second-degree felony murder doctrine, they do not have to allege and prove such intent. The assailant purportedly intended to strike someone, one time, with his own head. That was enough. He was convicted of second-degree felony murder predicated on third-degree assault, a general assault crime. By excluding general assaults from the list of predicate felonies, this Task Force recommends removing this inequity by effectively adopting a merger limitation.

Some may argue that sentencing discretion helps mitigate the inequity of convictions in such "one punch" cases. That may be true in some cases with some judges, but the safeguard has not proven universal. Judges have sentenced defendants convicted of second-degree felony murder predicated even on low-level general assaults at or near the 40-year statutory maximum. That is more time than most people convicted of intentional second-degree murder receive. Absent a substantive merger limitation, one tragically misplaced punch can be punished more harshly than pointing a loaded gun at a person's head and pulling the trigger.

Inequities do not end with convictions; they can carry through to unfair punishments, and the system currently in place allows for widely disparate sentencing. An assailant was involved in a bar fight in 1993 and sentenced to second-degree felony murder predicated on third-degree assault. According to the appellate court opinion, someone had taken his wallet. While he was confronting other bar patrons looking for it, he punched one of them (*State v. Gorman*, 1996). Eyewitnesses were impaired and could not be sure who threw the first punch. After receiving complicated instructions difficult for most lay jurors to understand, the jury convicted based on the felony murder doctrine. Rather than taking mitigating factual circumstances about the events into account, the sentencing judge actually ruled that there were aggravating factors and imposed a sentence of nearly 38 years.

A murder conviction can embolden a sentencing judge to make an unjust sentencing decision. The reforms recommended by this Task Force would curb the potential for abuse by sentencing judges by removing a framework for inequitable convictions. Though not unanimously, the Task Force recommends amending legislation to preclude general assaults as viable predicate felonies for second-degree felony murder. This represents the Task Force's conclusion that assailants, while deserving of some punishment, should not be in prison longer for throwing a single punch than for murdering someone in cold blood.

The current scheme also upends the policies of graded proof and liability underlying the homicide/manslaughter statutory scheme. Second-degree felony murder convictions predicated on general assaults require no criminal intent with respect to the death. It is a strict liability offense on that element. Yet it is punishable by 40 years imprisonment: the highest finite sentence in Minnesota's penal code. Crimes involving death that provide for significantly less punishment should also provide for lower levels of proof. Instead, they require elevated *mens rea*—more criminal intent and a higher bar for the prosecution—than the *mens rea* required for second-degree felony murder. For example, third-degree murder, punishable by 25 years in prison at least calls for "evincing a depraved mind, without regard for human life" (Minnesota Statutes § 609.195(a)). Even second-degree involuntary manslaughter requires prosecutors to at least prove "culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or bodily harm" (Minnesota Statutes § 609.205(1)). Second-degree involuntary manslaughter requires greater proof of intent with respect to death than second-degree felony murder, yet it is punishable by a fraction of the amount of time, merely 10 years (Minnesota Statutes § 609.205(1)).

Judges and legal scholars across the country have criticized these irrational inequities, characterizing the operation as “bootstrapping,” by letting a much less serious crime be used to strap on to the murder, thus bypassing other more appropriate charges within the homicide/manslaughter statutory scheme (*People v. Ireland*, 1969). Translated into contemporary Minnesota jurisprudence, this scheme facilitates the bypassing of lesser offenses that carry greater proof requirements, such as second-degree involuntary manslaughter, in favor of a far more serious charge, second-degree felony murder, which requires no proof on the element of intent to cause death. This scheme upends Minnesota’s entire homicide/manslaughter statutory code; it is the view of the majority of the Task Force that this illogical and inequitable operation must be corrected by no longer permitting general assaults to serve as viable predicate felonies for the second-degree felony murder rule, effectively adopting a merger limitation.

Not only are general assault predicate felonies problematic in the sense described above, but three layers of harsh legal doctrine, culminating in a low threshold of proof for general assault crimes, compound the problem. Minnesota is a jurisdiction recognizing felony murder. The trend around the country is for curtailing the doctrine generally. Adding to the problematic application of felony murder in general is the fact Minnesota, unlike 65% of felony murder jurisdictions around the country, does not currently recognize a merger limitation.

The third layer compounding the inequities of this construction is the low threshold of proof required for general assaults in Minnesota. Elevating levels of assault is premised primarily on the level of injury actually caused, not the actor’s state of mind or even the amount of force employed. Minnesota’s general intent assault provides for strict liability with respect to the element of level of injury caused. This is manifested in statute. For example, third-degree assault, punishable up to five years, is distinguished from first-degree assault, punishable up to 20 years, only by the level of injury caused. Third-degree assault requires “substantial bodily harm” (Minnesota Statutes § 609.223, subd. 1). First-degree Assault requires “great bodily harm” (Minnesota Statutes § 609.221, subd. 1).

There are minority jurisdictions that, like Minnesota, recognize felony murder without a merger limitation. What sets them apart from Minnesota is that these other jurisdictions protect against overly broad application of the felony murder doctrine by making predicate assaults viable only with elevated intent with respect to the degree of injury caused (Egan, 2018). Current Minnesota law does not provide for comparable restraint.

A recent case illustrates why this is problematic. A group of friends were drinking around a bonfire when one of them pushed another in the chest, just hard enough to make them lose their balance and stumble and fall into the bonfire. Not surprisingly, the burn injuries were “great” and by operation of law, that was enough to sustain a conviction to first-degree assault, notwithstanding the lack of intent to cause that level of harm and the nominal level of physical force actually applied (*State v. Dorn*, 2016). Other states grade assaults based on intent to cause a particular level of injury. Minnesota grades assaults based on a strict liability construction with respect to injury actually caused.

Minnesota’s low bar for general assault crimes seriously magnifies the problems with second-degree felony murder absent a merger limitation. Felony-level assault convictions that could not be obtained in most other jurisdictions can be used to transform extremely low-level conduct into murder. Minnesota is out of step with national trends as it is one of only six states that recognizes the felony murder doctrine, does not have a merger limitation, and grades assaults based on injury instead of intent. These three layers of inequity converge to create poorly reasoned

public policy. This Task Force recommends changing that by adopting a merger limitation manifested in a list-based predicate scheme that does not include general assaults.

The Task Force had spirited discussion about the value of second-degree felony murder predicated on general assaults in plea bargaining. Second-degree felony murder is not always the most serious charge included in a criminal complaint or indictment when a case resolves with a conviction at that level. Sometimes the second-degree felony murder count is a lesser included count on a complaint or an indictment that includes first-degree murder or second-degree intentional murder. When lawyers resolve cases with plea bargains, they can facilitate guilty pleas to second-degree felony murder. They may be reluctant to have that plea bargaining tool eviscerated by statute.

However, other tools exist to preserve the ability to reach settlements without second-degree felony murder predicated on general assaults. When prosecutors charge second-degree intentional murder, it is a signal of available proof for facts necessary to sustain a conviction at that level. As such, plea negotiations could, in most cases, still naturally arrive at guilty pleas to the charge of second-degree intentional murder. Defendants eager to accept shorter sentences in exchange for the negotiated plea would readily cooperate in providing the factual basis supporting such a conviction. As terms of their plea deals, prosecutors and judges could recognize factually mitigating circumstances with mitigated durational departures that bring the sentences in line with sentences that second-degree felony murder convictions would have carried. That provides a means of providing balance and equity in culpability and sentencing without using second-degree felony murder predicated on general assaults.

Conversely, guilty pleas to manslaughter charges could also represent well-reasoned alternatives to second-degree felony murder predicated on general assaults. In negotiating more serious cases in this category, aggravated durational departures could be used to arrive at the appropriate sentence.

Utilizing these two complementary tools, parties would marshal ample resources to reach substantively comparable negotiated settlements to those formerly resolved with second-degree felony murder pleas. The difference is that these alternative vehicles rely on logical, legally sound constructions and would facilitate fairness, simplicity, and transparency.

While other states have arrived at an outright abolition of the felony murder doctrine, this Task Force is not recommending abolition at this time. Second-degree felony murder would still be available. Parties to plea negotiations would simply have to use other predicate felonies. The list construction the Task Force recommends would contain ample alternative viable predicate felonies. The parties should not need to rely on general assaults.

As problematic as second-degree felony murder charges are when they represent lesser included charges, they are even more inequitable in the cases where they are the most serious count on an indictment or criminal complaint. Those are the “one punch” cases discussed above, but they are also more nuanced cases where logic gets twisted by the tortured legal reasoning of an antiquated doctrine, leading to inequitable results.

When these cases go to jury trial, which they frequently do, judges read jurors convoluted instructions that are frequently challenged in the appellate courts and that are difficult to make sense of or meaningfully apply. In second-degree felony murder trials, judges tell jurors, “The defendant is criminally liable for all the consequences of the defendant’s actions that occur in the ordinary and natural course of events, including those consequences brought about by one or more intervening causes, if such intervening causes were the natural result of the defendant’s acts. The fact that other causes contribute to the death does not relieve the defendant of criminal liability. However,

the defendant is not criminally liable if a ‘superseding cause’ caused the death. A ‘superseding cause’ is a cause that comes after the defendant’s acts, alters the natural sequence of events, and produces a result that would not otherwise have occurred” (Minn. Crim. Jig 7.13 Felony Murder in the Second Degree).

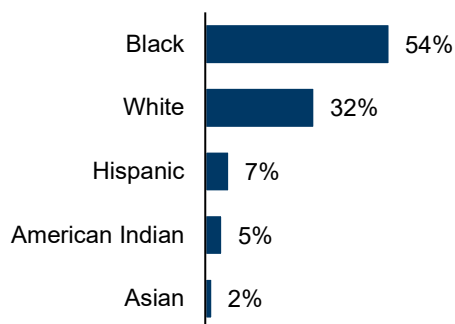
More straightforward, more equitable alternatives abound. Such alternatives would reflect logical reasoning, modern legal principals, and proportionality in the context of Minnesota’s homicide/manslaughter grading scheme. Sound policy demands that the criminal justice system embrace these alternatives. The Task Force recommends doing just that by adopting an exclusive statutory list of viable predicate felonies that does not include general assaults. Such reform would effectively amount to the adoption of a merger limitation, which would bring Minnesota in line with the overwhelming and growing majority of other states. This would create greater equity in culpability and sentencing, while preserving the tools parties need to effectively administer the quality of justice that this Task Force supports.

### Which Minnesotans are sentenced with second-degree felony murder?

An analysis of Minnesota Sentencing Guidelines Commission records shows that Black people and young people are disproportionately sentenced with second-degree felony murder. As discussed earlier in this report, there are several fundamental issues with felony murder liability, including that: 1) current law imposes murder liability without proof that any of the responsible parties intended to kill or had any other form of mental culpability as to causing or risking death; 2) the text of the second-degree felony murder statute permits almost any felony to serve as a predicate for felony murder, regardless of how low the risk of death may be when committing such a felony; and 3) the case law standards under *State v. Anderson* (2003), purporting to limit such predicate felonies to those posing a “special danger to human life” both in the abstract and as committed by the defendant(s), are not currently codified in statute.

Among the 290 second-degree felony murder sentences between 2011 and 2022, over two-thirds of defendants were people of color (68%) and over half (54%) of defendants were Black (Figure 6). Black defendants are convicted of second-degree felony murder in much higher proportions than other racial groups, and in higher proportions than the overall Black prison population (36%) or Black sentenced felony population (27%; Minnesota Sentencing Guidelines Commission, 2023).

#### 6. Second-degree felony murder cases between 2011 and 2022, by race (N=290)

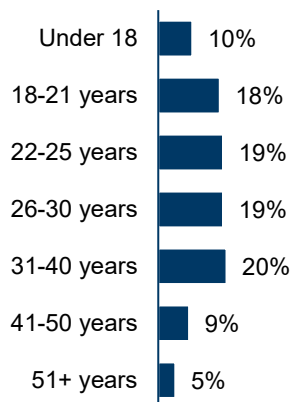


Source. Minnesota Sentencing Guidelines Commission data, pulled by Task Force data committee members.

Because Minnesota does not rely on a statutory list or codified standards to define predicate felonies for second-degree felony murder, there is more room for subjectivity in the court system. Within subjectivity is room for disparity and bias, as illustrated in the second-degree felony murder data. If judges are asked to determine whether a predicate felony poses a “special danger to human life,” history, and a great deal of research, shows that Black Americans will bear the brunt of that subjective call. “Our criminal justice system’s violence and inequality toward Black Americans is fueled by a long history of racism that frames Black people as inherently dangerous criminals” (Harvard Library, n.d.). Clarifying rules and statutes may help to reduce the gray area and, hopefully, disparities within the criminal justice system.

Second-degree felony murder cases also disproportionately involve younger Minnesotans. Nearly all responsible parties were 40 or younger at the time of the offense and almost half were 25 or younger (47%; Figure 7). A literature review for the previous legislative report found that “felony murder doctrines are especially concerning as applied to people with adolescent brains, due to the unique neurobiology of adolescence ... Adolescents are less capable than adults to foresee that a death may result from a course of action, less likely to know that they could be held criminally liable for another’s actions, and less able to suppress impulses or resist peer pressure that lead to aiding and abetting others’ course of conduct, and scholars argue that adolescents should, therefore, be held less liable under felony murder doctrines for deaths they did not intend to cause (Dobscha, 2019; Drizin et al., 2004; Kokkalera et al., 2021; Shitama, 2013)” (Turner, 2022, p. 10).

#### 7. Second-degree felony murder cases between 2011 and 2022, by age



Source. Minnesota Sentencing Guidelines Commission data, pulled by Task Force data committee members.

## Conclusions and recommendations

Based on the data presented throughout this report, and after multiple in-depth conversations among Task Force members, the Task Force presents the following recommendations to the Minnesota Legislature. Please note that the opinions and votes of the member reflect their own views and not necessarily those of their appointing agencies.

- 1) Revise existing Minnesota statutes to require that accomplices have a comparable state of mind (*mens rea*) as required of principals, for first-degree premeditated murder and second-degree intentional murder.
- 2) Incorporate an exclusive list structure for the felony murder in the second-degree statute. (This would make the second-degree felony murder statute akin in its construction to the statutory list provided in the first-degree felony murder statute.)
- 3) Exclude general assaults (first degree through fifth degree) from such an exclusive list of predicate felonies for second-degree felony murder (outlined in recommendation #2), which would effectively represent adoption of a merger limitation.
- 4) Codify the common law *Anderson* statute, which requires that predicate felony be dangerous in the abstract and dangerous in the circumstances under which the felony was committed. (Adopting an exclusive list of predicate felonies, outlined in recommendation #2, would obviate the need for codification of the dangerous in the abstract requirement.)
- 5) Retroactively apply recommendation #1—with respect to requiring a comparable state of mind for accomplices and principals—to people who have been convicted of first-degree premeditated murder. At this time, the Task Force is not making a recommendation with regard to retroactivity for aiding and abetting second-degree intentional murder or inequitable predicate felonies; however, a future Task Force could discuss this issue further.
- 6) Expand the Task Force mandate and authorize an 18–24-month timeline to undertake similar work on felony murder, aiding and abetting liability generally, and other implicated issues. Ideally, the subsequent Task Force would be authorized from August 1, 2024 to February 1, 2026 with a report due to the Legislature at that time.

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## Acknowledgements

**This report would not be possible without the work of the Task Force.**

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**Wilder Research contributors include:**

Anna Alba

Julie Atella

Marilyn Conrad

Rachel Fields

Kerry Walsh

## Appendices

### **A. Overview of the Task Force’s Work**

*The remaining appendices (B-I) are attached as submitted by Task Force members. Wilder Research has not altered the content of these appendices, other than minor spelling and formatting edits. Due to timeline limitations, the appendices were not converted to be digitally accessible.*

### **B. Data Subcommittee report 1, January 8, 2024**

### **C. Data Subcommittee report 2, January 8, 2024**

### **D. Legal Research Subcommittee report**

### **E. Predicate felony lists and standards in 43 true felony murder rule jurisdictions**

### **F. Predicate felonies by jurisdiction**

### **G. Outreach Subcommittee report**

### **H. Listening session summaries**

## Appendix A. Overview of the Task Force’s Work

The Task Force was created by legislative mandate during the 2023 legislative session. The Task Force met for the first time on Friday, September 22, 2023 and held meetings at least once a month after that. All Task Force meetings were open to the public and held in a hybrid in-person/virtual format. Meeting minutes and other relevant documents are available on the [Department of Corrections website](#).

Cohort	Meeting date	Link to meeting minutes
1	Friday, July 30, 2021	<a href="https://mn.gov/doc/assets/FMLR%20Task%20Force%20Meeting%20Minutes%207.30.21_tcm1089-499675.pdf">https://mn.gov/doc/assets/FMLR%20Task%20Force%20Meeting%20Minutes%207.30.21_tcm1089-499675.pdf</a> (PDF file will open)
1	Wednesday, August 18, 2021	<a href="https://mn.gov/doc/assets/AA-FM%20Task%20Force%20Meeting%20Minutes%208.18.21_tcm1089-505318.pdf">https://mn.gov/doc/assets/AA-FM%20Task%20Force%20Meeting%20Minutes%208.18.21_tcm1089-505318.pdf</a> (PDF file will open)
1	Wednesday, September 15, 2021	<a href="https://mn.gov/doc/assets/AA-FM%20Task%20Force%20Meeting%20Minutes%209.15.21_tcm1089-505319.pdf">https://mn.gov/doc/assets/AA-FM%20Task%20Force%20Meeting%20Minutes%209.15.21_tcm1089-505319.pdf</a> (PDF file will open)
1	Wednesday, October 20, 2021	<a href="https://mn.gov/doc/assets/AA-FM%20Task%20Force%20Meeting%20Minutes%2010.20.21_tcm1089-514826.pdf">https://mn.gov/doc/assets/AA-FM%20Task%20Force%20Meeting%20Minutes%2010.20.21_tcm1089-514826.pdf</a> (PDF file will open)
1	Wednesday, November 17, 2021	<a href="https://mn.gov/doc/assets/AAFM%20Task%20Force%20Meeting%20Minutes%2011.17.21_tcm1089-515302.pdf">https://mn.gov/doc/assets/AAFM%20Task%20Force%20Meeting%20Minutes%2011.17.21_tcm1089-515302.pdf</a> (PDF file will open)
1	Tuesday, November 30, 2021	<a href="https://mn.gov/doc/assets/AAFM%20Task%20Force%20Meeting%20Minutes%2011.30.21%20Meeting%20Minutes%20-2_tcm1089-514827.pdf">https://mn.gov/doc/assets/AAFM%20Task%20Force%20Meeting%20Minutes%2011.30.21%20Meeting%20Minutes%20-2_tcm1089-514827.pdf</a> (PDF file will open)
1	Wednesday, December 15, 2021	<a href="https://mn.gov/doc/assets/AAFM%20Task%20Force%20Meeting%20Minutes%2012.15.21_tcm1089-514814.pdf">https://mn.gov/doc/assets/AAFM%20Task%20Force%20Meeting%20Minutes%2012.15.21_tcm1089-514814.pdf</a> (PDF file will open)
1	Wednesday, January 5, 2022	<a href="https://mn.gov/doc/assets/AAFM%20Task%20Force%20Meeting%20Minutes%201.5.22_tcm1089-516266.pdf">https://mn.gov/doc/assets/AAFM%20Task%20Force%20Meeting%20Minutes%201.5.22_tcm1089-516266.pdf</a> (PDF file will open)

Cohort	Meeting date	Link to meeting minutes
1	Wednesday, January 19, 2022	<a href="https://mn.gov/doc/assets/AAFM%20Task%20Force%20Meeting%20Minutes%201.19.22_tcm1089-516408.pdf">https://mn.gov/doc/assets/AAFM%20Task%20Force%20Meeting%20Minutes%201.19.22_tcm1089-516408.pdf</a> (PDF file will open)
2	Friday, September 22, 2023	<a href="https://mn.gov/doc/assets/AAFM%20Task%20Force%20Meeting%20Minutes%209.22.23_tcm1089-597300.pdf">https://mn.gov/doc/assets/AAFM%20Task%20Force%20Meeting%20Minutes%209.22.23_tcm1089-597300.pdf</a> (PDF file will open)
2	Wednesday, October 11, 2023	<a href="https://mn.gov/doc/assets/AAFM%20Task%20Force%20Meeting%20Minutes%2010.11.23%20final_tcm1089-596715.pdf">https://mn.gov/doc/assets/AAFM%20Task%20Force%20Meeting%20Minutes%2010.11.23%20final_tcm1089-596715.pdf</a> (PDF file will open)
2	Wednesday, October 25, 2023	<a href="https://mn.gov/doc/assets/10-25-23%20meeting%20minutes_tcm1089-599756.pdf">https://mn.gov/doc/assets/10-25-23%20meeting%20minutes_tcm1089-599756.pdf</a> (PDF file will open)
2	Wednesday, November 29, 2023	<a href="https://mn.gov/doc/assets/AAFM%20Task%20Force%20Minutes%2011.29.23_tcm1089-603884.pdf">https://mn.gov/doc/assets/AAFM%20Task%20Force%20Minutes%2011.29.23_tcm1089-603884.pdf</a> (PDF file will open)
2	Wednesday, December 13, 2023	<a href="https://mn.gov/doc/assets/AAFM%20Task%20Force%20Minutes%2012.13.23_tcm1089-606096.pdf">https://mn.gov/doc/assets/AAFM%20Task%20Force%20Minutes%2012.13.23_tcm1089-606096.pdf</a> (PDF file will open)
2	Wednesday, January 10, 2024	<a href="https://mn.gov/doc/assets/AAFM%20Task%20Force%20Minutes%2001.10.24_tcm1089-607985.pdf">https://mn.gov/doc/assets/AAFM%20Task%20Force%20Minutes%2001.10.24_tcm1089-607985.pdf</a> (PDF file will open)
2	Friday, January 26, 2024	not available at time of report
2	Wednesday, February 7, 2024	not available at time of report