TASK FORCE ON AIDING & ABETTING FELONY MURDER

2023 Legislative Commissioned Task Force

February 15, 2024

Senate Judiciary and Public Safety Finance and Policy Committee

Senator Ron Latz, Chair
3105 Minnesota Senate Building
Saint Paul, MN 55155

Senator Warren Limmer, Minority Lead
2221 Minnesota Senate Building
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House Public Safety and Criminal Justice Reform Finance and Policy Division Committee

Representative Kelly Moller, Chair
509 State Office Building
Saint Paul, MN 55155

Representative Paul Novotny, Minority Lead
301 Rev. Dr. Martin Luther King Jr. Blvd.
Saint Paul, MN 55155

RE: Submission of the Task Force on Aiding & Abetting Felony-Murder Report, as Required by Laws of Minnesota 2023, chapter 52, article 4, section 23

Dear Legislators,

Laws of Minnesota 2023, chapter 52, article 4, section 23 requires that the Task Force on Aiding & Abetting Felony Murder submit a report on findings and recommendations to the chairs and ranking minority members of the committees with jurisdiction over criminal justice. Expanding on the work of the 2021 Task Force, this Task Force was established to collect and analyze data, hear individual stories, and conduct legal research related to broader issues regarding Minnesota's felony murder doctrine and aiding and abetting liability law. The aim is to assess whether current laws and practices promote public safety, retribution, and equity in sentencing, with an eye towards both benefits and unintended consequences of current practices.

The Task Force has identified laws in both spheres that are inequitable and ripe for change. The enclosed report documents our findings and recommendations. We hope you heed the call for reform. I remain available to facilitate dialogue and help broker change.

Very truly yours,

/s/ Greg Egan
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DEPARTMENT OF CORRECTIONS

Task Force on Aiding and Abetting Felony Murder

Report to the Minnesota Legislature

02/14/2024

Task Force on Aiding and Abetting Felony Murder

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https://mn.gov/doc/about/legislative-info/aiding-abetting/

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This report can be provided in another format upon request to the Department of Corrections. Printed on recycled paper.

Contents

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[1] 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

[1] 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.[2]

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.[3]

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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[2] 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.

[3] 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,"[4] 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.[5] An analysis of these cases showed that:

- Assault, of any kind, was the most common class6 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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[4] 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.

[5] 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.

[6] 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

		In 2021			2011-2022	
Judicial district	**Largest city**	**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 (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, 1st 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.[7]

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.

[7] 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

Required role	Member
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 Statues § Sec. 609.185 (a)(1)), and
- Second-degree murder, based on intent to kill without premeditation Minnesota Statues § 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.[8]

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[9] 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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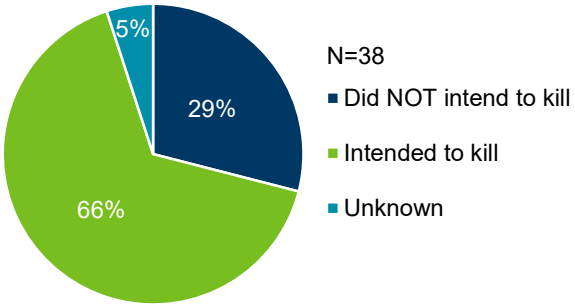
8 Attempted murder was excluded from this data analysis. To focus the inquiry on accomplices, the subcommittee examined only those cases for which Department of Corrections records reflected a General Offense Code (GOC) of "Aid/Abet" (or, rarely, "Liability for").

9 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,[10] Data Subcommittee members found 290 second-degree felony murder cases sentenced between 2011 and 2022.[11]

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[12] 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	%
Assault		
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%

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

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

[12] The subcommittee divided predicate felonies into three classes: 1) "Listed," meaning one of those listed in Minnesota Statutues § 609.185(a)(3) (first-degree felony murder), 2) "Assault, of any kind," and 3) "Other."

Predicate felonies (N=289)	N	%
Listed		
Aggravated robbery – first degree	51	18%
Burglary – first degree	9	3%
Arson – first degree	4	1%
Kidnapping	1	<1%
Other		
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 4th Judicial District (Hennepin County) accounting for nearly a quarter of the state's adult population, followed by the 10th district (18% of Minnesota's adults), the 1st district (14%), and 2nd 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 4th (Hennepin County) and 2nd (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

		In 2021			2011-2022	
Judicial district	Largest city	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** (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[13] 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.

[13] 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.[14] 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 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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[14] “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 county 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).

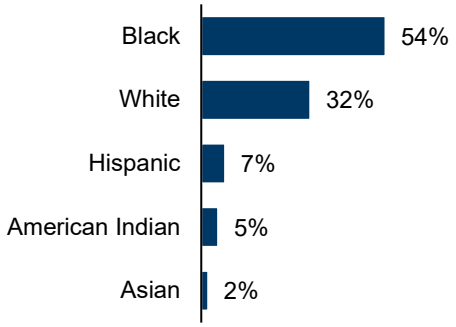
More straightforward, more equitable alternatives abound. Such alternatives would reflect logical reasoning, modern legal principals, and proportionality in the context of Minnesota's homicide/manslaughter grading scheme. Sound policy demands that the criminal justice system embrace these alternatives. 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)

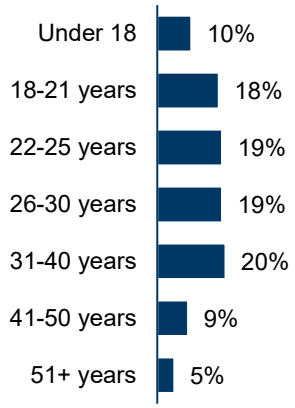


Source. Minnesota Sentencing Guidelines Commission data, pulled by Task Force data committee members.

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) *C*odify 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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Wilder Research contributors include:
Anna Alba
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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	https://mn.gov/doc/assets/FMLR%20Task%20Force%20Meeting%20Minutes%207.30.21_tcm1089-499675.pdf (PDF file will open)
1	Wednesday, August 18, 2021	https://mn.gov/doc/assets/AA-FM%20Task%20Force%20Meeting%20Minutes%208.18.21_tcm1089-505318.pdf (PDF file will open)
1	Wednesday, September 15, 2021	https://mn.gov/doc/assets/AA-FM%20Task%20Force%20Meeting%20Minutes%20%209.15.21_tcm1089-505319.pdf (PDF file will open)
1	Wednesday, October 20, 2021	https://mn.gov/doc/assets/AA-FM%20Task%20Force%20Meeting%20Minutes%2010.20.21_tcm1089-514826.pdf (PDF file will open)
1	Wednesday, November 17, 2021	https://mn.gov/doc/assets/AAFM%20Task%20Force%20Meeting%20Minutes%2011.17.21_tcm1089-515302.pdf (PDF file will open)
1	Tuesday, November 30, 2021	https://mn.gov/doc/assets/AAFM%20Task%20Force%20Meeting%2011.30.21%20Meeting%20Minutes%20-2_tcm1089-514827.pdf (PDF file will open)
1	Wednesday, December 15, 2021	https://mn.gov/doc/assets/AAFM%20Task%20Force%20Meeting%20Minutes%2012.15.21_tcm1089-514814.pdf (PDF file will open)
1	Wednesday, January 5, 2022	https://mn.gov/doc/assets/AAFM%20Task%20Force%20Meeting%20Minutes%201.5.22_tcm1089-516266.pdf (PDF file will open)

Cohort	Meeting date	Link to meeting minutes
1	Wednesday, January 19, 2022	https://mn.gov/doc/assets/AAFM%20Task%20Force%20Meeting%20Minutes%201.19.22_tcm1089-516408.pdf (PDF file will open)
2	Friday, September 22, 2023	https://mn.gov/doc/assets/AAFM%20Task%20Force%20Meeting%20Minutes%209.22.23_tcm1089-597300.pdf (PDF file will open)
2	Wednesday, October 11, 2023	https://mn.gov/doc/assets/AAFM%20Task%20Force%20Meeting%20Minutes%2010.11.23%20final_tcm1089-596715.pdf (PDF file will open)
2	Wednesday, October 25, 2023	https://mn.gov/doc/assets/10-25-23%20meeting%20minutes_tcm1089-599756.pdf (PDF file will open)
2	Wednesday, November 29, 2023	https://mn.gov/doc/assets/AAFM%20Task%20Force%20Minutes%2011.29.23_tcm1089-603884.pdf (PDF file will open)
2	Wednesday, December 13, 2023	https://mn.gov/doc/assets/AAFM%20Task%20Force%20Minutes%2012.13.23._tcm1089-606096.pdf (PDF file will open)
2	Wednesday, January 10, 2024	https://mn.gov/doc/assets/AAFM%20Task%20Force%20Minutes%2001.10.24_tcm1089-607985.pdf (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

Appendix B. Data Subcommittee report 1, January 8, 2024

(as submitted by committee chair)

Accomplices to Felony Murder Who Lack Intent to Kill

The Data Subcommittee's first research question was: Are accomplices who lack an intent to kill commonly imprisoned for premeditated and intentional murder? If so, how can the culpability of such accomplices be characterized?

Research Method

The Data Subcommittee examined people sentenced for either of two offenses: first-degree premeditated murder (Minn. Stat. § 609.185(a)(1)) or second-degree intentional murder (§ 609.19, subd. 1(1)). Attempts were excluded. 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").

Because DOC staff question the reliability of GOC data prior to 2018, only five years of second-degree intentional murder cases were examined, from 2018 through 2022. This yielded 31 second-degree cases of interest.

Because first-degree premeditated murder is less common, however, the subcommittee did not apply the 2018 restriction to these cases. Instead, it examined all first-degree premeditated murder cases where the GOC suggested the defendant may have been an accomplice, provided the defendant remained in prison. This yielded 77 cases, for a total of 108 cases of interest.

The subcommittee then enlisted the assistance of a volunteer team of Augsburg University students to research the facts underlying each of these 108 homicides, as reflected in district and appellate court records. The cases were divided among the team members, all of whom individually answered a series of questions about their assigned cases. If the researchers found defendants who, although lacking an intent to kill, had been imprisoned for aiding or abetting intentional murder, the researchers were asked to summarize the defendants' culpability.

Limitations of the Research Method

The above research method carries with it several limitations, and the results that follow should be viewed in this light. These limitations follow:

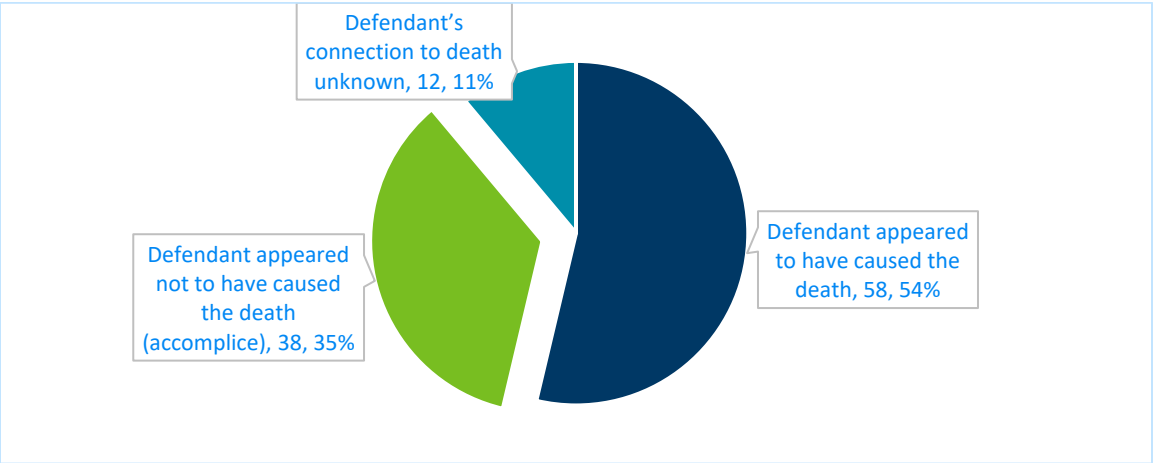
- The criteria for including second-degree intentional murder cases in this research were narrower than the inclusion criteria for first-degree premeditated murder cases. As a result, second-degree intentional murder cases are underrepresented in the research sample, and the number of second-degree intentional murder cases is small.

- Some second-degree intentional murder cases may have been excluded from the sample because DOC records were used to find GOCs. Any defendant who was not committed to DOC custody would have been excluded from the sample.
- Some aiding or abetting intentional murder cases may have been excluded from this research if the GOC was not properly coded. There are no systemic checks to ensure that GOC data is accurate.
- The 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.

Research Findings

In each of 108 intentional murder cases in question, the GOC indicated that the defendant was an accomplice. The student researchers, however, found only 38 cases where the defendant truly appeared to have been a mere accomplice—24 first-degree premeditated murder cases and 14 second-degree intentional murder cases. The students focused the remainder of their research on those 38 accomplice cases, rather than on those cases in which defendant could not be classified as an accomplice either because the defendant appeared to have caused the death (58 cases) or because insufficient facts were available (12 cases) (Figure 1).

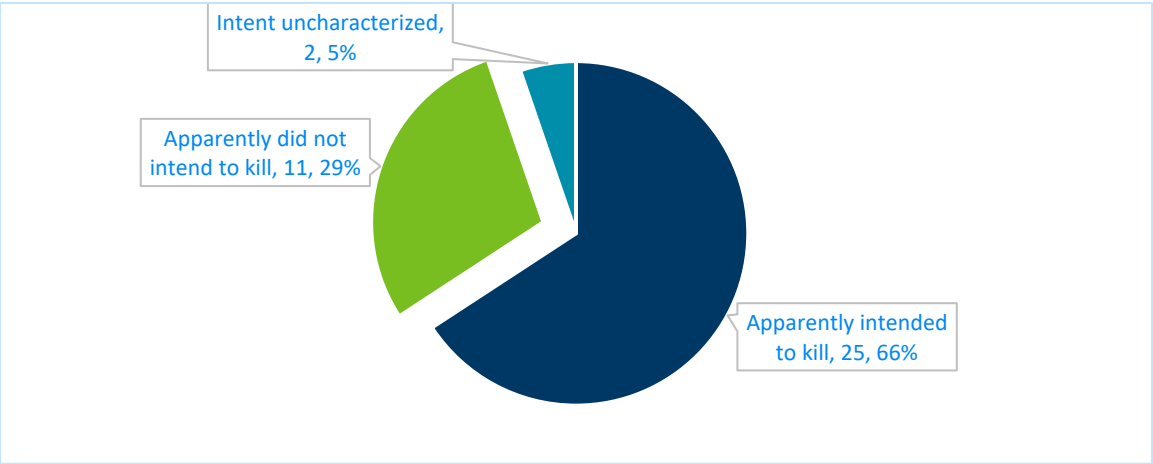
Figure 1. Defendant's Apparent Connection to the Victim's Death in 108 Intentional Murder Cases of Interest, as Assessed by Student Researchers.



Of the 38 cases in which the defendant was apparently imprisoned for having been an accomplice to intentional murder, the researchers found that the defendant apparently intended to kill in 25 cases (characterizing 17 of these murders as a team effort, two of these murders as having been procured by

the defendant, and six cases with other characteristics.[1]) In two other cases, the researchers did not characterize the defendant's intent.[2] (Figure 2.)

Figure 2. Defendant's Apparent Intent to Kill in 38 Cases of Aiding or Abetting Intentional Murder, as Assessed by Student Researchers.



In the remaining eleven cases—29 percent of the 38 murder cases in which the defendant was imprisoned for being an accomplice to intentional murder—the student researchers found that the accomplice-defendant apparently lacked the intent to kill (Figure 2).

[1] Researchers described these six cases as follows:

- "[Defendant] was at the scene and heard to say 'Kill him Shoota'. [Defendant] also assisted in covering up the murder by burning the victim's vehicle."
- "After receiving an order, [Defendant] called the victim to lead him to a location where several vehicles were waiting. Shooters shot at the victim's car ([Defendant] in the backseat)."
- "[Defendant] was with two other men outside of the victim's car with a gun. Witness thought he fired at least one round."
- "It's unclear whether or not [Defendant] was the one who pulled the trigger; evidence that he knew of the killing and helped plan it is present but the evidence that he was the killer is questionable (the testimony was recanted); although the aiding and abetting itself is a strong case, any murder charge is not."
- "[Defendant] planned the murder and handed [B.] the weapon."
- "[Defendant] provided information to assist her brother in murdering [victim] (such as home layout, location of his daughter) and helped clean up after the murder (cleaning up the murder site, burning the body)."

[2] In one of those cases, the researcher noted, "[Defendant] did not pull the trigger however he did go with [the killer] to buy ammunition, he also helped pay for the ammunition. [Defendant] claims [the killer] just wanted to 'rough up' the victim, who allegedly had been harassing [the killer's] girlfriend. [Defendant] and [the killer] had been drinking prior to the murder. It is objectively unclear as to what [Defendant] state of mind was during and before the murder, therefore unable to determine intent. However, because [Defendant] went with [the killer] to purchase the ammunition and because he also helped pay for the ammunition, it is my opinion that the crime was reasonably foreseeable."

The researchers summarized the accomplice-defendant's culpability in each of these eleven cases as follows. The first five are second-degree intentional murder cases; the remaining six are first-degree premeditated murder cases. Note that the last two cases represent the same murder; the defendants are codefendants.

- "Drove the car and provided the gun for an attempted robbery."
- "[Defendant] was picked up and the group agreed to commit a robbery. He was present in the car during the murder, but had no further involvement."
- "[Defendant] was present during the murder and helped to cover the evidence, but did not appear to play a role in the killing."
- "[Defendant] participated in the assault (along with several others), but it is unclear who ultimately caused the death."
- "[Defendant] accompanied [the killer] at his request. [Defendant] did not have a gun but knew [the killer] did and stated he was present to 'make sure things didn't go south.' [Defendant] did not fire any shots."
- "Made a call to attempt to lure victim to a home. Cell phone towers placed [Defendant] in the area of the murder."
- "Drove the car and was in the house during the murder. His fingerprints were not on the weapon."
- "[Defendant claims he] planned to have [the killer] rob [defendant] and [defendant's wife/victim] to 'scare' her."
- "[Defendant] drove the getaway car."
- "[Defendant] was in the home during the murder, but claims [codefendant] was responsible. Extensive evidence (blood on clothes, DNA under fingernails, etc.)."

"[Codefendant] was in the home during the murder, but claims [defendant] was responsible. Less evidence (some blood)."

Appendix C. Data Subcommittee report 2, January 8, 2024

(as submitted by committee chair)

Predicate Felonies for Second-Degree Felony Murder

The Data Subcommittee's second research question was: In practice, what were the predicate offenses for second-degree felony murder? The predicate offense is the "felony" in "felony murder"—the separate crime that was being committed while the death was caused.

This inquiry was limited to second-degree felony murder, in violation of Minn. Stat. § 609.19, subd. 2(1), because that statute does not define qualifying predicate felonies. First-degree felony murder, in violation of Minn. Stat. § 609.185(a)(3) (requiring intent to kill), was excluded from the inquiry because those predicate felonies are statutorily enumerated. Likewise, the specific statutory provisions requiring the predicate offenses to be criminal sexual conduct in the first or second degree with force or violence (Minn. Stat. § 609.185(a)(2)) or drive-by shooting (Minn. Stat. § 609.19, subd. 1(2)) were excluded because those predicate offenses are also statutorily defined.

The subcommittee examined the 296 second-degree felony murder cases sentenced from 2011 through 2022, according to Minnesota Sentencing Guidelines Commission (MSGC) records. Reviewing the court records associated with each case, Dakota County Attorney Kathryn M. Keena found that 6 of the 296 second-degree felony murder cases were incorrectly classified, and she identified predicate felonies in 289 of the remaining 290 cases. Thus, the numbers in the figures that follow will either total 290 (when dealing with the total number of second-degree felony murder cases) or 289 (when analyzing the type of predicate felony).

Classes of Predicate Felonies

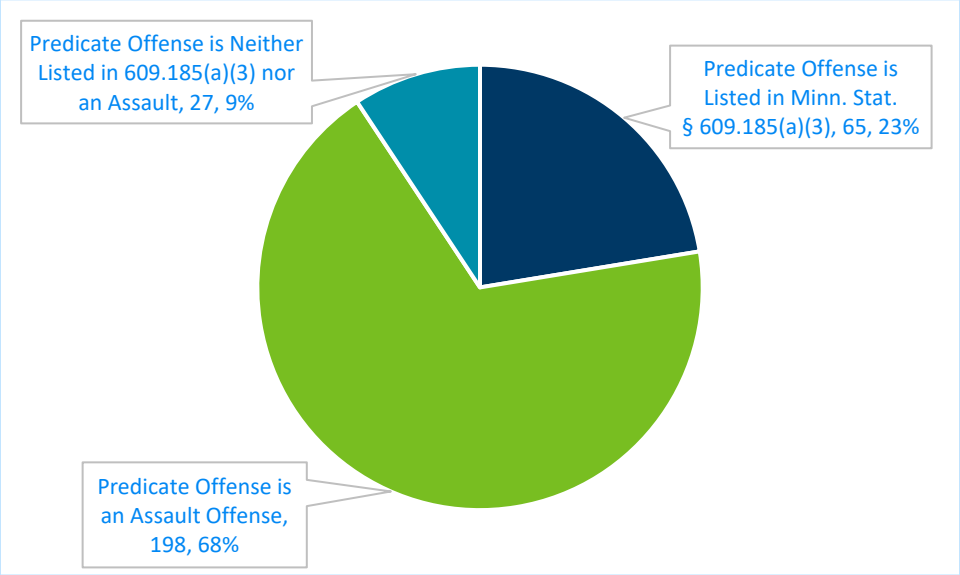
Each predicate felony is reported in one of three classes:

- **Listed** – the predicate offense is one of the predicate offenses listed in Minn. Stat. § 609.185(a)(3) (first-degree felony murder). (Recall that first-degree felony murder has a predicate-felony list, while second-degree felony murder does not.)[1]
- **Assault** – the predicate offense is any form of general assault.
- **Other** – the predicate offense is neither listed in Minn. Stat. § 609.185(a)(3) nor a general assault.

[1] That list has the following members: burglary, aggravated robbery, carjacking in the first or second degree (new in 2023), kidnapping, arson in the first or second degree, drive-by shooting, tampering with a witness in the first degree, escape from custody, or any felony violation of chapter 152 involving the unlawful sale of a controlled substance.

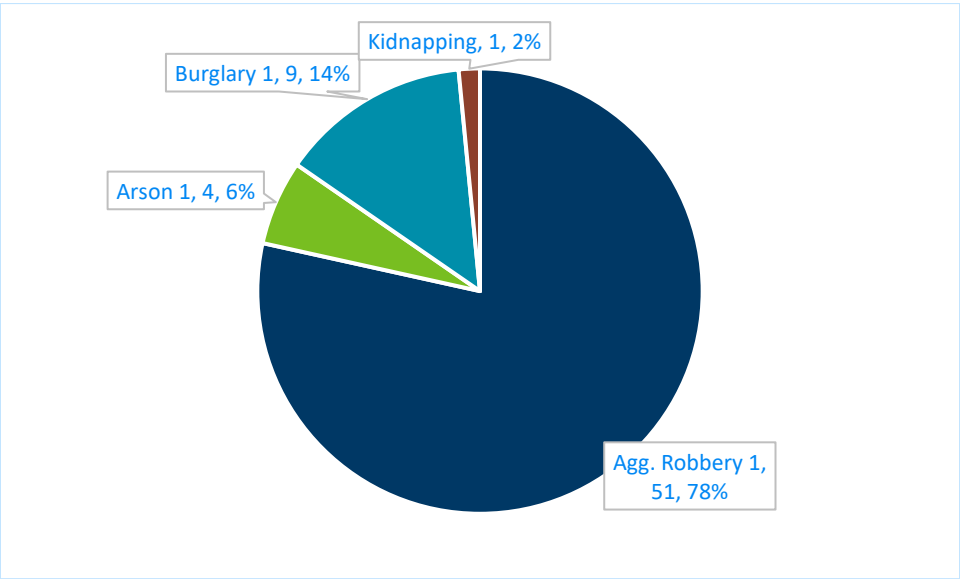
Figure 3 shows the distribution of predicate felonies by these three classes. Over two-thirds of the predicate felonies were some form of general assault.

Figure 1. General Classes of Predicate Felonies in Felony Murder 2nd Degree Cases Sentenced 2011–2022.



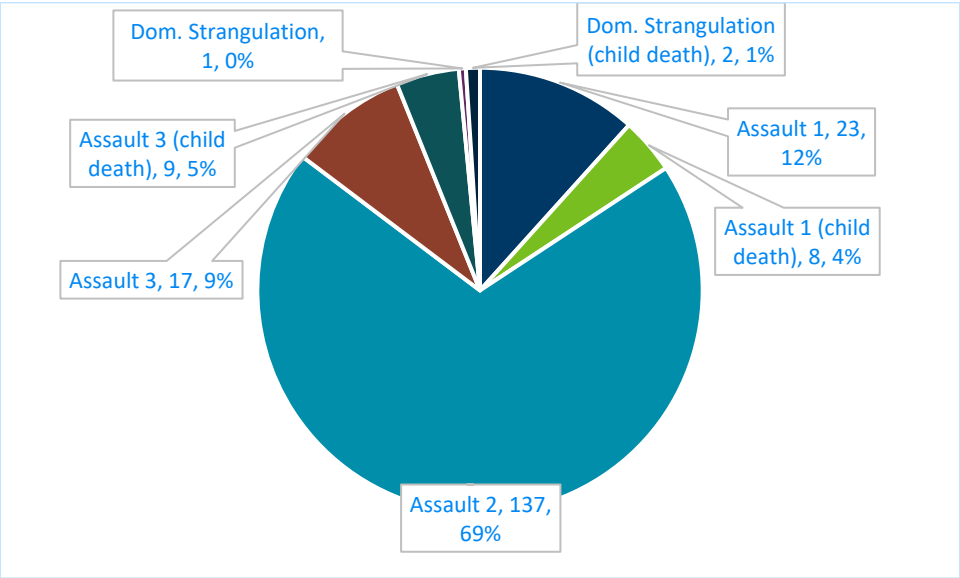
Among the "listed" class, over three-quarters of the predicate felonies were aggravated robbery in the first degree (defined as forcible theft from a person that either resulted in bodily harm or involved a dangerous weapon, whether real or simulated), as shown in Figure 4.

Figure 2. Predicate Felonies Listed in Minn. Stat. § 609.185(a)(3) in Felony Murder 2nd Degree Cases Sentenced 2011–2022.



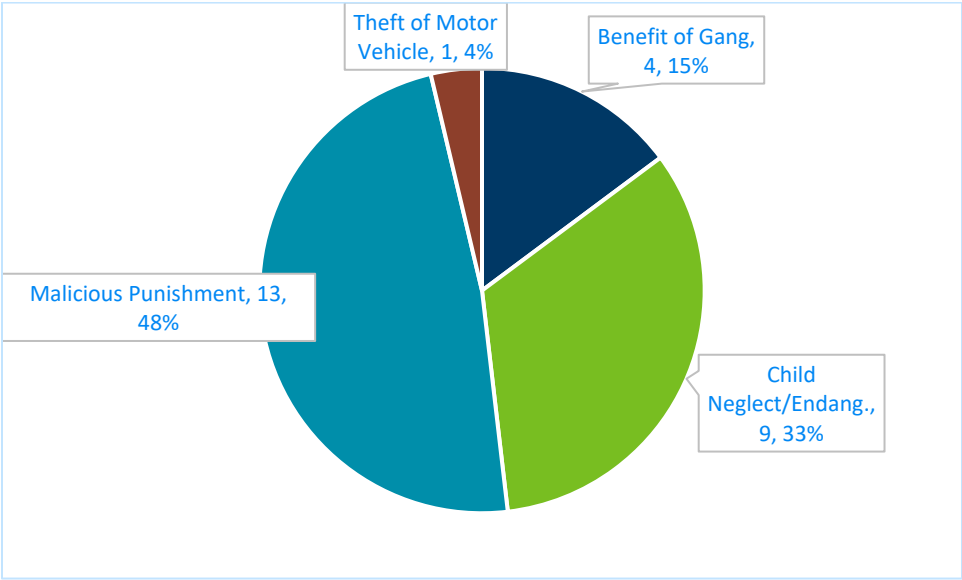
Among the “assault” class, over two-thirds of the predicate felonies were second-degree assault (defined as assault with a dangerous weapon) (Figure 5).

Figure 3. Predicate Felony Assaults in Felony Murder 2nd Degree Cases Sentenced 2011–2022.



Among the comparatively few “other” cases—where the predicate felony was neither an assault nor listed in the first-degree felony murder statute—the predicate felony most commonly involved a child: either malicious punishment of a child, child neglect, or child endangerment (Figure 6).

Figure 4. Other Predicate Felonies in Felony Murder 2nd Degree Cases Sentenced 2011–2022.



Race and Predicate Felonies

This section looks at the racial distribution of people sentenced for second-degree felony murder by class of predicate felony. Before this breakdown, however, Figure 7 shows the overall racial distribution of all people sentenced for second-degree felony murder. Black people comprised a majority (54%) of this group, compared to significantly lower percentages of Minnesota's 2022 adult population (7%), sentenced felony population (27%), and prison population (37%) (sources: U.S. Census Bureau, MSGC, and Minn. DOC).

Figure 5. Defendant's Race, Felony Murder 2nd Degree Sentenced 2011–2022.

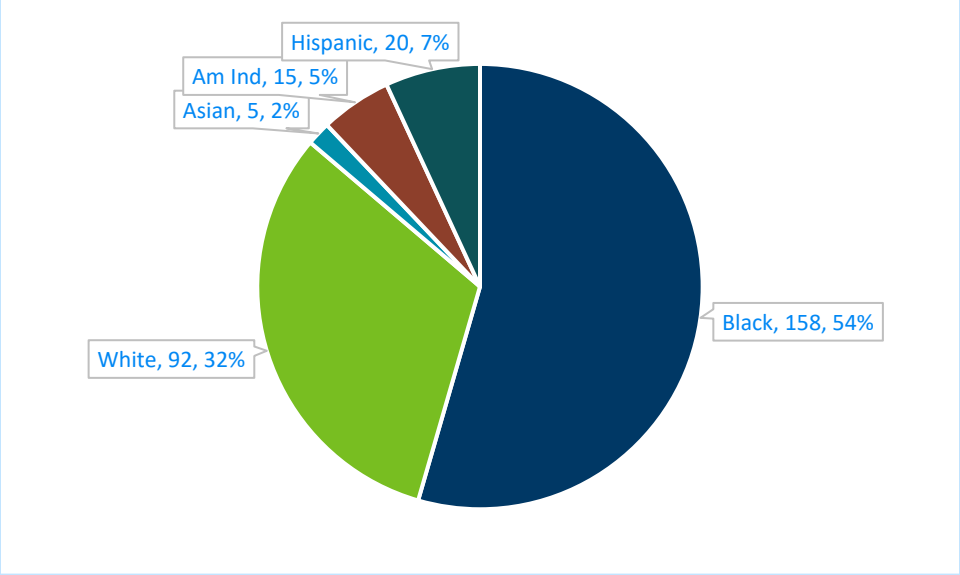
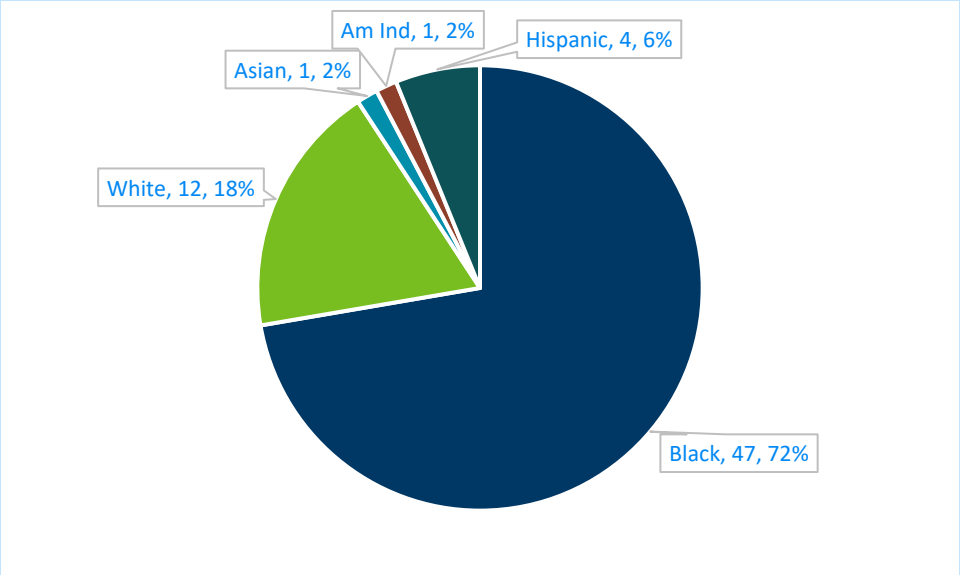


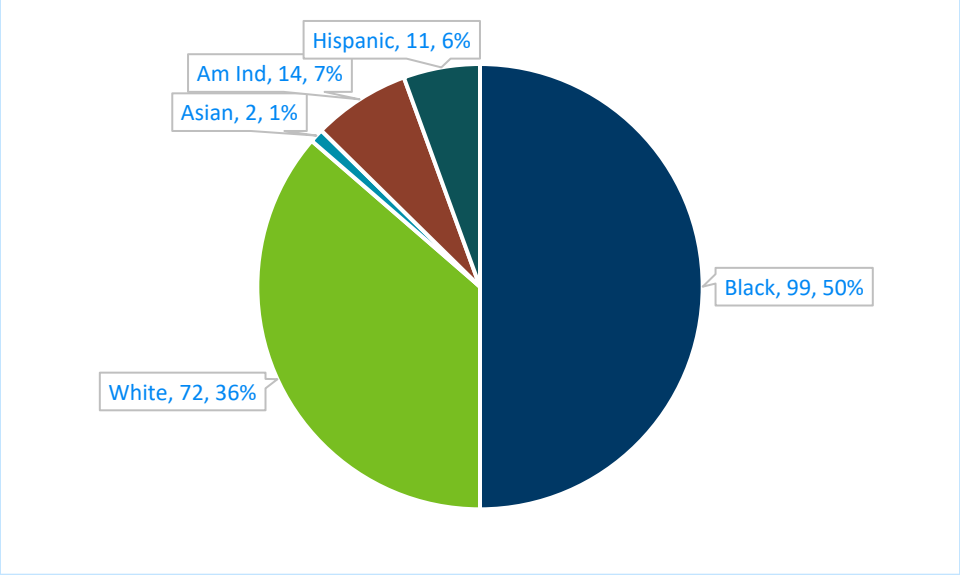
Figure 8 is limited to cases where the predicate felony is listed in Minn. Stat. § 609.185(a)(3). Black people comprised an even greater percentage of this group: 72 percent.

Figure 6. Defendant's Race, Felony Murder 2nd Degree Sentenced 2011–2022 with the Predicate Felony Listed in Minn. Stat. § 609.185(a)(3).



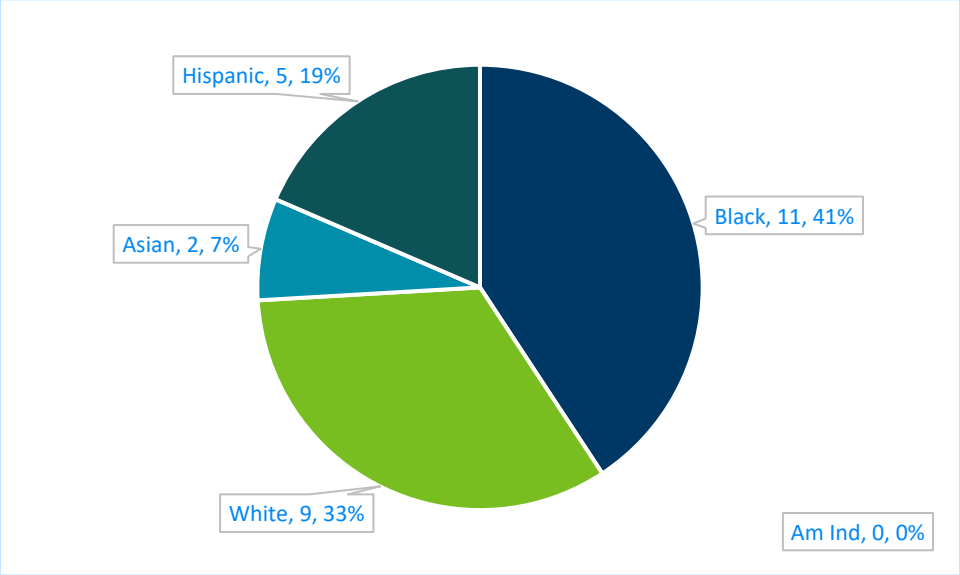
Cases of second-degree felony murder where the predicate felony was an assault were split evenly between defendants in the Black category and everyone else (Figure 9).

Figure 7. Defendant's Race, Felony Murder 2nd Degree Sentenced 2011–2022 with Assault as the Predicate Felony.



Black people also comprise the largest share (41%) of those sentenced for second-degree felony murder where the predicate felony was neither an assault nor listed in Minn. Stat. § 609.185(a)(3).

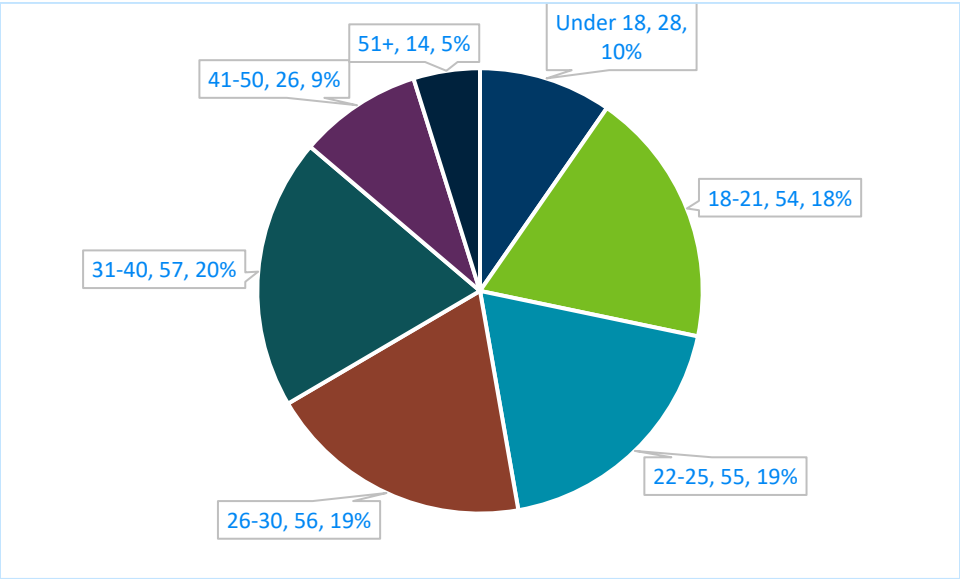
Figure 8. Defendant's Race, Felony Murder 2nd Degree Sentenced 2011–2022 with Other Predicate Felony.



Age and Predicate Felonies

Figure 11 shows the ages—within general groups—of those sentenced for second-degree felony murder from 2011 through 2022. Nearly half were under age 26 at the time of the offense.

Figure 9. Defendant's Age, Felony Murder 2nd Degree Sentenced 2011–2022.



Figures 12, 13, and 14 show defendant's ages by the type of predicate offense. Among those who committed second-degree felony murder when the predicate felony was listed in the first-degree felony murder statute, 42 percent were age 21 or younger (Figure 12), a significantly higher percentage than when the predicate felony was assault (26%, Figure 13) or other (23%, Figure 14).

Figure 10. Defendant's Age, Felony Murder 2nd Degree Sentenced 2011–2022 with the Predicate Felony Listed in Minn. Stat. § 609.185(a)(3).

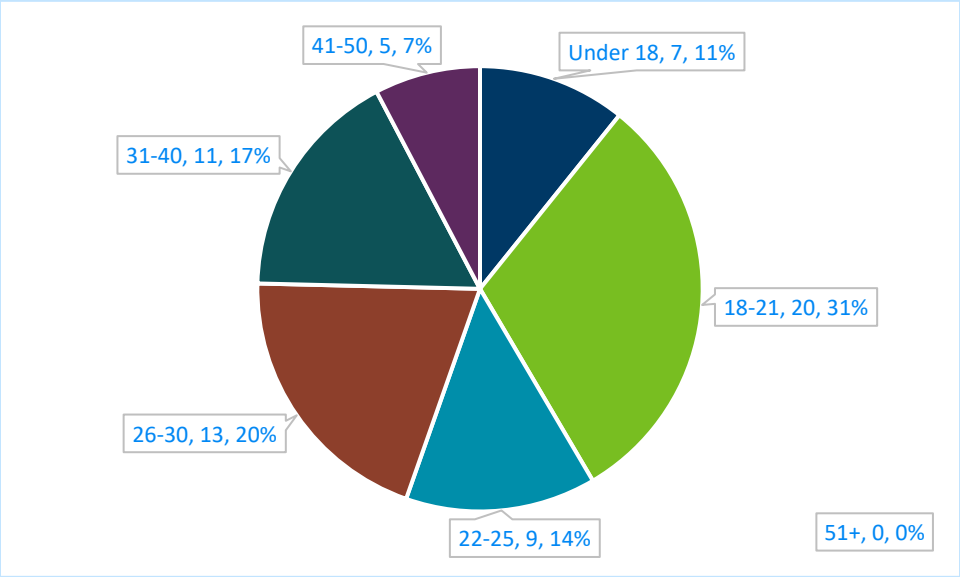


Figure 11. Defendant's Age, Felony Murder 2nd Degree Sentenced 2011–2022 with Assault as the Predicate Felony.

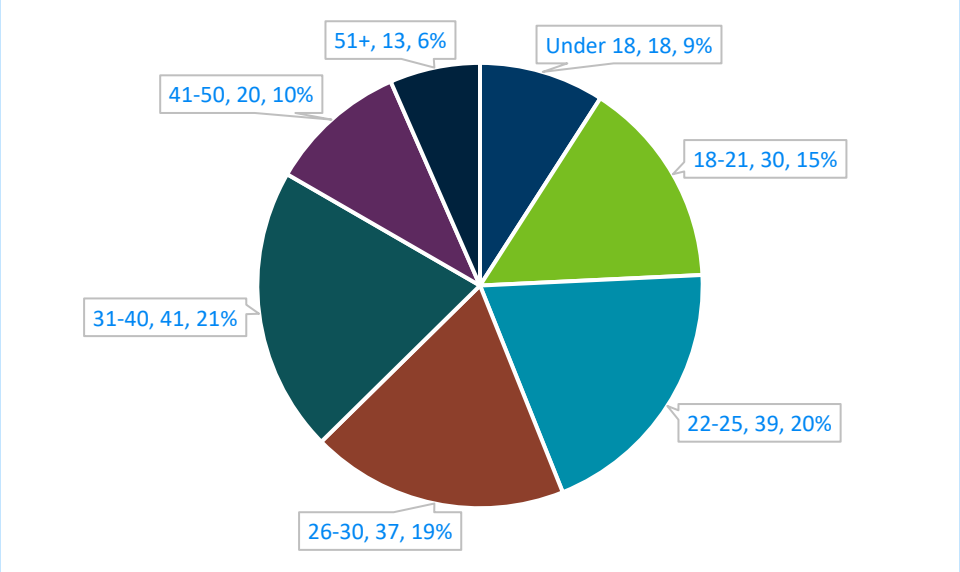
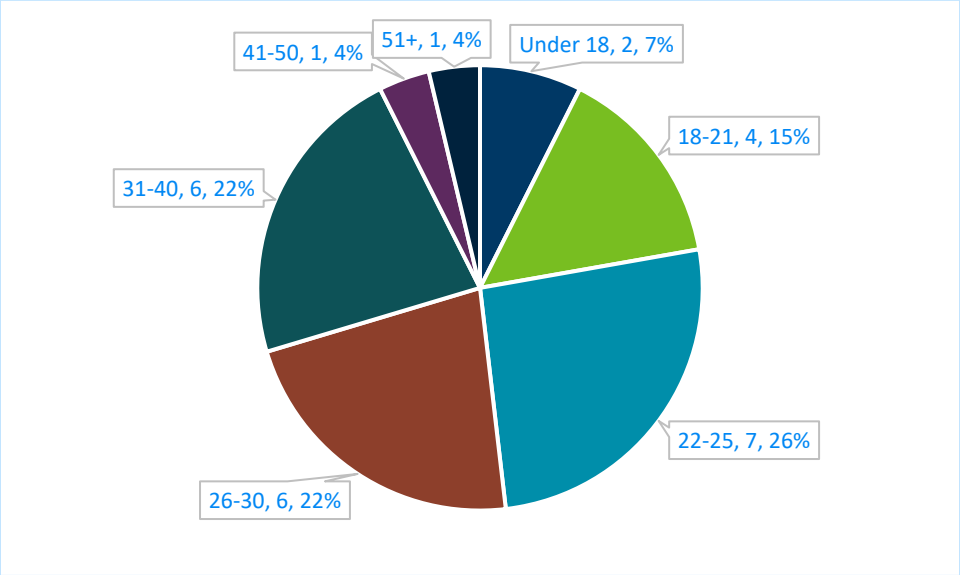


Figure 12. Defendant's Age, Felony Murder 2nd Degree Sentenced 2011–2022 with Other Predicate Felony.



Geography and Predicate Felonies

Minnesota is geographically divided into ten judicial districts. As Table 1 shows, these districts vary by population and felony case volume. Two of the districts each consist of only one county: the 2nd Judicial District (Ramsey County) and the 4th Judicial District (Hennepin County). A district map may be found at https://www.mncourts.gov/find-courts.aspx

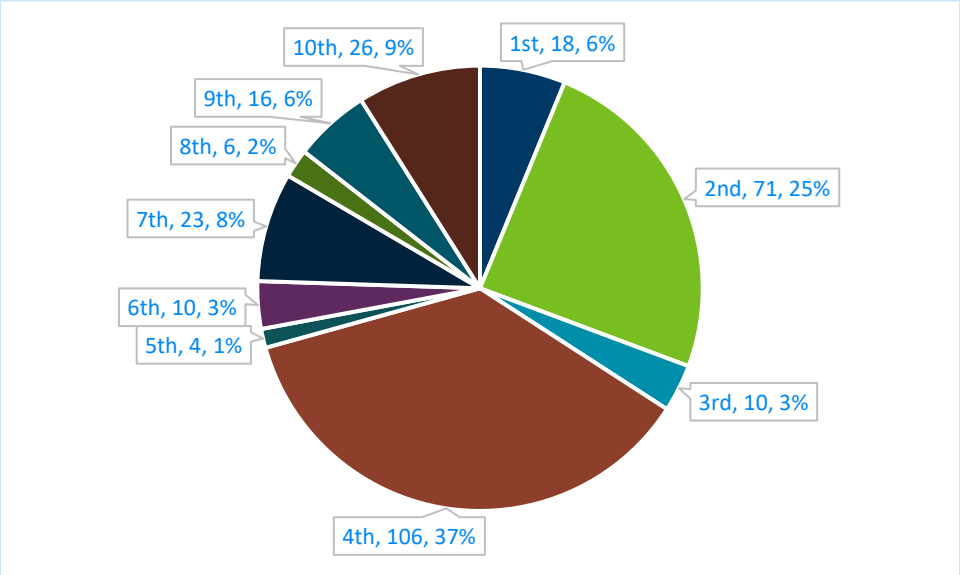
Table 1. Minnesota's Ten Judicial Districts.

Judicial District	Largest City	Share of Minn. Adults	Share of Felony Sentences	Share of Prison Inmates
1st	Lakeville	14%	15%	8%
2nd	St. Paul	9%	9%	11%
3rd	Rochester	9%	7%	8%
4th	Minneapolis	22%	17%	26%
5th	Mankato	5%	6%	6%
6th	Duluth	5%	4%	5%
7th	St. Cloud	9%	11%	12%
8th	Willmar	3%	3%	3%
9th	Bemidji	6%	10%	11%
10th	Woodbury	18%	16%	10%

Sources of 2022 population estimates and case & inmate counts: U.S. Census Bureau, MSGC, & Minn. DOC.

From 2011–2022, 61 percent of Minnesota's felony murder sentences occurred in the 4th and 2nd judicial districts (Figure 15). By comparison, these two districts, combined, hold only 32 percent of Minnesota's adults, sentenced only 27 percent of Minnesota's felony cases in 2022, and were responsible for only 37 percent of Minnesota's prison population in 2022 (Table 1).

Figure 13. Felony Murder 2nd Degree Sentenced 2011–2022, by Judicial District.



When limited to cases where the predicate felony is listed in Minn. Stat. § 609.185(a)(3), the percentage of second-degree felony murder cases from the 4th and 2nd judicial district was even higher: 66 percent (Figure 16). Among cases where the predicate was assault, the 4th and 2nd districts' combined share was 60 percent (Figure 17), and those two districts also sentenced a majority (56%) of the second-degree felony murder cases involving other predicate felonies (Figure 18).

Figure 14. Felony Murder 2nd Degree Sentenced 2011–2022 with the Predicate Felony Listed in Minn. Stat. § 609.185(a)(3), by Judicial District.

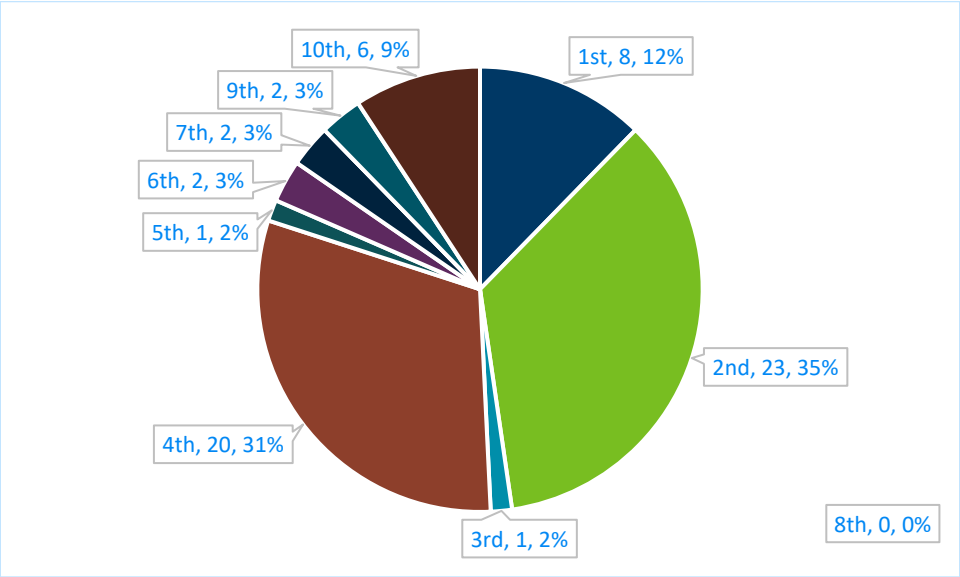


Figure 15. Felony Murder 2nd Degree Sentenced 2011–2022 with Assault as the Predicate Felony, by Judicial District.

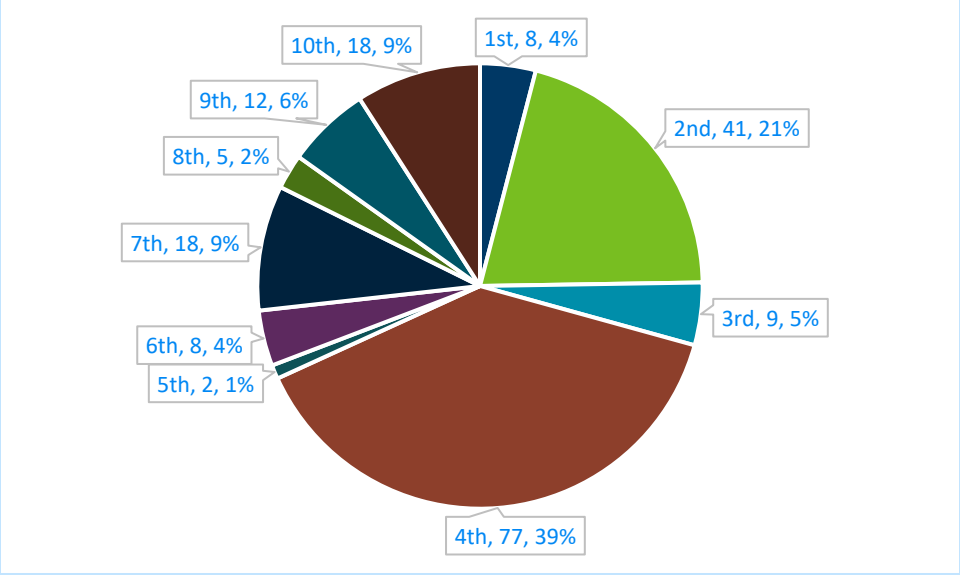
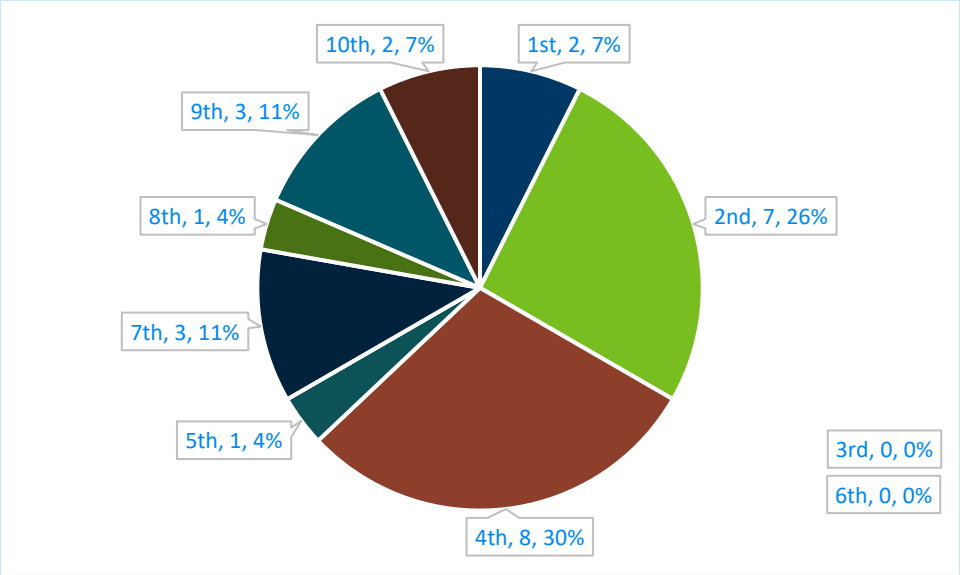


Figure 16. Felony Murder 2nd Degree Sentenced 2011–2022 with Other Predicate Felony, by Judicial District.



Appendix D. Legal Research Subcommittee report

(as submitted by committee chair)

Summary of the Subcommittee's Research on Possible Minnesota Criminal Law Reform Proposals[1]

Introduction

In the 2023 legislative session this Task Force was re-authorized and given a substantially expanded mandate that was designed to

> expand the focus of the task force's duties and work beyond the intersection of felony murder and aiding and abetting liability for felony murder to more generally apply to the broader issues regarding the state's felony murder doctrine and aiding and abetting liability schemes discussed in [the Task Force's 2022 Report].

As discussed at the first three meetings of the Task Force [TF] this Fall, at least a dozen possible criminal law reform recommendations fall within this expanded mandate. The broader issues of felony murder [FM] doctrine include FM issues not addressed in the first phase of the TF's work, and also non-FM homicide charges that can serve as alternatives to FM (and which become more important to the extent that the scope of FM liability is reduced). Broader issues of aiding and abetting [A&A] likewise include A&A homicide issues not addressed in the first phase of the TF's work, and also A&A liability for non-homicide crimes.

The Legal Research Subcommittee was able to build on several prior studies and criminal law treatises (see References list, below) but those prior works do not, individually or collectively, comprehensively address all within-mandate reform possibilities. Given limited time and research resources, the subcommittee decided that it would be necessary to prioritize research work – we could not fully research all of the reform possibilities. The subcommittee further decided that the highest research priority would be given to reforms that seem to have the best chance of receiving strong support from the Task Force and from the Legislature and the Governor.

This report summarizes research findings on each possible reform recommendation. Research results are reported in order of priority, as defined above.

I. Possible TF recommendations with the highest research priority [TF Focus Issues 1 and 2]

[1] This report was written by the Subcommittee Chair, Professor Richard Frase. He wishes to thank the following people for their assistance: Scott Dewey, Faculty Research Librarian, University of Minnesota Law School; Lucy Moran, Class of 2025, University of Minnesota Law School; Keenan Roarty, Class of 2022, University of Minnesota Law School; Greg Egan, Task Force Chair; Kathy Keena, Task Force Vice Chair; and Subcommittee members Jeremiah Carlson and Pat McDermott.

The research summarized in this highest-priority category relates to possible reforms that the subcommittee deemed likely to have the best chances of receiving strong TF and Legislative/Governor support. For these topics, the subcommittee attempted to conduct comprehensive research on relevant laws in Minnesota and in all other U.S. state and federal jurisdictions, updating prior research and conducting new research on topics that were not fully examined in prior research studies.

The two possible reforms examined below -- raising Minnesota's low culpability requirements for accomplices to intentional murder, and tightening Minnesota's broad standards determining which felonies qualify as predicates for Second Degree Felony Murder -- have one thing in common: in both areas, current Minnesota law violates fundamental principles of American 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 (mens rea).

A. Raising the mental culpability (mens rea) requirements for A&A intentional murder (1st or 2nd degree)

Minnesota Law. The focus here is on issues of A&A homicide liability that were not addressed in the first phase of the TF's work, in particular: A&A liability for First Degree Murder based on premeditated intent to kill (Minn. Stat. Sec. 609.185 (a)(1)), and A&A liability for Second Degree Murder based on intent to kill without premeditation (Minn. Stat. Sec. 609.19, subd. (1)(1)). (At its first three meetings last Fall the TF decided not to address any further issues related to First Degree Murder, and as to Second Degree Murder, to only address FM issues and accomplice liability for intentional murder.)

The relevant Minnesota A&A statute is Minn. Stat. Sec. 609.05. Subdivision 1 of that statute states the general A&A standard; this requires that the secondary party -- the accomplice, co-conspirator, or solicitor (ring leader/instigator) -- intentionally assist or encourage the primary party to commit the charged offense. This provision is generally not problematic in second-degree intentional murder cases since it requires proof that the secondary party intended the primary party to kill the victim (although problems may arise when the secondary party merely "advises, …counsels, or conspires" with the actual killer and does not solicit the killing or do anything at the scene to assist or encourage the killing). Subdivision 1 is likewise rarely problematic in first-degree premeditated murder cases -- 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.

More serious problems of A&A liability arise under Sec. 609.05 subd. 2 (entitled Expansive Liability):

> A person liable under subdivision 1 [for a crime committed by a primary party whom the secondary party assisted or encouraged] is also liable for any other crime committed [by such a primary party] in pursuance of the intended crime if [that other crime was] reasonably foreseeable by the person [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 intended death, let alone premeditated that intent. Moreover, the requirements of reasonable foreseeability and probable consequence are objective [should-have-known] standards; there is no requirement that the secondary party have actually been aware of a risk

of death (and in hindsight, things that did happen can seem more foreseeable than they were before they happened). One of the cases noted in the February 2022 TF report (Leila's case, p. 36) illustrates this expanded liability. Leila drove her partner to a drug deal, during which the partner deliberately killed someone; 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.

A number of reported Minnesota cases applying and interpreting subdivision 2 expressly hold that proof of such intent is unnecessary; the secondary party need not consciously foresee death, let alone intend that result. See, e.g., State v. McAllister, 862 N.W.2d 49 (Minn. 2015); State v. Yang, 774 N.W.2d 539 (Minn. 2009); State v. Souvannarath, 545 N.W.2d 30, 33 (Minn.1996).

As summarized below, many other states have similar statutory and case law rules, so Minn. Stat. Section 609.05 subdivision 2 is not an anomaly. However, under principles of logic and proportionality any such rule seems patently unjust, posing a very serious risk of allowing excessive liability and punishment (including mandatory life without parole). By definition, a secondary party has committed no proven act that directly caused death; given that lesser role, the required proof of mental culpability should be at least as high for a secondary party as it is for the primary party; when the charge is intentional murder, intent to kill should be required for both. Granted, in many such cases there is sufficient evidence to prove that the secondary party did intend death. But to maintain the accuracy and perceived legitimacy of the process such intent should be proved to the jury or admitted by the defendant as part of the factual basis for his or her guilty plea.

Similar risks of excessive accomplice liability and punishment lead this Task Force to recommend, and the Legislature to enact in its 2023 session, required proof of intent to kill when a felony accomplice is charged with First Degree Felony Murder under clause (a)(3) of the first-degree murder statute (dealing with intentional killings while committing one of the listed felonies). But there was no change in the rules governing accomplice liability for premeditated First Degree Murder, or for unpremeditated Second Degree intentional murders. That is some important unfinished business; when the charge is First Degree Murder based on a theory of premeditated intent to kill (Minn. Stat. Sec. 609.185(a)(1)), such intent should have to be shown as to both the actual killer and the accomplice. Likewise, when the charge is Second Degree Murder based on a theory of unpremeditated intent to kill (Minn. Stat. Sec. 609.19 subd. 1(1)), the same proof of intent should be required for the killer and for the accomplice.

Laws in other state and federal jurisdictions. Prior works (e.g., Binder 2011, pp. 502-12; Dressler 2018, § 30.05(B)(5); LaFave 2023, § 13.3(b)) have found that many states have accomplice-liability rules (some lacking any statutory basis and found only in case law) that are similar to the expansive liability standards contained in Minn. Stat. Sec. 609.05, subd. 2. Some of these states require that the further crime be "reasonably foreseeable" or a "natural and probable consequence" of committing the aided/abetted crime; other states only require that the further crime be "in furtherance" of the aided/abetted crime (which means that the further crime need not be foreseeable or probable); and some states, including Minnesota, require all of these standards to be met.

In whatever formulation, such expansive liability rules have been strongly criticized by criminal law scholars (see, e.g., Dressler 2018; Heymann 2010, 2013), as inconsistent with fundamental principles of American criminal law. Such rules were therefore rejected in the Model Penal Code (ALI 1962), and by the drafters of a proposed new federal criminal code (LaFave 2023). Likewise, at least 14 jurisdictions have rejected such rules: Alaska, Arizona, Colorado, Maryland, Massachusetts, Missouri, Montana, Nevada, New Mexico, Oregon, Pennsylvania, Vermont, Washington, and Washington D.C.[2]

Note – Topics B, C, and D below all deal with the issue of which felonies qualify, in Minnesota and in other state and federal jurisdictions, as predicates for a general FM rule like the one found in Minnesota's Second Degree Murder statute (Minn. Stat. Sec. 609.19, Subd. 2(1)). Such rules impose murder liability based solely on committing a qualifying felony, with no required proof of intent to kill, extreme indifference to human life, or even recklessness or criminal negligence related to causing or risking death. In the remainder of this report, these rules will be referred to as True Felony Murder Rules (TFMRs], so as to exclude murder rules that require proof of at least criminal negligence as to death risk. In Minnesota, most of the FM rules found in the First Degree Murder Statute are not TFMRs, because proof of intent to kill or at least extreme indifference to human life is required (in addition to proof that the defendant committed one of the listed felonies and that death resulted).

B. Adopting an assault "merger" limit for 2nd-degree Felony Murder (Minn. Stat. Sec. 609.19, subd. 2(1))

Most states that retain a TFMR comparable to Minnesota's 2nd–degree FM law do not allow felony assaults to qualify as predicate felonies. The assault is said to "merge" with the homicide; this is also known as the requirement that the predicate felony be "independent" of the homicide and/or that it represent a criminal purpose (e.g., theft, when the predicate is robbery) unrelated to causing physical injury to the victim.

The most common rationale for this limitation on FM liability is that, since almost all homicides are also felony assaults (or begin that way), allowing such assaults to support murder charges greatly expands the scope of FM liability (with attendant risks of excessive punishment and/or inconsistent charging). Such expansion also undermines legislative grading of homicide crimes. It reduces or eliminates the need to ever prove intent to kill or even extreme indifference to human life (depraved-mind murder). Such expansion likewise largely eliminates the crimes of voluntary (heat-of-passion) manslaughter and involuntary (reckless) manslaughter (since almost all cases usually charged with those crimes involve a felony assault; without merger, all such cases could be charged as felony murder.

Minnesota Law. The Minnesota Supreme Court has declined to adopt an assault merger limit, see, e.g., State v. Loebach, 310 N.W.2d 58, 65 (Minn. 1981). In favor of that position, it can be argued that the text of the murder statute does not include assault among the specified non-qualifying felonies, and further, that since non-merger has long been the rule any change should be made by the legislature. On

[2] Ten of these jurisdictions were identified in a Supreme Court case. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), Brief for Respondent. The other four jurisdictions were identified by Robinson & Williams (2018, chap. 12, n. 7). Subcommittee researchers have verified these claims -- expansive liability rules have been rejected in all 14 jurisdictions.

the other hand, courts in other states have imposed merger limits despite equally broad statutory qualifying-felony language. And Minnesota courts have imposed other limitations on FM-2, notwithstanding the broad language of the 2nd degree murder statute, for example the requirement that qualifying felonies must pose a "special danger to human life," see section D below.

Merger is an especially urgent reform need in Minnesota due to the state's unusually broad definition of what constitutes a felony-level assault – the grading of an assault (misdemeanor, gross misdemeanor, 1st/3rd/4th degree felony assault) depends solely on the seriousness of the harm that resulted from the defendant's acts, even if the defendant intended a lesser harm. Thus, for example, it's felony assault, and thus 2nd degree murder when death results, if the defendant punches the victim in the jaw (5th degree assault, a misdemeanor), the victim loses consciousness (making it 3rd degree assault, a felony), and the victim falls in a way that causes a head injury from which he later dies. (These were the actual facts in State v. Gorman, 532 N.W.2d 229 (Minn. App. 1995), affirming defendant's murder conviction.)

Laws in other state and federal jurisdictions. Of the 43 state and federal jurisdictions that have a True Felony Murder rule [TFMR] comparable to Minnesota's 2nd degree FM statute, 28 jurisdictions (65 percent) recognize merger limits and do not treat most assaults as qualifying felonies (in some of these jurisdictions exceptions are made allowing certain assaults to qualify, for example: assaults against children, the elderly, or public officials; assaults aimed at someone besides the homicide victim; and assaults with multiple victims). 14 states (including Minnesota) reject all assault merger limits; in one state the status of assault merger is unclear.

As for the rules defining felony-level assault, grading rules were found for 40 state and federal jurisdictions. Of these, 22 grade assaults according to the seriousness of the harm that the defendant intended (this is also the approach taken in the Model Penal Code, ALI 1962, §§ 1.13(10), 2.02(1), 211.1). Minnesota and 17 other jurisdictions grade assaults according to the actual resulting harm regardless of intent.[3] But many of those 17 other jurisdictions either lack a True Felony Murder Rule, or apply merger limits; Minnesota is one of only six jurisdictions that has a TFMR, allows assault as a predicate felony, and grades assaults according to harm not intent.

C. Enacting a definitive statutory list of qualifying predicate felonies for 2nd-degree Felony Murder

Almost all jurisdictions with FM rules comparable to Minnesota's 2nd degree FM statute agree that not every felony-level crime qualifies as a predicate for FM liability. However, jurisdictions take at least three approaches in defining qualified FM predicates. Some limit such predicates to specific felonies identified by statute ["list-only jurisdictions"). Other jurisdictions 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"). A third group of jurisdictions relies solely or almost solely on a case-law-based dangerous felony standard, with very few if any qualifying predicate felonies specified by statute. These different approaches have the well-known advantages and

[3] The 12 remaining jurisdictions have unknown assault grading rules, but in nine of those jurisdictions the issue of "felony" assault as a predicate for FM does not arise, either because there is no TFMR, or because assault cannot be a predicate felony (merger limits have been adopted).

disadvantages of rules and standards – fixed rules (felony lists) promote uniformity, predictability, and transparency; standards promote flexibility and the ideal of case-specific justice.

Minnesota Law. Minnesota's 2nd degree FM statute uses the third approach described above, relying almost entirely on a dangerous-felony standard to determine qualified predicate felonies.[4]

Laws in other state and federal jurisdictions. Binder (2011, pp. 450-51) identified 25 state and federal jurisdictions that use predicate felony lists as the exclusive criterion of which felonies qualify as FM predicates (there currently appear to be 26 list-only jurisdictions).

Binder placed 14 other jurisdictions in the second category described above, jurisdictions that use a combination of approaches -- listing qualifying predicate felonies but also employing dangerous felony standards (12 states currently belong in this category; North Carolina is really a first-category, list-only state; and as explained below, Minnesota belongs in the third, standard-only category). In most of these states the lists and standards apply to different degrees of murder, for example, a list is used for 1st degree FM murder and a standard for 2nd degree FM.

As a third category, Binder identified six FM states (Delaware, Georgia, Massachusetts, Missouri, South Carolina, Texas) that only use a dangerous-felony standard (Binder 2011, p. 466). However, the current number of states in that category is five. Delaware and Massachusetts now lack a TFMR. And Minnesota is best seen as a standard-only state, not a list-plus-standard state. That is because none of Minnesota's three TFMRs lists more than a single qualifying felony or felony cluster (criminal sexual conduct 1 and 2 for murder-1; drive-by shooting for murder-2, and schedule I and II drug crimes for murder-3). Similar one-crime "lists" are found in two other states in Binder's standard-only category, Georgia and Texas. But regardless of how Minnesota is classified, this state is very much in the minority among TFMR jurisdictions, in that Minnesota makes almost no use of the statutory-list approach in defining qualifying felonies for true FM crimes. As noted above, 38 TFMR jurisdictions (26 + 12) use lists exclusively or in a combined list-plus-standard approach; Minnesota is one of only five TFMR jurisdictions that rely almost entirely on the case-law-based standard approach.

[4] Minnesota's Second Degree Murder statute (Minn. Stat. Sec. 609.19, subd. 1(2) does list one qualifying felony: drive-by shooting (Minn. Stat. Sec. 609.66, subd. 1e). Minnesota's other two degrees of murder likewise contain True FM Rules based on a single listed qualifying felony. The First Degree Murder statute lists Criminal Sexual Conduct 1st or 2nd degree (Minn. Stat. Sec. 609.185(a)(2)); the Third Degree Murder statute lists Schedule I and II drug crimes (Minn. Stat. Sec. 609.195(b)). A more extensive list of felonies -- burglary, aggravated robbery, kidnapping, arson 1 and 2, drive-by shooting, witness tampering 1 and 2, escape, chapter 152 felony drug crimes, and terrorism crimes – is found in another subsection of the First Degree Murder statute (Minn. Stat. Sec. 609.185(a)(3)). However, this provision is not a TFMR, comparable to Minnesota's Second Degree Murder FM rule, because even when one of those listed felonies has been proved the state must also prove that the offender intended to cause death or, for terrorism crimes, manifested extreme indifference to human life. (As of 2023 proof of intent to kill is also required for accomplices to be guilty of this first degree FM murder crime.)

As shown in Appendix A, five felony crimes or crime clusters[5] are virtually always on statutory lists of qualified FM predicates -- arson, burglary, kidnapping, rape, and robbery. Almost two-thirds of the 38 jurisdictions using a list also include escape or flight from custody; over half list various specialized assault crimes (i.e., against children, the elderly, or public officials; drive-by shooting). Drug crimes are also frequently listed. More than half of the felony-list jurisdictions list more than seven crimes or crime clusters, with an average of eight per jurisdiction. Finally, it should be noted that generally-applicable assault laws (assault, battery, mayhem) are listed by 11 of the 38 jurisdictions, making clear that assault merger limits do not apply in those jurisdictions.

Overall, one notable finding is that the most-commonly listed felonies in other states correspond fairly closely to the crimes listed in Minnesota's First Degree Murder statute (although all but one of the latter provisions is not a TFMR because intent to kill must be proved, or at least extreme indifference to human life).[6] The listed Minnesota murder-1 felonies are:

> criminal Sexual Conduct 1st or 2nd degree with force or violence,
>
> burglary,
>
> aggravated robbery,
>
> carjacking in the first or second degree,
>
> kidnapping,
>
> arson in the first or second degree,
>
> drive-by shooting,
>
> tampering with a witness in the first degree,
>
> escape from custody,
>
> any felony violation of chapter 152 involving the unlawful sale of a controlled substance, and

[5] Listed felonies have been consolidated for ease of presentation and to facilitate comparability across jurisdictions. Terminology varies even when the underlying offenses are roughly 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 are grouped with robbery and counted as one crime even if both are listed; felonious restraint and false imprisonment are grouped with kidnapping; fleeing from police is grouped with escape; and multiple listed specialized assault crimes are grouped together and counted once.

[6] The only TFMR in Minnesota's First Degree Murder statute is the FM rule based on criminal sexual conduct 1st or 2nd degree. The crim sex FM rule (unlike FM rules based on the other listed felonies in the murder-1 statute) has no requirement to prove any mental culpability as to causing or risking death.

felony crimes to further terrorism.

The finding above suggests that one plausible second degree FM reform in Minnesota would be to simply list all or most of the same felonies under murder-2 as are listed in the murder-1 statute, but without the mental culpability elements of intent to kill or extreme indifference to human life specified in the murder-1 statute. When such culpability is proved the murder would continue to be first degree FM; without such proof it would be second degree FM. (The Task Force assumes the Legislature wishes to make no changes in the treatment of deaths caused during the commission of crim-sex 1 and 2, so those would remain a basis for first-degree murder.) Using the existing murder-1 felonies or most of them for second-degree as well as first-degree FM makes sense from a policy perspective: by listing these felonies in the murder-1 statute the Legislature has in effect already found that these crimes are particularly culpable and dangerous.[7]

D. Clarifying and limiting Minnesota's court-defined predicate felony standards

If the legislature chooses not to adopt the list approach to defining allowable predicate felonies (or if it does but the list contains a large number of crimes, requiring judicially-imposed limits), it would be helpful to courts and parties if the legislature would clarify and tighten the current dangerous-felony standards found in Minnesota case law. This would promote greater consistency and predictability in application of the standards, and ensure that all offenders convicted of FM are culpable enough to merit conviction for murder (with its severe punishment and stigma), not just manslaughter.

Minnesota law. As noted above, except in cases of drive-by shootings Minnesota's 2nd-degree felony murder rule defines qualifying felonies according to a dangerous-felony standard. Minnesota courts have long held that qualifying felonies must pose a "special danger to human life." In *State v. Anderson* the Minnesota Supreme Court stated, citing prior case law, that the test to determine whether a predicate felony is sufficiently dangerous is a "two-part inquiry into the inherent danger of the offense and the danger of the offense as committed." *Anderson*, 666 N.W.2d 696, 701 (Minn. 2003). However, the *Anderson* court also suggested that "inherent" special danger, based on proof of all required crime elements, does not mean "inevitable" special danger, noting that to require a predicate felony to pose a special danger to human life under the circumstances of every conceivable case would "eviscerate the

[7] An alternative reform point of departure might be the felonies listed in Minn. Stat. Sec. 624.712, Subd. 5, defining "Crime of violence." However, that list includes more crimes than the felony lists being used in other jurisdictions. And the Chapter 624 list was written for purposes of regulating dangerous weapons, not defining felony murder liability. At least some of the crimes on the list are clearly not suitable as FM predicates. For example, manslaughter crimes are often deemed unsuited even in jurisdictions that accept felony assaults as FM predicates (i.e., rejecting merger limits). Treating first degree (heat-of-passion) manslaughters as FM predicates would nullify the Legislature's clearly-expressed intent to treat these cases as murder, not manslaughter. Similarly, treating second-degree (reckless) manslaughters as FM predicates would largely eliminate convictions for that crime (again, contrary to the Legislature's evident intent to punish such reckless killings as manslaughter). In addition, a number of crimes on the Sec. 624.712 list can be and usually are committed in ways that are not life threatening (for example, "solicitation, inducement, and promotion of prostitution."

special danger to human life standard." *Anderson*, 666 N.W.2d at 701 n. 6. And in subsequent lower court cases, it seems that inherent special danger to human life is not a very high standard. For example, the Court of Appeals found that the standard was met for felony drunk driving (State v. Smoot, 737 N.W.2d 849 (Minn. Ct. App. 2007)). But in such cases the conduct involved in the offender's current DWI charge need not be any more dangerous than ordinary misdemeanor-level DWI, which rarely results in death (enhancement to felony level is based solely on the offender's *prior* alcohol-related driving record).

Laws in other state and federal jurisdictions. As noted in section C above, Binder (2011) identified 14 FM jurisdictions --now 12 -- that use both lists and dangerous-felony standards, while another six jurisdictions -- now 5 – rely almost exclusively on such standards. Of the 12 current list-plus-standard states, nine apply lists to the highest degree of murder, and standards to a lower degree. Only three of the states (Alabama, Illinois, and Montana) use both approaches for the same degree of murder – a list supplemented by a standard that permits additional felonies to qualify for that murder crime.

The 12 states that use both lists and standards tend to have fewer felonies on their lists (average: 7.2) than the 26 jurisdictions that use only a list (average: 8.5). This makes policy sense in that, if fewer felonies are listed there is greater need to supplement the list with a standard that permits additional felonies to qualify; conversely, if more felonies are listed there is less need for a supplementing standard. On the other hand, if a very large number of felonies is listed many of them will often not be life threatening. With a long list of felonies it therefore seems appropriate to use a dangerousness-as-committed standard as a *limiting* device (not a supplement) -- permitting a listed felony to be disqualified because, in the defendant's case, his or her acts were not sufficiently life threatening to justify the greater punishment and social stigma of a murder conviction.

If a standard is used -- as a supplement to a felony list within a given degree of murder, as a limiting device to disqualify listed felonies, or as the sole approach for one of the murder degrees -- how should the standard be formulated? What statutory (or case law) language gives courts and attorneys the best guidance? Guidance and meaningful limitation are needed to promote consistent application, and to ensure that FM liability is limited to very culpable offenders who deserve to be convicted of murder and not just manslaughter.

Unfortunately, none of the felony dangerousness standards currently being used in the 17 jurisdictions described above (12 list-plus-standard; 5 standard-only) suggests a formula that is clearly better than the current Minnesota standard under *Anderson* ("special danger to human life," both inherently and as committed). Non-Minnesota standards typically state that predicate felonies must be "inherently" or "clearly" dangerous to human life, or must pose a "substantial risk" of death; one state's standard simply states that a predicate felony must be "sufficiently dangerous to life, as judged by the nature of the crime or by the manner in which it was perpetrated" (presumably: sufficiently dangerous *to justify murder liability*). (State dangerous-felony standards are summarized in Appendix Da.)

Perhaps the "inherently dangerous" prong of the *Anderson* standard could be improved by the addition of language found in a California case: "the felony by its very nature cannot be committed without creating a substantial risk that someone will be killed." As for the felony's danger as committed, states

use varied approaches: some, like Minnesota, use this standard as an independent, necessary requirement for all qualifying felonies (in addition to inherent dangerousness); in other jurisdictions danger-as-committed is the only standard; a third group of jurisdictions considers dangerousness only in the abstract (based on the crime elements that must be proved), without considering the manner in which the defendant committed the felony in question.

Another reform possibility would be to codify *Anderson* to specify that a qualifying predicate felony must manifest -- both inherently (as elaborated above) and as committed -- "extreme indifference to human life." The Minnesota Legislature has already employed that culpability standard to elevate some homicides to First Degree Murder. (However, if a particular felony has been listed as a felony murder predicate, the Legislature will have already made an inherently-dangerous determination and courts would only need to apply an as-committed dangerousness standard.)

But who would make that determination? Although FM predicate standards -- as to both "Inherent" and "as- committed" dangerousness -- are typically applied by courts not juries, a good argument can be made that at least the as-committed assessment should be a crime element, found by the fact-finder (judge or jury) beyond a reasonable doubt.

If that approach were to be taken, however, why use the FM doctrine at all? If dangerousness to human life is a required crime element, why not use the "depraved mind" doctrine? (Third Degree Murder, in Minnesota.) That doctrine implicitly applies an extreme-indifference-to-human-life standard, and treats it as a required element of the murder charge, comparable to the extreme-indifference-to-human-life element for some murder-1 charges. (Depraved Mind Murder is discussed in the next section, below.)

II. Possible TF recommendations with a medium level of research priority

Unlike the research reported above, the research summarized in this medium-priority category, and in Category III below (lowest research priority), is not comprehensive, due to limitations of time and research resources. These summaries mostly just describe -- but do not complete and update -- the principal findings of prior research.

The four medium-priority topics discussed below relate to a common alternative to felony murder charges: "depraved mind" Third Degree Murder. The subcommittee deemed reforms related to Minnesota's Third Degree Murder law to be less likely (compared to the topics discussed in Part I, above) to receive strong support in the TF and from the legislature and governor, Nevertheless, one or more of these reforms might be needed as part of a reform package in this TF round, or might be chosen as a subject for further study if the Legislature authorizes a third round of TF work).

A. Legislatively overruling Minnesota's unusual limits on the scope of 3rd degree murder

Minnesota Law. Minnesota's Third degree, "depraved-mind" murder [DMM] law applies to anyone who

> … without intent to effect the death of any person, causes the death of another by perpetrating an act eminently dangerous to others and evincing a depraved mind, without regard for human life… Minn. Stat. Sec. 609.195(a).

In *State v. Noor*, 964 N.W.2d 424 (2021), the Minnesota Supreme Court held that DMM may not be charged if the defendant's dangerous actions were "directed with particularity" at the person who died (the Court referred to this rule as a Particular Person Exclusion ["PPE"]). The Court cited prior cases stating that DMM is a "general malice" crime. But the Court but did not state any policy reasons for this limitation, and none are readily apparent. Since recklessness as to the risk of death suffices for manslaughter when it is "directed" at the person who died, why shouldn't gross recklessness and extreme disregard for the victim's life be treated as culpable enough for 3rd degree murder? Or to take a classic DMM scenario: if a person drives his car at high speed into a crowd of people, why should it be murder if he doesn't target anyone in particular, but not murder if he hopes to hurt or at least terrorize a certain person? (In both hypothetical cases, multiple people could have been hurt; similar contrasting scenarios – targeting no one in particular; targeting a particular person -- can arise when only one person was likely to be hurt, for example, when the defendant fires a single shot into a house.) As explained below, very few other states with DMM laws apply the PPE rule.

Taken literally, the *Noor* standard would preclude DMM charges for an offender such as Derek Chauvin, whose highly dangerous and ultimately fatal acts were directed solely at George Floyd. Indeed, the Court seemed to be precluding DMM liability in a case like Chauvin's when it stated: "general malice does not refer to indifference [to human life] directed at the person slain" (*Noor*, 944 N.W. 2d at 433). In response to the argument that its ruling leaves a "hole" in the state's homicide laws, the Court suggested that cases barred by PPE can be charged as felony murder. But as research conducted by this Task Force and others shows, there are many problems with that doctrine, especially when (as in cases like *Noor* and *Chauvin*) FM liability would be based on felony assault.

It might be possible to interpret the *Noor* holding narrowly, so that it does not exclude extremely reckless killers like Chauvin but only defendants who intended to kill the victim, as officer Noor arguably did (he shot at the victim's body and claimed he did so because he feared for his partner's life). Indeed, almost all of the prior cases cited in the *Noor* opinion, rejecting DMM liability, involved either jury findings of intent to kill the victim or strong evidence of such intent; moreover, the earliest cited cases said DMM does not apply when the defendant had a "design" (or "intention and design") to kill the victim. When such evidence exists it can be argued that juries should not be allowed to ignore a provable intentional murder charge and convict on the lesser DMM charge. Nevertheless, even if this narrower interpretation is plausible and defensible on policy grounds, the *Noor* holding is ambiguous (and so was the pre-*Noor* case law; the DMM conviction in *Noor* thus could very well have been vacated based on the Rule of Lenity – ambiguous statutes are read narrowly). The scope of the DMM statute should be clarified, one way or the other, by the Legislature. As suggested below, it may also be wise to rewrite the DMM statute in other ways so as to further clarify its scope.

Laws in other state and federal jurisdictions. Of the 28 jurisdictions known to have a murder law similar to Minnesota's DMM, only six (including Minnesota) apply the PPE rule adopted in *State v. Noor*.[8]

Three of the other five states also apply an alternate limitation that was rejected in *Noor* and prior Minnesota cases – that the defendant's acts must have endangered more than one person; the *Noor* opinion refers to this as the More Than One Person Requirement [MTOPR]. A seventh state applies MTOPR but not PPE. (The Model Penal Code [ALI 1962] rejects both PPE and MTOPR limits on the scope of DMM.)

Both PPE and MTOPR are inconsistent with some of the best-known DMM cases in other states. For example, in *Commonwealth v. Malone*, 47 A.2d 445 (Pa. 1946) the defendant fired three times at his friend's head while playing a version of Russian Roulette. He claimed that he thought the sole bullet in the gun would not reach the firing position. But even if he truly believed that, this was extremely reckless conduct. His DMM conviction was affirmed, and rightly so.

B. If *Noor's* PPE limit is legislatively overruled, adding language limiting the scope of DMM in other ways

If the Minnesota Legislature follows the majority of other states with DMM laws and rejects PPE, other limits on the scope 3rd degree murder may be needed. Attorneys, judges, and jurors need guidance on which cases qualify, and statutory language should be added to ensure that DMM charges are not routinely filed along with manslaughter in every reckless, focused-on-the-victim case, but are limited to truly depraved conduct such as by Derek Chauvin and the defendant in *Malone*. Such DMM limits are especially important for cases like *Noor*, where the defendant made a split-second decision to shoot in the honest but unreasonable belief that this action was necessary to protect his life or the life of another person. (This could also apply to a case like that of Jeronimo Yanez, who appeared to have panicked and shot Philando Castille, fearing that Castille was pulling out the gun he said he was carrying but most likely not actually seeing the gun.) Such cases should not qualify as 3rd degree murder -- a person is not acting with extreme indifference to human life when trying to save his life or the life of another person.

Minnesota Law. See above – without a PPE rule or any other limit, defendants like Noor and Yanez would be chargeable with DMM.

[8] One limitation of the summary in text relates to the structure of American murder statutes. Some jurisdictions (not included in the 28 reported in text) lack a separate DMM statute but instead have a second degree murder offense that criminalizes "all other murder;" case law then determines whether and on what terms that jurisdiction recognizes a murder doctrine comparable to Minnesota DMM. Courts often interpret such other-murder provisions to include all or most traditional murder theories (especially DMM, and some or all FM doctrines) that have not already been specifically provided for by statute in that jurisdiction; such unspecified murder theories are assumed to be approved by the legislature because they were recognized as murder at common law or under predecessor statutes. It does not appear that prior studies have examined whether PPE and/or MTOPR limitations have been applied by courts in these additional, (judicially-) implied-DMM jurisdictions.

Laws in other state and federal jurisdictions. No cases or statutes have yet been found, in jurisdictions rejecting PPE and MTOPR, where courts or legislatures have used other standards to preclude DMM liability in cases like Noor and Yanez.

C. If *Noor's* PPE limit is not overruled, adding language to clarify the PPE limitation

If the *Noor* PPE limit is not legislatively overruled, the Legislature may wish to clarify whether some truly depraved acts can still be charged as 3rd degree murder.

Minnesota Law. As noted above, the Minnesota Supreme Court's decision in *State v. Noor* suggests that a case such as the killing of George Floyd by Derek Chauvin can't be charged as Third Degree murder. The Legislature may wish to clarify the law to specify that such gross recklessness, even if directed solely against a homicide victim, can be charged as DMM (or to clarify that it cannot be so charged, if the Legislature is of that view).

Laws in other state and federal jurisdictions. As noted, only five other states are known to have adopted the *Noor* PPE rule. Moreover, some of the cases so holding are quite old (Utah, 1944; Colorado, 1909; Oklahoma, 1896). Moreover, the leading cases in all five states (like almost all Minnesota cases stating or implying a PPE rule) involved actual jury findings of intent to kill or clear evidence of such intent; none of the cases appeared to involve facts similar to *Chauvin* or *Malone*, where the defendant's acts were extremely reckless but intent to kill was lacking.

D. Modernizing the archaic 3rd degree DMM language, to give courts and juries better guidance

In cases of unintended death that was more culpable than negligence and possibly extremely reckless, courts and juries need to be given meaningful guidance when making the critically important decision to convict the offender of murder rather than manslaughter. Even the lowest degree of murder carries a significantly greater degree of social stigma, as well as more severe penalties and collateral consequences. At a minimum, the DMM standard should be the same as the similar language found in the 1st degree murder statute: extreme Indifference to Human Life (Minn. Stat. Sec. 609.185, subds. 5 to 7).

Minnesota Law. The concept of "depraved mind" has no clear meaning (and thus is sometimes omitted from jury instructions, as it was in *Noor*). The term traces back to English Common Law, along with other similarly colorful but ambiguous language still used in other states (see below). The remaining language in Minnesota's DMM law ("an act eminently dangerous to others … without regard for human life") suggests both an objective standard (a reasonable person would perceive a substantial risk of death) and a subjective standard (the defendant was aware of that risk). Such a combination implies a concept of gross recklessness (awareness of a higher risk than is required for ordinary recklessness; as noted in Part III.C below, ordinary recklessness is the degree of culpability that suffices for manslaughter liability). No form of recklessness is mentioned in the text of the DMM statute, but that term is sometimes included in jury instructions. (In *Noor*, for example, the jury was told that the killing must have been "committed in a reckless or wanton manner with the knowledge that someone may be killed and with a heedless disregard of that happening.") As noted below, something akin to gross recklessness is

conveyed by the Model Penal Code DMM standard adopted in some states, and that standard would appear to provide better guidance than Minnesota's statutory DMM standard (even when the latter is supplemented with recklessness language).

Laws in other state and federal jurisdictions. Several other states also use a "depraved mind" standard or, more commonly, "depraved heart." Some states use other colorful language dating to English Common Law – "an abandoned, malignant heart;" or "a heart devoid of social duty, fatally bent on mischief." Several states have adopted the language recommended in the Model Penal Code (ALI 1962), Sec. 210.2(1)(b): causing death "recklessly under circumstances manifesting extreme indifference to the value of human life." One state (Illinois) has what appears to be a simple gross recklessness standard: the defendant "knows that [his or her] acts create a strong probability of death or great bodily harm to that individual [the person who died] or another."

III. Possible TF recommendations with a low level of research priority

The research summarized below relates to possible reforms that the subcommittee deemed very unlikely to receive strong TF and legislative/governor support in this TF round. However, as with the topics discussed in Part II above, the TF may wish to identify such additional reform possibilities and suggest that the Legislature consider treating them, or some of them, as possible topics to be addressed in a further extension (third phase) of the TF's work.

A. Broader issues of A&A liability for intentional crimes other than murder

Minnesota Law. As discussed in Section A of Part I, above, the "Expansive Liability" provision of Minn. Stat. 609.05, subd. 2 permits accomplices and other secondary parties to be found guilty of crimes that require proof of intent by the primary party, without corresponding proof of intent by the secondary party. As was also stated in Part I, principles of logic and proportionality require that, given the secondary party's lesser role, the required proof of mental culpability should be at least as high for a secondary party as it is for the primary party. That is especially true for intentional murder charges, but it is also true for non-murder charges. In reported cases Minn. Stat. 609.05, subd. 2 has most often been cited relative to murder charges, but it has sometimes also been used to convict accomplices for non-homicide crimes growing out of the crime the accomplice aided and abetted ["consequential crimes"]. See, e.g., State v. Fillipi, 335 N.W.2d 739 (Minn. 1983) (assaults committed by defendant's burglary accomplice).

Laws in other state and federal jurisdictions. See summary in Part 1, section A. As noted there, substantial new research, including case law as well as statutes in all states, would be needed to provide a comprehensive national assessment of these issues as they relate to non-murder offenses.

B. Adopting a general foreseeability-of-harm requirement for criminal liability

Minnesota Law. As of 2011 Minnesota was one of only four felony murder jurisdictions that did not requires the victim's death to be foreseeable (Binder 2011 at 487-88). However, for several crimes--third degree drug-crime FM, and first degree manslaughter paragraphs (2) and (4) -- the statutory text requires foreseeability (or proximate causation, which usually requires proof that the result was

foreseeable). There are very few reported Minnesota cases on proximate cause requirements for liability on any kind of charge, and little prior research on these issues.

Laws in other state and federal jurisdictions. See above. It would require a substantial amount of new research to examine foreseeability requirements more generally (beyond the FM context). That research will be challenging because almost all of the foreseeability rules will be found in case law, not statutes.

C. Clarifying that the culpability requirement for 2nd degree manslaughter is recklessness – conscious disregard of a substantial and unjustifiable risk of death or great bodily harm

Minnesota Law. Appellate case law indicates that the mental culpability required under Minn. Stat. Sec. 609.205 paragraph (1) is recklessness (conscious disregard of a substantial risk of death or great bodily harm). This requirement is based on statutory language -- the offender "consciously takes chances of causing death or great bodily harm to another." However, courts and juries may be confused by the reference to "culpable negligence" at the beginning of the 2nd degree manslaughter statute. Criminal negligence is a lower standard (less culpable; easier to prove) than recklessness. In common parlance as well as in law, such negligence does not require actual awareness of risk, merely circumstances where a reasonable person would have been aware of the risk and would have acted with greater care.

Laws in other state and federal jurisdictions. About three-fifths of state and federal manslaughter laws require proof of recklessness as to the risk of death, as defined above; a minority require only criminal or gross negligence (or, very rarely, civil negligence).

D. Enacting a generally-applicable Negligent Homicide crime (or one applicable in certain circumstances not covered by existing criminal negligence statutes)

Negligent homicide is more appropriate than manslaughter for unreasonable but less-than-reckless homicides. It is also more appropriate for sudden, intentional killings committed in the honest but unreasonable belief that doing so was necessary for self defense or for another justification. This scenario corresponds to the facts in the *Noor* and *Yanez* cases; it also describes the case of Kimberly Potter (the Minneapolis police officer who shot a traffic suspect to death honestly, but unreasonably, thinking she was firing her Taser).

Minnesota Law. There is no broadly applicable negligent homicide crime although negligence, gross negligence, or their equivalents suffice for liability in certain contexts (hunting, setting a spring gun or a similar device, keeping a dangerous animal, child endangerment, and careless driving). (As noted above, paragraph (1) of the 2nd degree manslaughter law requires proof of recklessness, not just negligence; as illustrated in Kimberly Potter's case, there are also situations where recklessness can produce liability for 1st degree manslaughter.) If the Legislature does not wish to enact a generally-applicable negligent homicide law like the ones found in other states (see below), it might consider enacting a more targeted law applicable to unreasonable (reckless or criminally negligent) use of deadly force by law enforcement officers.

Laws in other state and federal jurisdictions. 19 states have a generally-applicable negligent homicide crime, along with a manslaughter crime requiring proof of recklessness and carrying more severe

penalties. This two-level structure is also recommended in the Model Penal Code (ALI 1962, Secs. 210.3 and 210.4). (By contrast in 11 states, including Minnesota, there is only one generally-applicable involuntary-homicide crime [manslaughter], and it requires proof of recklessness; there is no generally-applicable negligence-based crime.)

E. Recognizing some version of the doctrine of Imperfect Self Defense

Self defense and other use-of-force affirmative defenses typically require that the defendant have reasonably believed his or her use of force was necessary to defend against an unlawful violent threat. But some jurisdictions allow defendants who kill unreasonably (e.g., with an honest but unreasonable belief in the need to use deadly defensive force) to be found guilty of manslaughter or some other homicide crime less serious than murder (e.g., negligent homicide, where that crime has been enacted). Most such mitigated-liability cases involve defendants who intended to kill (without premeditation), thus making them guilty of murder unless they have at least a partial affirmative defense. In this way, the doctrine of "imperfect self defense" is analogous to the doctrine of heat-of-passion (or "reasonable," legally adequate provocation), under which an intentional murder is mitigated to voluntary manslaughter.

Minnesota Law. Minnesota courts have declined to recognize any version of the doctrine of imperfect self defense. See, e.g., *State v. Hennum*, 428 N.W.2d 859 (Minn. Ct. App. 1988). This means that self defense (and presumably also the use of deadly force to arrest) is an all-or-nothing matter – a person who intentionally kills, in the honest but unreasonable belief that such action is justified, has no defense at all and can be found guilty of intentional murder.

Laws in other state and federal jurisdictions. Nineteen state and federal jurisdictions recognize imperfect self defense [ISD] based on honest but unreasonable belief in the need to use defensive force. Five of these jurisdictions also have an ISD rule applicable when a defendant reasonably believed he or she had grounds to use force in self-defense but used excessive force (more force than necessary to repel the attack). Three other states only have such an excessive-force ISD rule, and do not recognize unreasonable-belief ISD. Thus, in total, 22 jurisdictions have some kind of ISD rule. Most ISD rules mitigate what would otherwise be murder to manslaughter (either voluntary or involuntary). Some jurisdictions have adopted the version of ISD recommended by the Model Penal Code. That ISD doctrine seeks to match the offender's degree of liability to their degree of culpability in the use of force – an offender is guilty of reckless manslaughter if he or she was reckless in believing the killing (even an intentional killing) was justified; if the offender was negligent in such belief, he or she is guilty of negligent homicide.

F. Abolishing 2nd degree felony murder (or cutting it back very substantially)

True Felony Murder Rules – those with no required proof of mental culpability as to causing or risking death -- have been strongly criticized by most scholars (e.g., Dressler 2018; LaFave 2023) because they are inconsistent with core principles of criminal law: that an offender's degree of criminal liability and punishment should be proportionate to his or her mental culpability [mens rea], and that such

culpability should be clearly defined by statute and established in each case with proof beyond a reasonable doubt.[9]

Recognizing those principles, courts in most states have used various rules, including assault merger and dangerous-felony requirements, to limit the scope of their FM laws. Several states have gone farther and have either completely abolished their felony murder doctrine, or have revised it so substantially that it no longer qualifies as a TFMR. These states have concluded that TFMR liability is unjust, and also largely unnecessary – when TFMRs are abolished or made unavailable in particular cases, almost all of these offenders can be charged instead with other homicide crimes. In Minnesota, those other crimes include intentional 2nd degree murder, 3rd degree murder, 1st degree manslaughter, 2nd degree manslaughter, or (if enacted) negligent homicide.

Minnesota Law. As noted above, Minnesota 2nd degree murder law includes a very broad TFMR:

1) felony assaults can yield FM liability (there is no assault merger limit);

2) felony-level assault is defined broadly -- assault grading is based on the harm that was caused, not what was intended;

3) predicate felonies are almost entirely defined with a case-law-based, dangerous-felony standard, not a statutory list; and

[9] Professor Binder (2011) argues that felony murder liability can be justified based on a theory he calls "dual culpability" – the offender is culpable for taking actions that are at least negligent as to the risk of causing death, which adds to his culpability for the felony itself. But that theory can only apply if there is a case-specific finding that the defendant committed the predicate felony in a particularly dangerous way; such added culpability is not established simply by the fact that death occurred (sometimes death is accidental and unforeseeable). Yet, as shown above, the majority of felony murder jurisdictions use an exclusive statutory list of qualifying felonies, and some jurisdictions employing a dangerous-felony standard assess proposed qualifying felonies "in the abstract" based solely on the felony elements that must be proved. Under either of those approaches, there is no case-specific finding of particularly dangerous felony conduct – proven culpability is "single" not "dual," based on the death risk inherent whenever the felony elements are established. Binder's theory makes more sense in the few systems that assesses death risk based on the felony "as committed," but his standards of culpability and proof are quite low. He argues that when a jurisdiction requires "foreseeability" of death, that means the defendant was negligent as to death risk. But foreseeability standards suffer from hindsight bias, and may be no higher than civil negligence. Furthermore, a system that leaves it to the trial judge to determine whether the defendant's acts were sufficiently dangerous (a procedure which Binder does not question) is far less constraining than a system where mental culpability as to death risk is a felony murder element that must be found by the fact finder (jury or judge) beyond a reasonable doubt. The subcommittee's research found that most state felony murder rules contain no such required mental culpability element (where such elements were found, that jurisdiction was deemed to not have a True Felony Murder Rule).

4) the dangerous-felony standard has been interpreted broadly (e.g., to include felony DWI regardless of how minimally impaired the defendant's currently-charged driving conduct was).

Laws in other state and federal jurisdictions. At least nine states have either completely abolished the FM doctrine, or have effectively abolished it by requiring proof of some kind of mental culpability with respect to causing or risking death – some form of traditional murder culpability (intent to kill, extreme indifference to human life, intent to cause great bodily harm), or at least recklessness or negligence as to the risk of death. Those states are Arkansas, Delaware, Hawaii, Kentucky, Massachusetts, Michigan, New Hampshire, New Mexico, and Vermont (Kolar 2023).[10]

[10] One recent survey [Robinson & Williams 2018, pp. 53-56] claims that seven additional states have effectively abolished true FM liability because they require proof of recklessness or negligence as to causing or risking death. Those additional seven states are Alabama, Illinois, Maine, New Jersey, North Dakota, Pennsylvania, and Texas. However, an examination of laws and statutes in these states shows that they all still have a True Felony Murder Rule as defined in this report, in that neither recklessness nor negligence is a required element of their FM crimes. The authors' claim of de facto abolition is based on inferences from other laws, not the language of the FM statutes themselves or interpretive case law.

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

(as submitted by committee chair)

This is a murder law with no required proof of mental culpability (mens rea) as to causing or risking death

Part A

26 jurisdictions with exclusive predicate-felony lists (there is no supplemental dangerous-felony standard allowing additional felonies to qualify)

USA 18 U.S.C. § 1111 - **(a)** Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the **first degree**.

Any other murder is murder in the **second degree.**

Note: Second degree murder does not appear to include any True Felony Murder Rules [TFMRs].

Alaska Stat. § 11.41.110 –

(a) A person commits the crime of murder in the **second degree** if…
(3) under circumstances not amounting to murder in the first degree under AS 11.41.100(a)(3), while acting either alone or with one or more persons, the person commits or attempts to commit arson in the first degree, kidnapping, sexual assault in the first degree, sexual assault in the second degree, sexual abuse of a minor in the first degree, sexual abuse of a minor in the second degree, burglary in the first degree, escape in the first or second degree, robbery in any degree, or misconduct involving a controlled substance under AS 11.71.010(a), 11.71.021(a), 11.71.030(a)(2) or (9), or 11.71.040(a)(1) or (2) and, in the course of or in furtherance of that crime or in immediate flight from that crime, any person causes the death of a person other than one of the participants;
(4) acting with a criminal street gang, the person commits or attempts to commit a crime that is a felony and, in the course of or in furtherance of that crime or in immediate flight from that crime, any person causes the death of a person other than one of the participants; or

(5) the person with criminal negligence causes the death of a child under the age of 16, and the person has been previously convicted of a crime involving a child under the age of 16 that was (A) a felony violation of AS 11.41; (B) in violation of a law or ordinance in another jurisdiction with elements similar to a felony under AS 11.41; or (C) an attempt, a solicitation, or a conspiracy to commit a crime listed in (A) or (B) of this paragraph.

Note: **First Degree** murder requires intent to kill except when death occurs during or in furtherance of or flight from one of three listed felonies, only one of which appears to be a TFMR, lacking required proof of mental culpability as to causing or risking death.

Ariz. Rev. Stat. Ann. § 13-1105 –

A. A person commits **first degree** murder if:

1. Intending or knowing that the person's conduct will cause death, the person causes the death of another person, including an unborn child, with premeditation or, as a result of causing the death of another person with premeditation, causes the death of an unborn child.

2. Acting either alone or with one or more other persons the person commits or attempts to commit sexual conduct with a minor under § 13-1405, sexual assault under § 13-1406, molestation of a child under § 13-1410, terrorism under § 13-2308.01, marijuana offenses under § 13-3405, subsection A, paragraph 4, dangerous drug offenses under § 13-3407, subsection A, paragraphs 4 and 7, narcotics offenses under § 13-3408, subsection A, paragraph 7 that equal or exceed the statutory threshold amount for each offense or combination of offenses, involving or using minors in drug offenses under § 13-3409, drive by shooting under § 13-1209, kidnapping under § 13-1304, burglary under § 13-1506, 13-1507 or 13-1508, arson under § 13-1703 or 13-1704, robbery under § 13-1902, 13-1903 or 13-1904, escape under § 13-2503 or 13-2504, child abuse under § 13-3623, subsection A, paragraph 1 or unlawful flight from a pursuing law enforcement vehicle under § 28-622.01 and, in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person.

3. Intending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty.

Note: **Second degree** murder (§13-1104) does not include any TFMRs; it requires intentionally causing death, knowingly causing serious physical injury, and reckless conduct that results in death.

Colo. Rev. Stat. § 18-3-102 –

(1) A person commits the crime of murder in **the first degree** if:

(c) By perjury or subornation of perjury he procures the conviction and execution of any innocent person; or

(e) He or she commits unlawful distribution, dispensation, or sale of a controlled substance to a person under the age of eighteen years on school grounds as provided in section 18-18-407(2), or 18-18-407(1)(g)(I) for offenses committed on or after October 1, 2013, and the death of such person is caused by the use of such controlled substance; or

(f) The person knowingly causes the death of a child who has not yet attained twelve years of age and the person committing the offense is one in a position of trust with respect to the victim.

§ 18-3-103 –

(1) A person commits the crime of murder in the **second degree** if:

… (b) Acting either alone or with one or more persons, he or she commits or attempts to commit felony arson, robbery, burglary, kidnapping, sexual assault as prohibited by section 18-3-402, sexual assault in the first or second degree as prohibited by section 18-3-402 or 18-3-403, as those sections existed prior to July 1, 2000, or a class 3 felony for sexual assault on a child as provided in section 18-3-405(2), or the felony crime of escape as provided in section 18-8-208, and, in the course of or in furtherance of the crime that he or she is committing or attempting to commit, or of immediate flight therefrom, the death of a person, other than one of the participants, is caused by any participant.

Note: None of the other Colorado 1st and 2nd degree murder offenses includes a TFMR.

Conn. Gen. Stat. § 53a-54c – **Felony Murder**

A person is guilty of murder when, acting either alone or with one or more persons, such person commits or attempts to commit robbery, home invasion, burglary, kidnapping, sexual assault in the first degree, aggravated sexual assault in the first degree, sexual assault in the third degree, sexual assault in the third degree with a firearm, escape in the first degree, or escape in the second degree and, in the course of and in furtherance of such crime or of flight therefrom, such person, or another participant, if any, causes the death of a person other than one of the participants, except that in any prosecution under this section, in which the defendant was not the only participant in the underlying crime, it shall be an affirmative defense that the defendant…

Note: Connecticut has two other murder crimes. The general "**Murder**" statute (§ 53a-54a) requires intent to cause death. "**Arson Murder**" (§ 53a-54d) is a TFMR with arson as the predicate felony.

D.C. Code § 22-2101 – Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate an offense punishable by imprisonment in the penitentiary, or without purpose to do so kills another in perpetrating or in attempting to perpetrate any arson, as defined in § 22-301 or § 22-302, first degree sexual abuse, first degree child sexual abuse, first degree cruelty to children, mayhem, robbery, or kidnaping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, or in perpetrating or attempting to perpetrate a felony involving a

controlled substance, is guilty of murder in the first degree. For purposes of imprisonment following revocation of release authorized by § 24-403.01(b)(7), murder in the **first degree** is a Class A felony.

Murder in the **second degree** (§ 22-2103) does not appear to include any TFMRs.

Idaho Code Ann. § 18-4003 –

(a) All murder which is perpetrated by means of poison, or lying in wait, or torture, when torture is inflicted with the intent to cause suffering, to execute vengeance, to extort something from the victim, or to satisfy some sadistic inclination, or which is perpetrated by any kind of willful, deliberate and premeditated killing is murder of the **first degree**.

(b) Any murder of any peace officer, executive officer, officer of the court, fireman, judicial officer or prosecuting attorney who was acting in the lawful discharge of an official duty, and was known or should have been known by the perpetrator of the murder to be an officer so acting, shall be murder of the **first degree**.

(c) Any murder committed by a person under a sentence for murder of the first or second degree, including such persons on parole or probation from such sentence, shall be murder of the first degree.

(d) Any murder committed in the perpetration of, or attempt to perpetrate, aggravated battery on a child under twelve (12) years of age, arson, rape, robbery, burglary, kidnapping or mayhem, or an act of terrorism, as defined in section 18-8102, Idaho Code, or the use of a weapon of mass destruction, biological weapon or chemical weapon, is murder of the **first degree**.

(e) Any murder committed by a person incarcerated in a penal institution upon a person employed by the penal institution, another inmate of the penal institution or a visitor to the penal institution shall be murder of the **first degree**.

(f) Any murder committed by a person while escaping or attempting to escape from a penal institution is murder of the **first degree**.

(g) All other kinds of murder are of the **second degree.**

Note: Second Degree murder does not appear to include any TFMRs.

Ind. Code Ann. § 35-42-1-1 **Murder**

Sec. 1. A person who:

(1) knowingly or intentionally kills another human being;

(2) kills another human being while committing or attempting to commit arson, burglary, child molesting, consumer product tampering, criminal deviate conduct (under IC 35-42-4-2 before its repeal), kidnapping, rape, robbery, human trafficking, promotion of human labor trafficking, promotion of human sexual trafficking, promotion of child sexual trafficking, promotion of sexual trafficking of a younger child, child sexual trafficking, or carjacking (before its repeal);

(3) kills another human being while committing or attempting to commit:

(A) dealing in or manufacturing cocaine or a narcotic drug (IC 35-48-4-1);

(B) dealing in methamphetamine (IC 35-48-4-1.1);

(C) manufacturing methamphetamine (IC 35-48-4-1.2);

(D) dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2);

(E) dealing in a schedule IV controlled substance (IC 35-48-4-3); or

(F) dealing in a schedule V controlled substance; or

(4) except as provided in section 6.5 of this chapter, knowingly or intentionally kills a fetus in any stage of development;

commits murder, a felony.

Note: Indiana only has one "murder" crime. However, the three degrees of "dealing in a controlled substance resulting in death" *function* as list-based TFMR crimes. (All other types of homicide (causing suicide, assisting suicide, and manslaughter) require intent to kill or recklessly causing death.)

Iowa Code § 707.2 –

1. A person commits murder in the **first degree** when the person commits murder under any of the following circumstances:

b. The person kills another person while participating in a forcible felony.

c. The person kills another person while escaping or attempting to escape from lawful custody. d. The person intentionally kills a peace officer, correctional officer, public employee, or hostage while the person is imprisoned in a correctional institution under the jurisdiction of the Iowa department of corrections, or in a city or county jail.

e. The person kills a child while committing child endangerment under section 726.6, subsection 1, paragraph "b", or while committing assault under section 708.1 upon the child, and the death occurs under circumstances manifesting an extreme indifference to human life.

f. The person kills another person while participating in an act of terrorism as defined in section 708A.1.

707.3. **Murder in the second degree.**

1. A person commits murder in the second degree when the person commits murder which is not murder in the first degree.

Notes: The term "forcible felony", in the murder-1 statute, is defined by § 702.11 to include felonious child endangerment, assault, murder, sexual abuse, kidnapping, robbery, human trafficking, arson in the first degree, or burglary in the first degree.

Second Degree Murder does not appear to include any TFMRs.

Kan. Stat. Ann. § 21-3402 –

(a) **Murder in the first degree** is the killing of a human being committed:

(2) in the commission of, attempt to commit, or flight from any inherently dangerous felony.

"inherently dangerous felony" =

(1) Any of the following felonies, whether such felony is so distinct from the homicide alleged to be a violation of subsection (a)(2) as not to be an ingredient of the homicide alleged to be a violation of subsection (a)(2):

(A) Kidnapping, as defined in K.S.A. 21-5408(a), and amendments thereto;

(B) aggravated kidnapping, as defined in K.S.A. 21-5408(b), and amendments thereto;

(C) robbery, as defined in K.S.A. 21-5420(a), and amendments thereto;

(D) aggravated robbery, as defined in K.S.A. 21-5420(b), and amendments thereto;

(E) rape, as defined in K.S.A. 21-5503, and amendments thereto;

(F) aggravated criminal sodomy, as defined in K.S.A. 21-5504(b), and amendments thereto;

(G) abuse of a child, as defined in K.S.A. 21-5602, and amendments thereto;

(H) felony theft of property, as defined in K.S.A. 21-5801(a)(1) or (a)(3), and amendments thereto;

(I) burglary, as defined in K.S.A. 21-5807(a), and amendments thereto;

(J) aggravated burglary, as defined in K.S.A. 21-5807(b), and amendments thereto;

(K) arson, as defined in K.S.A. 21-5812(a), and amendments thereto;

(L) aggravated arson, as defined in K.S.A. 21-5812(b), and amendments thereto;

(M) treason, as defined in K.S.A. 21-5901, and amendments thereto;

(N) any felony offense as provided in K.S.A. 21-5703, 21-5705 or 21-5706, and amendments thereto;

(O) any felony offense as provided in K.S.A. 21-6308(a) or (b), and amendments thereto;

(P) endangering the food supply, as defined in K.S.A. 21-6317(a), and amendments thereto;

(Q) aggravated endangering the food supply, as defined in K.S.A. 21-6317(b), and amendments thereto;

(R) fleeing or attempting to elude a police officer, as defined in K.S.A. 8-1568(b), and amendments thereto;

(S) aggravated endangering a child, as defined in K.S.A. 21-5601(b)(1), and amendments thereto;

(T) abandonment of a child, as defined in K.S.A. 21-5605(a), and amendments thereto;

(U) aggravated abandonment of a child, as defined in K.S.A. 21-5605(b), and amendments thereto; or

(V) mistreatment of a dependent adult or mistreatment of an elder person, as defined in K.S.A. 21-5417, and amendments thereto; and

(2) any of the following felonies, only when such felony is so distinct from the homicide alleged to be a violation of subsection (a)(2) as to not be an ingredient of the homicide alleged to be a violation of subsection (a)(2):

(A) Murder in the first degree, as defined in subsection (a)(1);

(B) murder in the second degree, as defined in K.S.A. 21-5403(a)(1), and amendments thereto;

(C) voluntary manslaughter, as defined in K.S.A. 21-5404(a)(1), and amendments thereto;

(D) aggravated assault, as defined in K.S.A. 21-5412(b), and amendments thereto;

(E) aggravated assault of a law enforcement officer, as defined in K.S.A. 21-5412(d), and amendments thereto;

(F) aggravated battery, as defined in K.S.A. 21-5413(b)(1), and amendments thereto; or

(G) aggravated battery against a law enforcement officer, as defined in K.S.A. 21-5413(d), and amendments thereto.

Capital murder (§ 21-3401) and **Murder in the second degree** (§ 21-5403) do not appear to include anyTFMRs.

La. Rev. Stat. Ann. § 14:30.1 –

A. **Second degree murder** is the killing of a human being:

…(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated or first degree rape, forcible or second degree rape, aggravated arson, aggravated burglary, aggravated kidnapping, second degree kidnapping, aggravated escape, assault by drive-by shooting, armed robbery, first degree robbery, second degree robbery, simple robbery, cruelty to juveniles, second degree cruelty to juveniles, or terrorism, even though he has no intent to kill or to inflict great bodily harm.

Note: Neither subsection (1) of the above statute, nor **First degree Murder** (§§30.), contains a TFMR (both require intent to kill or inflict great bodily harm).

Me. Rev. Stat. Ann. tit. 17-A, § 202 – **Felony Murder**

1. A person is guilty of felony murder if acting alone or with one or more other persons in the commission of, or an attempt to commit, or immediate flight after committing or attempting to commit, murder, robbery, burglary, kidnapping, arson, gross sexual assault, or escape, the person or another participant in fact causes the death of a human being, and the death is a reasonably foreseeable consequence of such commission, attempt or flight.

Murder (§201) is not a TFMR as it requires a person to "intentionally or knowingly" cause death, demonstrate a depraved indifference to human life, or intentionally/knowingly cause another person to commit suicide.

Neb. Rev. Stat. § 28-303 –

A person commits **murder in the first degree** if he or she kills another person (1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary, or (3) by administering poison or causing the same to be done; or if by willful and corrupt perjury or subornation of the same he or she purposely procures the conviction and execution of any innocent person

Note: Murder in the **second degree** (28-304) is not a true FM murder rule because it requires that the defendant caused the death of another intentionally but without premeditation.

N.J. Stat. Ann. § 2C:11-3 – **Murder**

a. Except as provided in N.J.S.2C:11-4, criminal homicide constitutes murder when:

…(3) It is committed when the actor, acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary, kidnapping, carjacking, criminal escape or terrorism pursuant to section 2 of P.L.2002, c. 26 (C.2C:38-2), and in the course of such crime or of immediate flight therefrom, any person causes the death of a person other than one of the participants; except that in any prosecution under this subsection, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant…

b. (1) Murder is a crime of the first degree but a person convicted of murder shall be sentenced, except as provided in paragraphs (2), (3) and (4) of this subsection, by the court to a term of 30 years, during which the person shall not be eligible for parole, or be sentenced to a specific term of years which shall be between 30 years and life imprisonment of which the person shall serve 30 years before being eligible for parole.

(2) If the victim was a law enforcement officer and was murdered while performing his official duties or was murdered because of his status as a law enforcement officer, the person convicted of that murder shall be sentenced by the court to a term of life imprisonment, during which the person shall not be eligible for parole.

(3) A person convicted of murder shall be sentenced to a term of life imprisonment without eligibility for parole if the murder was committed under all of the following circumstances:

(a) The victim is less than 18 years old; and

(b) The act is committed in the course of the commission, whether alone or with one or more persons, of a violation of N.J.S.2C:14-2 or N.J.S.2C:14-3.

(4) Any person convicted under subsection a.(1) or (2) who committed the homicidal act by his own conduct; or who as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value; or who, as a leader of a narcotics trafficking network as defined in N.J.S.2C:35-3 and in furtherance of a conspiracy enumerated in N.J.S.2C:35-3, commanded or by threat or promise solicited the commission of the offense, or, if the murder occurred during the commission of the crime of terrorism, any person who committed the crime of terrorism, shall be sentenced by the court to life imprisonment without eligibility for parole, which sentence shall be served in a maximum security prison, if a jury finds beyond a reasonable doubt that any of the following aggravating factors exist:

(a) The defendant has been convicted, at any time, of another murder. For purposes of this section, a conviction shall be deemed final when sentence is imposed and may be used as an aggravating factor regardless of whether it is on appeal;

(b) In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim;

(c) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim;

(d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value;

(e) The defendant procured the commission of the murder by payment or promise of payment of anything of pecuniary value;

(f) The murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another;

(g) The murder was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit murder, robbery, sexual assault, arson, burglary, kidnapping, carjacking or the crime of contempt in violation of subsection b. of N.J.S.2C:29-9;

(h) The defendant murdered a public servant, as defined in N.J.S.2C:27-1, while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant;

(i) The defendant: (i) as a leader of a narcotics trafficking network as defined in N.J.S.2C:35-3 and in furtherance of a conspiracy enumerated in N.J.S.2C:35-3, committed, commanded or by threat or promise solicited the commission of the murder or (ii) committed the murder at the direction of a leader of a narcotics trafficking network as defined in N.J.S.2C:35-3 in furtherance of a conspiracy enumerated in N.J.S.2C:35-3;

(j) The homicidal act that the defendant committed or procured was in violation of paragraph (1) of subsection a. of N.J.S.2C:17-2;

(k) The victim was less than 14 years old; or

(*l*) The murder was committed during the commission of, or an attempt to commit, or flight after committing or attempting to commit, terrorism pursuant to section 2 of P.L.2002, c. 26 (C.2C:38-2).

Note: Subsections (1) and (2) of the above statute do not contain any TFMRs.

N.Y. Penal Law § 125.25 –

A person is guilty of murder in the **second degree** when:

… 3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, criminal sexual act in the first degree, sexual abuse in the first degree, aggravated sexual abuse, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant [did not commit or solicit the homicidal act, was not armed with a deadly weapon, etc.].

Note: Subsections 1, 2, 4, and 5 of the above statute, and Murder in the **first degree** (§ 125.27) do not contain any TFMRs.

N.C. Gen. Stat. § 14-17 – **Murder in the first and second degree defined; punishment**

(a) A murder which shall be perpetrated by means of a nuclear, biological, or chemical weapon of mass destruction as defined in G.S. 14-288.21, poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the **first degree** …

(a1) If a murder was perpetrated with malice as described in subsection (b) of this section, and committed against a spouse, former spouse, a person with whom the defendant lives or has lived as if

married, a person with whom the defendant is or has been in a dating relationship as defined in G.S. 50B-1(b)(6), or a person with whom the defendant shares a child in common, there shall be a rebuttable presumption that the murder is a "willful, deliberate, and premeditated killing" under subsection (a) of this section and shall be deemed to be murder in the **first degree**, a Class A felony, if the perpetrator has previously been convicted of one of the following offenses involving the same victim …

(b) A murder other than described in subsection (a) or (a1) of this section or in G.S. 14-23.2 shall be deemed **second degree murder**. …

Note: Binder (2011) viewed NC as a list-plus-standard state, but nothing in the current NC murder statute above seems to function like a FM dangerous-felony standard.

For murder-1 (paragraph a), the "or other felony…deadly weapon" language might suggest the need for courts to apply a supplemental standard in order to recognize additional qualifying predicate felonies. But the better view is that this is just one more category of qualifying felonies on the list -- those that (like many crimes, in virtually all FM states) list "deadly weapon" as an element of the crime.

As for murder-2 (paragraph b), although some states interpret such an "all other murder" provision to include felony murder, NC cases defining the allowed forms of "malice" under murder-2 do not seem to include a FM theory. (The closest thing to FM is actually a depraved heart/mind theory, where the defendant's act was "*done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief*".)

NC should therefore be classified as a "list-only" FM jurisdiction.

N.D. Cent. Code § 12.1-16-01 – **Murder**

1. A person is guilty of murder**,** a class AA felony, if the person:

… c. Acting either alone or with one or more other persons, commits or attempts to commit treason, robbery, burglary, kidnapping, felonious restraint, arson, gross sexual imposition, a felony offense against a child under section 12.1-20-03, 12.1-27.2-02, 12.1-27.2-03, 12.1-27.2-04, or 14-09-22, or escape and, in the course of and in furtherance of such crime or of immediate flight therefrom, the person or any other participant in the crime causes the death of any person. In any prosecution under this subsection in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant…

2. A person is guilty of murder, a class A felony, if the person causes the death of another human being under circumstances which would be class AA felony murder, except that the person causes the death under the influence of extreme emotional disturbance for which there is reasonable excuse. The reasonableness of the excuse must be determined from the viewpoint of a person in that person's situation under the circumstances as that person believes them to be. An extreme emotional disturbance is excusable, within the meaning of this subsection only, if it is occasioned by substantial provocation, or a serious event, or situation for which the offender was not culpably responsible.

Note: Subsections 1(a) and 1(b) of the above statute do not contain any TFMRs.

Ohio Rev. Code Ann. § 2903.02 –

(A) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code.

(C) Division (B) of this section does not apply to an offense that becomes a felony of the first or second degree only if the offender previously has been convicted of that offense or another specified offense.

§ 2901.01(9).(9) "Offense of violence" means any of the following:

(a) A violation of section 2903.01 [aggravated murder], 2903.02 [murder], 2903.03 [voluntary manslaughter], 2903.04 [involuntary manslaughter], 2903.11 [felonious assault], 2903.12 [aggravated assault], 2903.13 [assault], 2903.15 [permitting child abuse], 2903.18 [strangulation], 2903.21 [aggravated menacing], 2903.211 [menacing by stalking], 2903.22 [menacing], 2905.01 [kidnapping], 2905.02 [abduction], 2905.11 [extortion], 2905.32 [trafficking in persons], 2907.02 [rape], 2907.03 [sexual battery], 2907.05 [gross sexual imposition], 2909.02 [aggravated arson], 2909.03 [arson], 2909.24 [terrorism], 2911.01 [aggravated robbery], 2911.02 [robbery], 2911.11 [aggravated burglary], 2917.01 [inciting to violence], 2917.02 [aggravated riot], 2917.03 [riot], 2917.31 [inducing panic], 2917.321 [swatting], 2919.25 [domestic violence], 2921.03 [intimidation], 2921.04 [intimidation of attorney, victim, or witness], 2921.34 [escape], or 2923.161 [improperly discharging firearm in school zone], of division (A)(1) of section 2903.34 [patient abuse], of division (A)(1), (2), or (3) of section 2911.12 [burglary/breaking and entering], or of division (B)(1), (2), (3), or (4) of section 2919.22 child endangerment] of the Revised Code or felonious sexual penetration in violation of former section 2907.12 [felonious sexual penetration] of the Revised Code;

b) A violation of an existing or former municipal ordinance or law of this or any other state or the United States, substantially equivalent to any section, division, or offense listed in division (A)(9)(a) of this section;

(c) An offense, other than a traffic offense, under an existing or former municipal ordinance or law of this or any other state or the United States, committed purposely or knowingly, and involving physical harm to persons or a risk of serious physical harm to persons;

(d) A conspiracy or attempt to commit, or complicity in committing, any offense under division (A)(9)(a), (b), or (c) of this section;

(e) A violation of division (C) of section 959.131 of the Revised Code. [causing serious physical harm to a companion animal].

Note: **Aggravated murder** (§2903.01) is not a TFMR because it requires that the defendant knowingly/purposefully caused the death of another.

Or. Rev. Stat. § 163.115 – **Murder; affirmative defenses; sentence**

(1) Except as provided in ORS 163.095, 163.118 and 163.125, criminal homicide constitutes **murder in the second degree**:

(a) When it is committed intentionally, except that it is an affirmative defense that, at the time of the homicide, the defendant was under the influence of an extreme emotional disturbance;

(b) When it is committed by a person, acting either alone or with one or more persons, who commits or attempts to commit any of the following crimes and in the course of and in furtherance of the crime the person is committing or attempting to commit, or during the immediate flight therefrom, the person, or another participant if there be any, causes the death of a person other than one of the participants:

(A) Arson in the first degree as defined in ORS 164.325;

(B) Criminal mischief in the first degree by means of an explosive as defined in ORS 164.365;

(C) Burglary in the first degree as defined in ORS 164.225;

(D) Escape in the first degree as defined in ORS 162.165;

(E) Kidnapping in the second degree as defined in ORS 163.225;

(F) Kidnapping in the first degree as defined in ORS 163.235;

(G) Robbery in the first degree as defined in ORS 164.415;

(H) Any felony sexual offense in the first degree defined in this chapter;

(I) Compelling prostitution as defined in ORS 167.017; or

(J) Assault in the first degree, as defined in ORS 163.185, and the victim is under 14 years of age, or assault in the second degree, as defined in ORS 163.175 (1)(a) or (b), and the victim is under 14 years of age; or

(c) By abuse when a person, **recklessly** under circumstances manifesting extreme indifference to the value of human life, causes the death of a child under 14 years of age or a dependent person, as defined in ORS 163.205, and:

(A) The person has previously engaged in a pattern or practice of assault or torture of the victim or another child under 14 years of age or a dependent person; or

(B) The person causes the death by neglect or maltreatment.

Note: **Aggravated murder** (§163.095) is not a TFMR because it requires a person to have "premeditated and committed intentionally" with intent to cause death. **First degree murder** (§163.107) appears to include one TFMR (where death "occurred in the course of or as a result of intentional maiming or

torture of the victim") and possibly a second TFMR (where death occurred after escape from a correctional facility and before being returned to custody).

Pa. 18 Pa.C.S.A. § 2502 – **Murder**

… **(b) Murder of the second degree.--**A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony.

(c) Murder of the third degree.--All other kinds of murder shall be murder of the third degree…

(d) Definitions. …

"Perpetration of a felony." The act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.

Note: Murder in the **first degree** (§2502(a)) is not a TFMR because it requires a murder "committed by an intentional killing." Murder in the **third degree** does not appear to include any TFMRs.

S.D. Codified Laws § 22-16-4 – **Homicide as murder in the first degree**

Homicide is murder in the **first degree**:

(1) If perpetrated without authority of law and with a **premeditated design to effect** the death of the person killed or of any other human being, including an unborn child; or

(2) If committed by a person engaged in the perpetration of, or attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, or unlawful throwing, placing, or discharging of a destructive device or explosive.

Homicide is also murder in the **first degree** if committed by a person who perpetrated, or who attempted to perpetrate, any arson, rape, robbery, burglary, kidnapping or unlawful throwing, placing or discharging of a destructive device or explosive and who subsequently effects the death of any victim of such crime to prevent detection or prosecution of the crime.

Note: Murder in the **second degree** (§22-16-7) is not a TFMR because it requires "any act imminently dangerous to others and evincing a depraved mind, without regard for human life, although without any premeditated design to effect the death of any particular person, including an unborn child."

Tenn. Code Ann. § 39-13-202 – **First Degree Murder**

(a) First degree murder is:

(1) A premeditated and intentional killing of another;

(2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, arson, robbery, burglary, theft, kidnapping, aggravated abuse of an elderly or vulnerable adult

in violation of § 39-15-511, aggravated neglect of an elderly or vulnerable adult in violation of § 39-15-508, aggravated child abuse, aggravated child neglect, or aircraft piracy;

(3) A killing of another committed as the result of the unlawful throwing, placing, or discharging of a destructive device or bomb;

(4) A killing of another in the perpetration or attempted perpetration of an act of terrorism in violation of § 39-13-805; or

(5) A killing of another in the perpetration or attempted perpetration of an aggravated rape, rape, rape of a child, or aggravated rape of child.

(b) No culpable mental state is required for conviction under subdivisions (a)(2)-(5), except the intent to commit the enumerated offenses or acts in those subdivisions.

Note**: Second degree** murder (§39-13-210) generally requires "knowing" killing of another, but it also contains a TFMR for deaths resulting from distributing unlawful substances.

Utah Code Ann. § 76-5-203 – **Murder**

(1)(a) As used in this section, "predicate offense" means:

(i) a clandestine drug lab violation under Section 58-37d-4 or 58-37d-5;

(ii) aggravated child abuse, under Subsection 76-5-109.2(3)(a), when the abused individual is younger than 18 years old;

(iii) kidnapping under Section 76-5-301;

(iv) child kidnapping under Section 76-5-301.1;

(v) aggravated kidnapping under Section 76-5-302;

(vi) rape under Section 76-5-402;

(vii) rape of a child under Section 76-5-402.1;

(viii) object rape under Section 76-5-402.2;

(ix) object rape of a child under Section 76-5-402.3;

(x) forcible sodomy under Section 76-5-403;

(xi) sodomy upon a child under Section 76-5-403.1;

(xii) forcible sexual abuse under Section 76-5-404;

(xiii) sexual abuse of a child under Section 76-5-404.1;

(xiv) aggravated sexual abuse of a child under Section 76-5-404.3;

(xv) aggravated sexual assault under Section 76-5-405;

(xvi) arson under Section 76-6-102;

(xvii) aggravated arson under Section 76-6-103;

(xviii) burglary under Section 76-6-202;

(xix) aggravated burglary under Section 76-6-203;

(xx) robbery under Section 76-6-301;

(xxi) aggravated robbery under Section 76-6-302;

(xxii) escape or aggravated escape under Section 76-8-309; or

(xxiii) a felony violation of Section 76-10-508 or 76-10-508.1 regarding discharge of a firearm or dangerous weapon.

(2) an actor commits murder if:

… (d) (i) the actor is engaged in the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense, or is a party to the predicate offense;

(ii) an individual other than a party described in Section 76-2-202 is killed in the course of the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense; and

(iii) the actor acted with the intent required as an element of the predicate offense;

(e) the actor recklessly causes the death of a peace officer or military service member in uniform while in the commission or attempted commission of:

(i) an assault against a peace officer under Section 76-5-102.4;

(ii) interference with a peace officer while making a lawful arrest under

(iii) an assault against a military service member in uniform under Section 76-5-102.4; or

(f) the actor commits a homicide that would be aggravated murder, but the offense is reduced in accordance with Subsection 76-5-202(4).

(5)(a) Any predicate offense that constitutes a separate offense does not merge with the crime of murder.

(b) An actor who is convicted of murder, based on a predicate offense that constitutes a separate offense, may also be convicted of, and punished for, the separate offense.

Note: Subsections (2)(a), (2)(b), and (2)(c) of the above statute do not appear to include any TFMRs, nor does **Aggravated murder** (§76-5-202) (requiring the actor to "intentionally or knowingly" cause the death of another under specific circumstances).

W. Va. Code § 61-2-1 – Murder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing, or in the commission of, or attempt to commit, arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody, or a felony offense of manufacturing or delivering a controlled substance as defined in article four, chapter sixty-a of this code, is murder of the **first degree**. All other murder is murder of the **second degree.**

In an indictment for murder and manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused, but it shall be sufficient in every such indictment to charge that the defendant did feloniously, willfully, maliciously, deliberately and unlawfully slay, kill and murder the deceased.

Note: Second degree murder does not appear to include a TFMR, as it requires proof of (unpremeditated] intent to kill.

Wis. Stat. § 940.03 – **Felony Murder**

Whoever causes the death of another human being while committing or attempting to commit a crime specified in s[ections] 940.19, 940.195, 940.20, 940.201, 940.203, 940.204, 940.225(1) or (2)(a), 940.30, 940.31, 943.02, 943.10(2), 943.231(1), or 943.32(2) may be imprisoned for not more than 15 years in excess of the maximum term of imprisonment provided by law for that crime or attempt.

Note: **first degree intentional homicide** (940.01) and **first degree reckless homicide** (940.02) do not appear to include any TFMRs.

Wyo. Stat. Ann. § 6-2-101 –

(a) Whoever purposely and with premeditated malice, or in the perpetration of, or attempt to perpetrate, any sexual assault, sexual abuse of a minor, arson, robbery, burglary, escape, resisting arrest, kidnapping or abuse of a child under the age of sixteen (16) years, kills any human being is guilty of **murder in the first degree.**

… (d) A person is guilty of murder in the first degree of an unborn child, punishable as provided for other convictions of murder in the first degree, if:

> (i) The person purposely and with premeditated malice, or in the perpetration of, or attempt to perpetrate, any sexual assault, sexual abuse of a minor, arson, robbery, burglary, escape,

resisting arrest, kidnapping or abuse of a child under the age of sixteen (16) years, kills or attempts to kill any human being;

(ii) The human being was pregnant with an unborn child; and

(iii) The unborn child dies as a result of the person's actions.

Note: Sections (b) and (c) in the above statute deal with sentencing for murder-1. Murder in **the second degree** (§6-2-104) is not a TFMR because it requires proof that the defendant "purposely and maliciously, but without premeditation" killed another person.

Part B

*12 states using both predicate-felony lists and a dangerous-felony standard***

** Material shown in ***bold-italic*** refers to statutory language and case law dealing with dangerous-felony standards for qualified felony murder predicates. "CL" refers to holdings or language in case law.

Ala. Code § 13A-6-2 –

(a) A person commits the crime of **murder** if he or she does any of the following:

…(3) He or she commits or attempts to commit arson in the first degree, burglary in the first or second degree, escape in the first degree, kidnapping in the first degree, rape in the first degree, robbery in any degree, sodomy in the first degree, aggravated child abuse under Section 26-15-3.1, or ***any other felony clearly dangerous to human life*** and, in the course of and in furtherance of the crime that he or she is committing or attempting to commit, or in immediate flight therefrom, he or she, or another participant if there be any, causes the death of any person.

Note: Alabama does not distinguish between first and second degree murder. Subsections (1)(b) and (1)(c) of the above statute do not include any TFMRs.

Per CL, "clearly dangerous to human life" depend[s] on a ***fact-based approach*** rather than upon the elements of the crime in the abstract. Courts must consider the facts and circumstances of the particular case to determine if the felony was ***inherently dangerous in the manner and circumstances in which it was committed***.

Cal. Penal Code § 189. **Murder; Degrees**

(a) All murder that is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or that is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206 [torture], 286 [sodomy], 287 [oral copulation and v=minor], 288 [lewd/lasc. Acts], or 289 [sex. Penetration not by sex organ], or former

Section 288a, or murder that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the **first degree.**

(b) All other kinds of murders are of the **second degree.**

Note: per CL, "All other kinds of murders" does include a TFMR based on additional, unlisted felonies. The determination of which felonies qualify as predicates for FM-2 is a question of Law. The standard is ***"inherently dangerous to human life" per elements in the abstract, not the particular facts of the case; This ensures "the felony by its very nature cannot be committed without creating a substantial risk that someone will be killed" [Alternate formulations: "a high probability that death will result;" it is not "possible to violate the statute without great danger."]***

Fla. Stat. § 782.04 . **Murder**

(1)(a) The unlawful killing of a human being:

1. When perpetrated from a premeditated design to effect the death of the person killed or any human being;

2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any:

a. Trafficking offense prohibited by s. 893.135(1),

b. Arson,

c. Sexual battery,

d. Robbery,

e. Burglary,

f. Kidnapping,

g. Escape,

h. Aggravated child abuse,

i. Aggravated abuse of an elderly person or disabled adult,

j. Aircraft piracy,

k. Unlawful throwing, placing, or discharging of a destructive device or bomb,

l. Carjacking,

m. Home-invasion robbery,

n. Aggravated stalking,

o. Murder of another human being,

p. Resisting an officer with violence to his or her person,

q. Aggravated fleeing or eluding with serious bodily injury or death,

r. Felony that is an act of terrorism or is in furtherance of an act of terrorism, including a felony under s. 775.30, s. 775.32, s. 775.33, s. 775.34, or s. 775.35, or

s. Human trafficking; or

3. Which resulted from the unlawful distribution by a person 18 years of age or older of any of the following substances, or mixture containing any of the following substances, when such substance or mixture is proven to have caused, or is proven to have been a substantial factor in producing, the death of the user:

a. A substance controlled under s. 893.03(1);

b. Cocaine, as described in s. 893.03(2)(a) 4.;

c. Opium or any synthetic or natural salt, compound, derivative, or preparation of opium;

d. Methadone;

e. Alfentanil, as described in s. 893.03(2)(b) 1.;

f. Carfentanil, as described in s. 893.03(2)(b) 6.;

g. Fentanyl, as described in s. 893.03(2)(b) 9.;

h. Sufentanil, as described in s. 893.03(2)(b) 30.;

i. Methamphetamine, as described in s. 893.03(2)(c) 5.; or

j. A controlled substance analog, as described in s. 893.0356, of any substance specified in sub-subparagraphs a.-i.,

is murder in the **first degree** and constitutes a capital felony, punishable as provided in s. 775.082.

(2) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, is murder in the **second degree** and constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) When a human being is killed during the perpetration of, or during the attempt to perpetrate, any:

(a) Trafficking offense prohibited by s. 893.135(1),

(b) Arson,

(c) Sexual battery,

(d) Robbery,

(e) Burglary,

(f) Kidnapping,

(g) Escape,

(h) Aggravated child abuse,

(i) Aggravated abuse of an elderly person or disabled adult,

(j) Aircraft piracy,

(k) Unlawful throwing, placing, or discharging of a destructive device or bomb,

(l) Carjacking,

(m) Home-invasion robbery,

(n) Aggravated stalking,

(o) Murder of another human being,

(p) Aggravated fleeing or eluding with serious bodily injury or death,

(q) Resisting an officer with violence to his or her person, or

(r) Felony that is an act of terrorism or is in furtherance of an act of terrorism, including a felony under s. 775.30, s. 775.32, s. 775.33, s. 775.34, or s. 775.35,

by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony commits murder in the second degree, which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, ***any felony other than*** any:

(a) Trafficking offense prohibited by s. 893.135(1),

(b) Arson,

(c) Sexual battery,

(d) Robbery,

(e) Burglary,

(f) Kidnapping,

(g) Escape,

(h) Aggravated child abuse,

(i) Aggravated abuse of an elderly person or disabled adult,

(j) Aircraft piracy,

(k) Unlawful throwing, placing, or discharging of a destructive device or bomb,

(*l*) Unlawful distribution of any substance listed in sub-subparagraphs (1)(a)3.a.-j. by a person 18 years of age or older, when such substance is proven to have caused, or is proven to have been a substantial factor in producing, the death of the user,

(m) Carjacking,

(n) Home-invasion robbery,

(*o*) Aggravated stalking,

(p) Murder of another human being,

(q) Aggravated fleeing or eluding with serious bodily injury or death,

(r) Resisting an officer with violence to his or her person, or

(s) Felony that is an act of terrorism or is in furtherance of an act of terrorism, including a felony under s. 775.30, s. 775.32, s. 775.33, s. 775.34, or s. 775.35,

is murder in the **third degree** …

Note: per CL, third degree murder does include a TFMR, but the standard for qualifying predicate felonies is unclear. For example, in a FM-3 case based on a felony theft, it was said that the trial court must (merely) "determine whether the ***killing is closely connected to the initial taking of the property in time, place, causation, and continuity of action***…

It is also unclear whether assault can be a qualifying felony. No case appears to have clearly ruled on assault "merger," one way or the other. However, the Florida Supreme Court has said, in dicta, that "[t]hird–degree felony murder is a 'catch-all' felony murder crime, in that it may be based on any felony other than those enumerated [in the murder-1 and murder-2 statutes. Aggravated battery is not one of the enumerated felonies, and as such, may form a basis for a conviction of third-degree felony murder." See *Daugherty v. State*, 211 So.3d 29, 40 (Fl. 2017).

IL, 720 Ill. Comp. Stat. 5/9-1(a)(3) – **First Degree Murder**

(a) A person who kills an individual without lawful justification commits **first degree** murder if, in performing the acts which cause the death:

…(3) he or she, acting alone or with one or more participants, commits or attempts to commit a forcible felony other than second degree murder, and in the course of or in furtherance of such crime or flight therefrom, he or she or another participant causes the death of a person.

"forcible felony" defined under 720 ILCS 5/2-8: "Forcible felony" means treason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnaping, kidnaping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement and ***any other felony which involves the use or threat of physical force or violence against any individual.***

Note: Subsections (a)(1) and (a)(2), in the murder-1 statute above, do not include any TFMRs, nor does **Second degree** murder (§5/9-2.) – the latter deals with cases that are mitigated from first degree murder to second degree because of factors such as heat of passion/provocation or honest but unreasonable belief if the right to use deadly force in self defense.

Per CL, the meaning of "use or threat of physical force or violence" depends not on whether the crime is classified as violent or nonviolent, but rather "whether, under particular facts of case, ***it was contemplated that violence might be necessary*** to enable conspirators to carry out their common purpose." One court said that the standard is met when: ***"defendant contemplated use of force and was willing to use [his dangerous weapon]***; another court said "aggravated discharge of a firearm necessarily involves ***violence directed against an individual***." Another court held that "aggravated possession of a stolen motor vehicle" could qualify as a forcible felony where defendant led officers on a high-speed chase.

MD Code Ann., Crim. Law § 2-201. **Murder in the first degree**

(a) A **murder is in the first degree** if it is:

…(4) committed in the perpetration of or an attempt to perpetrate:

(i) arson in the first degree;

(ii) burning a barn, stable, tobacco house, warehouse, or other outbuilding that:

1. is not parcel to a dwelling; and

2. contains cattle, goods, wares, merchandise, horses, grain, hay, or tobacco;

(iii) burglary in the first, second, or third degree;

(iv) carjacking or armed carjacking;

(v) escape in the first degree from a State correctional facility or a local correctional facility;

(vi) kidnapping under § 3-502 or § 3-503(a)(2) of this article;

(vii) mayhem;

(viii) rape;

(ix) robbery under § 3-402 or § 3-403 of this article;

(x) sexual offense in the first or second degree;

(xi) sodomy as that crime existed before October 1, 2020; or

(xii) a violation of § 4-503 of this article concerning destructive devices.

Note: Subsections (a)(1) to (a)(3) in the statute above do not contain any TFMRs.

Per CL, a felony not listed in the statute governing first-degree murder will support **second-degree murder** (§ 2-204-- all "murder that is not in the first degree"), provided that the felony is "***sufficiently dangerous to life, as judged by the nature of the crime or by the manner in which it was perpetrated***."

MS Code Ann. § 97-3-19 – **"Murder" and "capital murder" defined**

(1) The killing of a human being without the authority of law by any means or in any manner shall be **murder** in the following cases:

…(c) When done without any design to effect death by any person engaged in the commission of ***any felony other than*** rape, kidnapping, burglary, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39, or in any attempt to commit such felonies, shall be **first-degree murder**; …

(2) The killing of a human being without the authority of law by any means or in any manner shall be **capital murder** in the following cases:

… (e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies;

(f) When done with or without any design to effect death, by any person engaged in the commission of the crime of felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39, or in any attempt to commit such felony; …

Note: Subsections (1)(a), (1)(b), (1)(d), (2)(a) through (2)(d), and (2)(g) through (2)(k) do not include any TFMRs.

Binder (2011) says Mississippi also allows unenumerated felonies as predicates for FM, presumably per the "any felony … other than" language in Subsection (1)(c). Several predicate felonies have been

approved in reported cases (drive by shooting; aggravated domestic violence; felony DWI), with no suggestion that there is a limiting rule or standard disqualifying some felonies – perhaps all qualify.

Mont. Code Ann. § 45-5-102 – **Deliberate Homicide**

(1) A person commits the offense of deliberate homicide if:

… (b) the person attempts to commit, commits, or is legally accountable for the attempt or commission of robbery, sexual intercourse without consent, arson, burglary, kidnapping, aggravated kidnapping, felonious escape, assault with a weapon, aggravated assault, ***or any other forcible felony*** and in the course of the forcible felony or flight thereafter, the person or any person legally accountable for the crime causes the death of another human being; …

Note: Subsections (1)(a) and (1)(c) of the above statute do not contain any TFMRs, nor does the separate crime of **Mitigated deliberate homicide** (§45-5-103).

There does not appear to be any statutory definition of the key term, "forcible felony," but the Commentary to Section 45-5-102 states that "(t)he enumerated offenses in subsection [1] (b) broaden the old law dealing with felony-murders ... to include ***any felony which involves force or violence against an individual***. Since such offenses are usually coincident with an ***extremely high homicidal risk***, a homicide which occurs during their commission can be considered a deliberate homicide."

Nev. Rev. Stat. § 200.030. **Degrees of murder; penalties**

1. **Murder of the first degree** is murder which is:

(a) Perpetrated by means of poison, lying in wait or torture, or by any other kind of willful, deliberate and premeditated killing;

(b) Committed in the perpetration or attempted perpetration of sexual assault, kidnapping, arson, robbery, burglary, invasion of the home, sexual abuse of a child, sexual molestation of a child under the age of 14 years, child abuse or abuse of an older person or vulnerable person pursuant to NRS 200.5099;

(c) Committed to avoid or prevent the lawful arrest of any person by a peace officer or to effect the escape of any person from legal custody;

(d) Committed on the property of a public or private school, at an activity sponsored by a public or private school or on a school bus while the bus was engaged in its official duties by a person who intended to create a great risk of death or substantial bodily harm to more than one person by means of a weapon, device or course of action that would normally be hazardous to the lives of more than one person; or

(e) Committed in the perpetration or attempted perpetration of an act of terrorism.

2. **Murder of the second degree** is all other kinds of murder.

Note – per CL, a qualifying felony for FM-2 must be an ***"inherently dangerous felony and [there is] an immediate and direct causal relationship between the defendant's actions and victim's death; "immediate" is defined as without the intervention of some other source or agency."***

Okla. Stat. tit. 21, § 701.7. **Murder in the first degree**

… B. A person also commits the crime of murder in the first degree, regardless of malice, when that person or any other person takes the life of a human being during, or if the death of a human being results from, the commission or attempted commission of murder of another person, shooting or discharge of a firearm or crossbow with intent to kill, intentional discharge of a firearm or other deadly weapon into any dwelling or building as provided in Section 1289.17A of this title, forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, eluding an officer, first degree burglary, first degree arson, unlawful distributing or dispensing of controlled dangerous substances or synthetic controlled substances, trafficking in illegal drugs, or manufacturing or attempting to manufacture a controlled dangerous substance…

C. A person commits murder in the first degree when the death of a child results from the willful or malicious injuring, torturing, maiming or using of unreasonable force by said person or who shall willfully cause, procure or permit any of said acts to be done upon the child pursuant to Section 843. 5 of this title. It is sufficient for the crime of murder in the first degree that the person either willfully tortured or used unreasonable force upon the child or maliciously injured or maimed the child.

§ 701.8. **Murder in the second degree**

Homicide is murder in the second degree in the following cases:

… 2. When perpetrated by a person engaged in the commission of ***any felony other than*** the unlawful acts set out in Section 1, subsection B, of this act

Note – There are no TFMRs in other subsections of the above statutes.

Per CL, under the "any felony" language of the murder-2 statute ***"there must be a nexus between the underlying felony and the death of the victim" and "[t]he felony must be inherently or potentially dangerous to human life, inherently dangerous as determined by the elements of the offense or potentially dangerous in light of the facts and circumstances surrounding both the felony and the homicide."***

R.I. Gen. Laws § 11-23-1. **Murder**

The unlawful killing of a human being with malice aforethought is murder. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any arson or any violation of § 11-4-2, 11-4-3, or 11-4-4, rape, any degree of sexual assault or child molestation, burglary or breaking and entering, robbery, kidnapping, or committed during the course of the perpetration, or attempted perpetration, of felony manufacture, sale, delivery, or other distribution of a controlled substance otherwise prohibited

by the provisions of chapter 28 of title 21, or committed against any law enforcement officer in the performance of his or her duty or committed against an assistant attorney general or special assistant attorney general in the performance of his or her duty, or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him or her who is killed, is murder in the **first degree**. Any other murder is murder in the **second degree**.

Note: Per CL, FM-2 includes all ***"inherently dangerous felonies***" not listed under FM-1.

Va. Code Ann. § 18.2-32. **First and second degree murder defined; punishment**

Murder, other than aggravated murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate or animate object sexual penetration, robbery, burglary or abduction, except as provided in § 18.2-31, **is murder of the first degree**, punishable as a Class 2 felony.

All murder other than aggravated murder and murder in the first degree is **murder of the second degree** and is punishable by confinement in a state correctional facility for not less than five nor more than forty years.

Note: per CL, "all murder other than…" includes a TFMR. A qualifying predicate felony for FM-2 is ***"any felonious act, other than those expressly excepted, during prosecution of which a death occurs supplies malice which raises an accidental killing to the level of second-degree murder." "Nothing in the statute defining felony-murder in the second degree limits its scope to felonies foreseeably dangerous;*** rather, such statute encompasses all felonious acts except capital murder and several crimes particularly named in statute defining felony-murder in the first degree"

Note: **Aggravated murder** (§18.2-31) is not a TFMR since it requires "willful, deliberate, and premeditated killing" of certain protected persons.

Wash. Rev. Code § 9A.32.030(1)(c) – **Murder in the first degree**

(1) A person is guilty of murder in the first degree when:

…(c) He or she commits or attempts to commit the crime of either (1) robbery in the first or second degree, (2) rape in the first or second degree, (3) burglary in the first degree, (4) arson in the first or second degree, or (5) kidnapping in the first or second degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants…

9A.32.050. **Murder in the second degree**

(1) A person is guilty of murder in the second degree when

… (b) He or she commits or attempts to commit ***any felony, including assault, other than those enumerated*** in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than

one of the participants; except that in any prosecution under this subdivision (1)(b) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant…

Note: The other subsections of the murder-1 and murder-2 statutes above do not contain any TFMRs.

Per CL, "***second-degree felony murder does not require that underlying felonies were foreseeably dangerous to human life."*** But there must be ***a close proximity in terms of time and distance between the felony and the homicide.***

Part C

5 states that almost entirely# use dangerous-felony standards, not lists [CL= case law]

 # Some of these states list a single felony, or only one felony per degree of murder

Ga. Code Ann. §16-5-1 **Murder**

… (c) A person commits the offense of **murder** when, in the commission of a felony, he or she causes the death of another human being irrespective of malice.

(d) A person commits the offense of **murder in the second degree** when, in the commission of cruelty to children in the second degree, he or she causes the death of another human being irrespective of malice.

Note: The other sections of the above statute contain no TFMRs.

Per CL, a qualifying predicate felony under subsection (c) must be ***inherently dangerous to human life - per se, or by circumstances that created a foreseeable risk of death.*** However, some cases suggest ***courts don't actually look at the elements in the abstract, only at how the felony was committed***.

Minn. Stat. Ann. §609.185. **Murder in the first degree**

(a) Whoever does any of the following is guilty of murder in the first degree and shall be sentenced to imprisonment for life:

… (2) causes the death of a human being while committing or attempting to commit criminal sexual conduct in the first or second degree with force or violence, either upon or affecting the person or another …

Minn. Stat. Ann. §609.19. **Murder in the second degree**

Subdivision 1. Intentional murder; drive-by shootings. Whoever does either of the following is guilty of murder in the second degree and may be sentenced to imprisonment for not more than 40 years:

…(2) causes the death of a human being while committing or attempting to commit a drive-by shooting in violation of section 609.66, subdivision 1e, under circumstances other than those described in section 609.185, paragraph (a), clause (3).

Subd. 2. Unintentional murders. Whoever does either of the following is guilty of **unintentional murder in the second degree** and may be sentenced to imprisonment for not more than 40 years:

(1) causes the death of a human being, without intent to effect the death of any person, while committing or attempting to commit ***a felony offense other than*** criminal sexual conduct in the first or second degree with force or violence or a drive-by shooting…

Minn. Stat. Ann. §609.195. **Murder in the third degree**

… (b) Whoever, without intent to cause death, proximately causes the death of a human being by, directly or indirectly, unlawfully selling, giving away, bartering, delivering, exchanging, distributing, or administering a controlled substance classified in Schedule I or II, is guilty of **murder in the third degree** and may be sentenced to imprisonment for not more than 25 years or to payment of a fine of not more than $40,000, or both.

Note: The other subsections of the MN murder-1, murder-2, and murder-3 statutes above do not contain any TFMRs.

Notes: Under the "a felony offense other than…" provision in the murder-2 statute, a qualifying FM-2 predicate felony must pose a "***special danger to human life," both in the abstract and as committed***. However, lower courts seem to interpret this standard broadly; for example, felony DWI satisfies both prongs of the standard. See State v. Smoot, 737 N.W.2d 849 (Minn. Ct. App. 2007).

Binder (2011) viewed Minnesota as a list-plus-standard state, but it really shouldn't be classified that way. He presumably was of that view because Minnesota murder laws include three listed TFMR felonies/felony groups, one for each degree of murder (for first degree, criminal sexual conduct; for second degree, drive-by shooting; for third degree, drug crimes). However, the Task Force's focus is on FM-2, and for that crime Minnesota's qualifying-predicates "list" includes just one felony. Similar one-crime "lists" are found in two of the remaining four states in Binder's standard-only category: Georgia and Texas. For present purposes, all three states should be classified as standard-only FM jurisdictions.

Missouri, V.A.M.S. §565.021 **Second degree murder, penalty**

…(2) Commits or attempts to commit ***any felony***, and, in the perpetration or the attempted perpetration of such felony or in the flight from the perpetration or attempted perpetration of such felony, another person is killed as a result of the perpetration or attempted perpetration of such felony or immediate flight from the perpetration of such felony or attempted perpetration of such felony.

Note: Subsection (1) of the above statute, as well as the **First Degree** Murder statute (V.A.M.S. §565.020) contain no TFMRs.

Per CL, Any felony can qualify as a FM-2 predicate provided ***death was "foreseeable and a proximate cause*** of the underlying felony." Indeed, "***courts are prohibited from considering the inherent dangerousness, or lack thereof" of the felony.*** One case stated: "it is foreseeable that a death could result from an illegal drug deal."

So. Car. Code 1976 §16-3-10. **"Murder" defined.**

"Murder" is the killing of any person with malice aforethought, either express or implied.

Note: Per CL, implied malice aforethought includes a TFMR. Any felony can qualify if ***death was "a probable or natural consequence of the acts done in pursuance of the common [felony] design***"

Texas, V.T.C.A., Penal Code § 19.02. **Murder**

… (3) commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, the person commits or attempts to commit an act ***clearly dangerous to human life*** that causes the death of an individual;

(4) [deaths resulting from commission of certain drug crimes]

Note: Other subsections of the above **Murder** statute contain no TFMRs. The **Capital Murder** statute (V.T.C.A., Penal Code § 19.03) contains one listed-predicate TFMR, where a death occurs while the defendant was escaping or attempting to escape from a penal institution.

Appendix F. Predicate felonies by jurisdiction

(as submitted by committee chair)

Figure 1. Listed predicate felonies in the 26 "list-only" jurisdictions

Types of predicate felonies	Alaska	Arizona	Colorado	Connecticut	District of Columbia	Idaho	Indiana	Iowa	Kansas	Louisiana	Maine	Nebraska	New Jersey	New York	North Carolina	North Dakota	Ohio	Oregon	Pennsylvania	South Dakota	Tennessee	Utah	West Virginia	Wisconsin	Wyoming	United States	Total # of jurisdictions listing each felony
Robbery, carjacking, etc.	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	**26**
Rape/sex crime	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	**26**
Kidnapping, restraint, etc.	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	**26**
Burglary, breaking & entering	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	**26**
Arson	1	1	1	0	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	1	**25**
Escape & fleeing	1	1	1	1	0	1	0	1	1	1	1	0	1	1	0	1	1	1	0	0	0	1	1	0	1	1	**18**
Drug offenses	1	1	1	0	1	0	1	0	1	0	0	0	1	0	0	0	0	0	0	0	0	1	1	0	0	0	**10**
Assault, battery, mayhem	0	1	0	0	1	1	0	0	1	0	0	0	0	0	0	0	1	1	0	0	0	0	0	0	1	0	**7**
Specified-victim, other specialized assault crimes	1	1	0	0	1	1	0	1	1	1	0	0	1	1	0	1	1	1	0	0	1	1	0	1	1	1	**17**
Terrorism	0	1	0	0	0	1	0	1	0	1	0	0	1	0	0	0	1	0	0	0	1	0	0	0	0	0	**7**
Mass destruction/ biological/ chemical weapon	0	0	0	0	0	1	0	0	0	0	0	0	1	0	0	0	0	1	0	1	1	0	0	0	0	0	**5**
Death to unborn child	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0	**2**

Figure 1. Listed predicate felonies in the 26 "list-only" jurisdictions (continued)

Types of predicate felonies	Alaska	Arizona	Colorado	Connecticut	District of Columbia	Idaho	Indiana	Iowa	Kansas	Louisiana	Maine	Nebraska	New Jersey	New York	North Carolina	North Dakota	Ohio	Oregon	Pennsylvania	South Dakota	Tennessee	Utah	West Virginia	Wisconsin	Wyoming	United States	Total # of jurisdictions listing each felony
Felony theft	0	0	0	0	0	0	0	0	1	0	0	1	0	0	0	0	0	0	0	0	1	0	0	0	0	0	**3**
Treason	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	1	**3**
Discharge of weapon	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0	0	1	0	1	0	0	0	0	**4**
Perjury leads to conviction/ execution	0	0	1	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	**2**
Contract killing	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	**1**
Killing witness/ witness family/ victim to prevent/ retaliate against testimony	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	**1**
Gang activity	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	**1**
Consumer product tampering	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	**1**
Human/labor/child sex trafficking	0	0	0	0	0	0	1	1	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	**2**
Endangering food supply	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	**1**
Compelling prostitution	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	**1**
Espionage	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	**1**
Sabotage	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	**1**
Train wrecking	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	**0**
Torture	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	**0**

Figure 1. Listed predicate felonies in the 26 "list-only" jurisdictions (continued)

Types of predicate felonies	Alaska	Arizona	Colorado	Connecticut	District of Columbia	Idaho	Indiana	Iowa	Kansas	Louisiana	Maine	Nebraska	New Jersey	New York	North Carolina	North Dakota	Ohio	Oregon	Pennsylvania	South Dakota	Tennessee	Utah	West Virginia	Wisconsin	Wyoming	United States	Total # of jurisdictions listing each felony
Stalking	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	**1**
Extortion	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	**1**
Inciting riot	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	**1**
Domestic violence	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	**1**
Intimidation	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	**1**
Total number of listed predicate felonies	**9**	**10**	**8**	**5**	**8**	**10**	**8**	**9**	**13**	**8**	**6**	**7**	**11**	**7**	**5**	**8**	**16**	**10**	**5**	**7**	**9**	**9**	**7**	**8**	**9**	**10**	
Average # of predicate felonies per "list only" jurisdiction = 8.5																											

Note: For ease of presentation and to facilitate comparability across jurisdictions, listed felonies have been consolidated and counted as one crime in this table, even if a jurisdiction lists more than one of the crimes (see footnote 5, main report). Varying terminology can be applied to similar offenses (e.g., burglary). Also, specialized crimes (e.g., carjacking; assaults against the elderly) do not exist in some jurisdictions, requiring cases to be charged under generally-applicable statutes.

Figure 2. Listed predicate felonies in the 12 "list plus standard" jurisdictions and 38 "list-only" *and* "list plus standard" jurisdiction totals

Types of predicate felonies	Alabama	California	Florida	Illinois	Maryland	Mississippi	Montana	Nevada	Oklahoma	Rhode Island	Virginia	Washington	Total # of jurisdictions listing each felony	
													12 list + standard jurisdictions	38 list *and* list + standard jurisdictions
Robbery, carjacking, etc.	1	1	1	1	1	1	1	1	1	1	1	1	**12**	**38**
Rape/sex crime	1	1	1	1	1	1	1	1	1	1	1	1	**12**	**38**
Kidnapping, restraint, etc.	1	1	1	1	1	1	1	1	1	1	1	1	**12**	**38**
Burglary, breaking & entering	1	1	1	1	1	1	1	1	1	1	1	1	**12**	**38**
Arson	1	1	1	1	1	1	1	1	1	1	1	1	**12**	**37**
Escape & fleeing	1	0	1	0	1	0	1	1	1	0	0	0	**6**	**24**
Drug offenses	0	0	1	0	0	0	0	0	1	1	0	0	**3**	**13**
Assault, battery, mayhem	*0*	1	*0*	1	1	*0*	1	0	*0*	*0*	*0*	*0*	**4**	**11**
Specified-victim, other specialized assault crimes	1	0	1	0	0	1	0	1	*0*	*0*	*0*	*0*	**4**	**21**
Terrorism	0	0	1	0	0	0	0	1	0	0	0	0	**2**	**9**
Mass destruction/ biological/ chemical weapon	0	0	0	0	0	0	0	0	0	0	0	0	**0**	**5**
Death to unborn child	0	0	0	0	0	0	0	0	0	0	0	0	**0**	**2**
Felony theft	0	0	0	0	0	0	0	0	0	0	0	0	**0**	**3**
Treason	0	0	0	0	0	0	0	0	0	0	0	0	**0**	**3**
Discharge of weapon	0	0	1	1	0	0	0	0	1	0	0	0	**3**	**7**
Perjury leads to conviction/ execution	0	0	0	0	0	0	0	0	0	0	0	0	**0**	**2**
Contract killing	0	0	0	0	0	0	0	0	0	0	0	0	**0**	**1**

Figure 2. Listed predicate felonies in the 12 "list plus standard" jurisdictions and 38 "list-only" *and* "list plus standard" jurisdiction totals (continued)

Types of predicate felonies	Alabama	California	Florida	Illinois	Maryland	Mississippi	Montana	Nevada	Oklahoma	Rhode Island	Virginia	Washington	Total # of jurisdictions listing each felony	
													12 list + standard jurisdictions	38 list *and* list + standard jurisdictions
Killing witness/ witness family/ victim to prevent/ retaliate against testimony	0	0	0	0	0	0	0	0	0	0	0	0	**0**	**1**
Gang activity	0	0	0	0	0	0	0	0	0	0	0	0	**0**	**1**
Consumer product tampering	0	0	0	0	0	0	0	0	0	0	0	0	**0**	**1**
Human/labor/ child sex trafficking	0	0	1	0	0	0	0	0	0	0	0	0	**0**	**3**
Endangering food supply	0	0	0	0	0	0	0	0	0	0	0	0	**0**	**1**
Compelling prostitution	0	0	0	0	0	0	0	0	0	0	0	0	**0**	**1**
Espionage	0	0	0	0	0	0	0	0	0	0	0	0	**0**	**1**
Sabotage	0	0	0	0	0	0	0	0	0	0	0	0	**0**	**1**
Train wrecking	0	1	0	0	0	0	0	0	0	0	0	0	**0**	**1**
Torture	0	1	0	0	0	0	0	0	0	0	0	0	**0**	**1**
Stalking	0	0	*1	0	0	0	0	0	0	0	0	0	**0**	**2**
Extortion	0	0	0	0	0	0	0	0	0	0	0	0	**0**	**1**
Inciting riot	0	0	0	0	0	0	0	0	0	0	0	0	**0**	**1**
Domestic violence	0	0	0	0	0	0	0	0	0	0	0	0	**0**	**1**
Intimidation	0	0	0	0	0	0	0	0	0	0	0	0	**0**	**1**
Total number of listed predicate felonies	**7**	**8**	**12**	**7**	**7**	**6**	**7**	**8**	**8**	**6**	**5**	**5**		
Average # of predicate felonies per "list plus standard" (N=12) jurisdiction = 7.2														
Average # of predicate felonies per "list-only" *and* "list plus standard" (N=38) jurisdiction = 8.1														

Figure 3. Listed predicate felonies in the 5 "standard only" (or almost-only) jurisdictions

Types of predicate felonies*	Georgia	Minnesota	Missouri	South Carolina	Texas	Total # of jurisdictions listing each felony
Rape/sex crime	0	1	0	0	0	**1**
Escape & fleeing	0	0	0	0	1	**1**
Drug offenses	0	1	0	0	1	**2**
Specified-victim, other specialized assault crimes	1	1	0	0	0	**2**
Total number of listed predicate felonies	**1**	**3****	**0**	**0**	**2****	
Average # of predicate felonies per "standard only" jurisdiction = 1.2						

*There are fewer rows in Figure 3 (than in Figures 1 and 2), because rows with zero in each cell have been suppressed.

** Each listed felony applies to a different degree of murder.

Appendix G. Outreach Subcommittee report

(as submitted by committee chair)

The Outreach Subcommittee consisted of Bobbi Holtberg (Minnesota Alliance on Crime), Molly Evans (related to someone incarcerated for aiding and abetting felony murder), and Bill Ward (Minnesota State Public Defender.) This subcommittee was responsible for gathering information from those impacted by Minnesota's aiding and abetting felony murder doctrine, including victims' family members and loved ones, and those incarcerated under this doctrine. The subcommittee's work highlighted the culpability and sentencing disparities that exist for those who did not take a life and the primary actor who is responsible for the death of another, as outlined in identified cases. Prior to each interview, a member of the Outreach Subcommittee spoke with the attorney of record for incarcerated individual.

The work of the Outreach Subcommittee's was advanced collaboratively with the three subcommittee members leveraging their unique knowledge sets and relationships as it pertained to the focus of work of the full task force. To advance their work, the subcommittee:

1. Identified five (5) cases that met the criteria that was established by the full task force. These cases consisted of charges and convictions for Aiding and Abetting 1st degree murder.
2. Sent letters of request to the five (5) incarcerated individuals asking to meet with them to discuss the elements of their cases and asses if their cases truly met the objective and focus of work of the subcommittee.
3. The subcommittee conducted interviews with all five (5) incarcerated individuals whose cases had been identified.
    - Prior to speaking with the individuals, a member of the subcommittee made outreach to the individuals' attorneys to advise them of the work of the full task force and the focused work of outreach subcommittees.
    - The subcommittee extended invitations to participate in the listening session held on January 5th, 2024, to four (4) of the individuals, and four (4) individuals provided consent to participate.
    - The subcommittee chose not extend an invitation to one individual due to factual inconsistencies.
4. The subcommittee made outreach to victim-witness staff in the three (3) counties that prosecuted each of the cases. The purpose of this outreach was to attempt connection with family members, in each case, of the victim who lost their life. Because of the age of the matters, it was not possible to obtain contact information in all of the cases. For the two (2) cases we were able to make outreach to surviving family members of the deceased victim, a member of the subcommittee spoke with them to:
    - Provide information regarding the work of the full task force;
    - Provide information regarding the Outreach Subcommittee

- Provide them with an opportunity to submit something in writing to be read at the listening sessions and included in the final report.

5. Of the two (2) families that were contacted, neither agreed to submit something in writing to be included in the final report.
6. The subcommittee chair worked with the Task Force chair who had identified two (2) cases that fall under the "merger doctrine." One (1) of those individuals consented to participate in the listening session. The other case, which better illustrates the merger doctrine, will be summarized, based on public information, including court documents.
7. The Outreach Subcommittee also distributed and collected informed consent forms from listening session participants, so that listening session participants could opt in or opt out from having a summary of their story included in this report.

The subcommittee also held the following meetings:

Outreach Subcommittee meeting 1: November 15, 2023

Subcommittee discussed specific plans to advance their work, including using cases pulled by the Data Subcommittee to identify impacted people with diversity of age, geography, race, and criminal history score and invite these individuals to share their stories with the Task Force. Task Force letterhead was created to properly identify themselves in communications. The subcommittee discussed organizing a virtual listening session to be held the first week in January. Subcommittee members agreed that they needed to hear from victims and those convicted in order to understand the issue in a balanced way. They discussed organizing a virtual listening session, as well as working with victim advocacy organizations and victim-witness coordinators to provide an opportunity for family members to provide feedback. The subcommittee organized and assigned next steps.

Outreach Subcommittee meeting 2: December15, 2023

Subcommittee discussed the five (5) cases in which an initial interview had taken place to for the purpose of identifying which cases/individuals should be invited to participate in the virtual listening session to take place on January 5, 2024. It was agreed that four (4) cases met the criteria of the Task Force and would be invited to participate. The Task Force chair attended the subcommittee meeting and indicated that the chair hopes to have 1-2 additional cases, that fall under the Merger Doctrine, also participate in the listening session. The listening session facilitator was identified.

Listening Session for Task Force members and the public: January 5, 2024

The Outreach Subcommittee chair facilitated conversations with five (5) currently incarcerated individuals. Four (4) of the cases pertained to aiding and abetting first degree murder, and one (1) case fell under the merger doctrine. For those incarcerated for aiding abetting first degree murder, all four (4) received the same or longer sentences than the co-defendant who was responsible for taking the life of another. During these conversations, several themes emerged:

- All four incarcerated individuals deny knowing about, planning for, or taking part in the crime that resulted in the death of another.

- Three out of four individuals were at least ten-years older than their co-defendants; one individual was ten years younger and had no roots in the community where the crime occurred
- Three out of four individuals rejected plea deals and were convicted at trial. All three shared the belief that since they didn't know about, plan for, or take the life of another, they would be exonerated at trial.
    a. These three individuals were sentenced to life without the possibility of parole.
    b. The fourth individual who accepted a plea deal was sentenced to life with the possibility of parole.
- Three individuals stated that their families played a major factor in their decisions to not accept a plea deal.

Two individuals whose cases fall under the Merger Doctrine were interviewed by the subcommittee chair and the Task Force chair. One of those individuals consented to participate in the listening session. Themes from those conversations include:

- There was no intent to kill. In one of the matters, there was no knowledge that their brief altercation with the victim resulted in fatal injuries, according to court documents.
    a. Quoting from the criminal complaint of the individual who did not consent to participate in the listening session, "Victim walks towards a male, Victim does not appear aggressive and no sign of conflict is apparent. As victim nears defendant, defendant suddenly "head-butts" victim. Defendant's forehead appears to make direct contact with victim's forehead/face. Victim appears to be immediately knocked unconscious, falls backwards, and strikes his head on the floor. Defendant walks away." The defendant was not aware that the victim was taken to a hospital or that, approximately four weeks later, the victim's injuries resulted in death.
    b. The matter involving the listening session participant, while there was no intent to kill, ultimately, they became aware of the critical nature of the victim's injuries and ultimately did call 911.
- A general assault predicate led to conviction and sentencing to 2nd degree felony murder. This unintentional crime carries a maximum sentence of 40 years.

Summaries of all five individuals who participated in the listening session are included below.

Appendix H. Listening session summaries

(as submitted by committee chair)

Summary of Listening Session with "Calvin"

Personal Background:

Calvin was born in Illinois and moved to Minnesota when he was in Elementary school. He started high school at Harding High in Saint Paul and then moved to Arlington High School where he graduated in 1999. Calvin grew up in a two-parent household along with 2 brothers and 3 sisters. After high school, Calvin attended College at Mankato State University where he received a BS in Criminal Law and Minored in Political Science. Calvin's family values family above all. They looked out for each other, and the family had a lot of love for one another. Calvin's parents were firm on education and lived their family value of education by putting their six kids through High School and through college. Calvin's first job post-college was at a treatment center in St. Peter. Following this position he began employment with the Post Office in Bemidji, Minnesota, and moved to a position in St. Cloud seven months later. Calvin met the victim in this case while living in Bemidji. The victim was pregnant with a daughter from a previous relationship at the time that she and Calvin met.

The Case and Facts:

The victim and Calvin moved from Bemidji to St. Cloud while the victim was pregnant with her first child. Calvin needed to leave the state for about seven months and while he was away, he wanted to make sure that the victim had the familial support she needed while giving birth to her daughter. Calvin returned seven months later and went back to work at the Post Office in St. Cloud. On the day of the incident, Calvin was driving a truck for the Post Office, a position that required him to bring mail from the central Post Office to smaller surrounding post offices.

That evening Calvin came home and cooked dinner for his family while the kids' played games. After dinner his oldest daughter came to him and told him that someone had come over to their apartment while Calvin had been at work, and she was told that she could not tell anyone that they had been there. She was told if she told Calvin, she was not going to be able to go to the park to play.

Calvin questioned the victim because he thought that a child would not make up a story like the one that was told to him by their oldest daughter. He inquired of the victim "how can a mother agree and let someone else come into our household and change the whole dynamics and tell your kids to lie to the other parent?" Calvin said his mind started to over-generalize things and as he was talking to the victim his emotions got the best of him and he became overwhelmed. Calvin thought that a house with kids should be a safe haven and a place where they are loved and cared for. Telling secrets and keeping secrets was not included in the household environment that he was trying diligently to foster. Calvin told the victim that he was just awarded custody of his son from a previous relationship and that he was worried how it would look if the social workers found out about this. He tried to explain all of this to the victim, and it was not "clicking." Calvin said that his intent at that time was to make the victim "feel what I was feeling." He felt betrayed and had a lot of fear of the unknown.

Calvin grabbed and shook the victim to try to get her to understand. He pushed her head against the wall. Calvin punched the victim. The victim was talking to Calvin while the physical argument was ensuing.

Calvin helped the victim to the bed and helped her lay down. She was able to walk and get to the bed assisted. Calvin told her he was going to call his parents and have them come get the kids until they could figure things out. Upon checking on the victim, Calvin realized that she was unresponsive. At this time, he called his parents who then instructed Calvin to call 911 and to get help. Calvin called 911 and continued to check on the victim as well as try to resuscitate her. Calvin's parents drove from Saint Paul, MN to Sauk Rapids, Minnesota to pick up their four grand kids. By the time that they arrived the ambulance was already at the apartment residence. Both EMT's and the police department responded to the 911 call. The EMT's took Calvin to the hospital when he told them that he had taken Vicodin.

Other Charges:

Calvin never used a weapon other than his hands during the assault. However, the Stearns County Attorney charged him with 2nd degree Intentional and Unintentional murder. No one ever brought up the possibility of a Manslaughter charge, until Calvin asked about it. Instead, he resolved the case with a guilty plea calling for an aggravated sentence, which means potentially serving more time than the Minnesota Sentencing Guidelines call for. The basis of the loner sentence offered was due to "particular cruelty as Calvin waited too long to call for help." Calvin received an upward departure sentence of 270 months.

During Incarceration:

Calvin has been incarcerated for 3 years. He has asked for domestic violence and anger management classes but has not received any. He has also asked to take restorative justice classes, but he has not been able to participate in any of it. The hardest part of his incarceration has been that his parents having to raise all four of their kids: their oldest daughter from the victim's previous relationship, the two children they had together, as well as Calvin's son from the previous relationship. At this time, Calvin does not see his children. Calvin's parents share updates and pictures of his children. Calvin shares that his "kids are growing up without me. I write to each of my children when I can." What I share with other incarcerated people is that "they can actually kill someone or critically hurt someone without ever intending to." "My biggest takeaway that I would like to share regarding my experience with the legal process is that I do not want someone to feel like they have to take a plea deal because that is their only option."

Summary of Listening Session with "Tess"

Personal Background:

Tess grew up in Coon Rapids, Minnesota in a family with two working parents and one brother and one sister. She reports that she had a good upbringing but that she just always tried to fit in and that's where she got into a lot of trouble. She has been involved in the juvenile justice system since the age of 12 and she shared that it was at this time that she started "shooting up" Methamphetamines. Tess dropped out of Coon Rapids Middle school when she was in the 8th grade.

Tess currently has contact with and support from her mother who is now 73 years old. Tess has another immediate family member that is also incarcerated. She stated that her mother has stopped talking to that family member.

Facts of the Case:

Tess met the victim, her boyfriend, when she was 14 years-old and he was 16 years-old. Their families did not want them dating. Her relationship with her boyfriend had been on and off for several years. The two of them ended up getting back together, and they were both methamphetamine users. Tess reported that they lived in hotel rooms and on the day before the incident, she and her boyfriend had gotten into a physical argument. During the argument her boyfriend hit her and she hit him back. This was the first time that her boyfriend had ever hit her. She said that her boyfriend was not abusive, however their relationship was definitely unhealthy. After the argument, Tess and some other friends went to a hotel to party and to use drugs and it was here that Tess said "I am going to kill this mother f****" referring to her boyfriend, and other people in the hotel room overheard her say this.

On the evening of November 27th, 2003, Tess called her family member and asked him to hang out with her. He came to the hotel room where she and her friends were partying and her family member used methamphetamines with her. That same evening Tess's boyfriend called her on the phone and threatened her. Tess's family member overheard this conversation and the two of them wanted to scare her boyfriend because he had hit her earlier that day. Tess's family member then left the hotel and went to go meet Tess's boyfriend, where the two of them ended up getting into a confrontation. After the confrontation between Tess's family member and her boyfriend, the family member returned to the hotel and left Tess's boyfriend asleep in the front seat of his truck while he went back inside the hotel. During this time, everyone present at the hotel including Tess, talked about beating up Tess's boyfriend. While this was going on, unbeknownst to anyone else, Tess's family member had left the hotel to go buy zip-ties.

Tess and her family member got into the truck, where Tess's boyfriend was asleep in the front seat, and Tess was driving. Tess's family member was sitting in the back seat of the truck. Tess's family member suddenly reached over the seat and put a zip tie around her boyfriend's neck, who was asleep in the front seat. Tess's boyfriend was jolted awake and upon waking, he jumped out of the truck. Tess who was driving, immediately pulled over and yelled at her family member to get out of the vehicle and to go get her boyfriend who was now trying to run away. Tess's family member yelled at someone to get a knife to cut the zip time off, but no one had a knife.

Tess shared that she never called the police to stop what was going on or to help her boyfriend. She was scared and she said she did not call the police because she didn't want her family member to get in trouble. She was scared to do anything. The burglary that night never happened because they did not ever get to where they were going.

Other Charges:

Tess was offered a plea bargain. She had felony points from prior burglaries so with the plea deal her sentence would have been 12 years and her family member would have received 9 years. Her family member rejected the plea deal and took the case to trial. Tess shared that her family member told her while she was in Ramsey County Jail that she should take the case to trial, and so that was what she did. Tess went to trial and was found guilty of first-degree premeditated murder aiding/abetting (Minn. Stat. § 609.185(a)(1)(2004). Her family member who was the principal actor in this incident was charged & convicted under first-degree premeditated murder (Minn. Stat. § 609.185(a)(1)(2004) and 2nd Degree Murder with Intent-Not Premeditated Minn. Stat. § 609.19.

Tess is now 42 years old and has served 19 years of a life sentence. Out of 9 codefendants, Tess and her family member both received a life sentence without parole. The other 7 codefendants in the case received no time, in exchange for testifying against Tess and her family member. Tess applied for and was granted a Commutation in 2022 and is now serving a Life Sentence with the possibility of Parole after 30 years.

During Incarceration:

Tess has lost much during her incarceration and has often struggled with mental health and has often been suicidal in prison. Early in her incarceration Tess continued to struggle with Substance Abuse and because of this, she was shipped out of state to another prison. It was after she got shipped out of MCF-Shakopee that she got sober. Chemical dependency programming was not available to her at that time in MCF-Shakopee.

She shared that she has written an apology letter to the victim's family that is in the apology bank. She said it has taken so much healing to "heal and move through" the grief. Tess says that early in her incarceration she was able to watch the "Redemption Series" and that changed her life. "Watching this mother's experience helped me to understand the impact of my actions." One of the hardest parts for Tess has been missing her family's "whole life." She says "a life sentence sucks the air out of the room and this sentence says that I am not redeemable." Tess now identifies as having a Christian faith and says that she deeply values her relationship with God. Tess shared "What I would like most is to tell them (the victim's family) that I am sorry. I did play a part and was there and I should have done everything in my power to stop it. And the fact that I didn't, that weighs heavy on me every day."

Summary of Listening Session with "Deion"

Personal Background:

Deion was born and raised in North Minneapolis, Minnesota. He grew up in a tight-knit community where both his dad and grandad were pastors. Deion was raised in a two-parent household along with his two brothers and three sisters. He was close with both his parents and his siblings. Deion attended Richfield High School but did not receive a diploma.

Deion's family was supportive during his court process. They tried to provide as much help, direction, and support to him as possible during this time.

Facts of the Case:

On August 24th, 2011, it was a normal day for Deion who was on his way to go see his younger brother who had just gotten out of the hospital and was recovering at their mother's house. Deion's younger brother had been shot just a few weeks prior, following an altercation at school. On his way to go visit his brother, Deion was waved down while driving his father's church van by a distant family member and some of his brother's friends. They said they wanted to go see Deion's brother too. Deion initially said no to giving them a ride, as the boys were known to be kind of "bad kids, up to no good." However, Deion was 24 at the time and they were 13 or 14, and they were his brother's friends, so he gave in and agreed to give them a ride to his mother's house. While Deion went into his mother's house, Deion's younger brother came outside and talked to his friends who remained in the van.

When Deion decided to leave his parent's house, he told his brother's friends he was going to drop them back off where he picked them up. While they were on their way to the drop off location, the young boys suddenly asked Deion to pull over so they could go talk to someone. Deion pulled over, two boys hopped out of the van and they went behind a building. Deion heard gunshots fired and he pulled off quickly, not knowing where the gunshots had come from. He then saw the two boys who had gotten out of the van, running behind the van. He slowed down and the boys quickly caught up to the van and hopped inside. Deion asked what happened and the boys said that someone shot at them, and then they shot back. Deion dropped the boys off and continued onto his girlfriend's house, which was about a block away. He did not think about calling the police because he did not know anyone was hurt. He stated that it was not unusual for something like that to happen in that area or unusual to hear gunshots. Deion shared that "growing up calling the police was not something that I was trained to do. I was taught things will figure themselves out."

Other Charges:

The two individuals who were in Deion's van were apprehended a few days following the incident. Almost 2 years went by before the police apprehended Deion. During those two years, Deion was still in Minneapolis, living where he was at the time of the incident.

Deion was offered a plea deal of 234 months through an email thread between the prosecutor and his defense counsel. But no one ever let Deion know about the plea deal. This surfaced during later legal proceedings when Deion filed a Data Privacy Request, and the plea deal was discovered. Deion's family

greatly influenced his decision to take his case to trial. His family, especially his father, was against him taking a deal for something he did not do.

Deion was indicted by a grand jury. His codefendants had been charged almost two years earlier, but their trial had not begun. One codefendant eventually pled guilty and one codefendant took the case to trial. When asked, Deion shared that he feels that the "codefendant's willingness to cooperate with the state's theory greatly impacted their sentencing." He does not feel that his sentence reflects his level of culpability. Deion believes that he got sentenced as if he was responsible for everything. Deion said that the victim that was injured, not the one that was killed, was related to the person who shot his younger brother. Deion was not at the time of this incident, nor has he ever been, gang-affiliated.

The codefendants in this case were very young, almost 10 years younger than Deion who was 24 at the time of the incident. Following the trial, Deion was convicted of Premeditated 1st Degree Murder Aid/Abet (Minn. Stat. § 609.185(a)(1) (2014) and sentenced to Life without Parole.

Deion was never asked to testify against his codefendants, but his codefendants did testify against him. When asked about restorative processes Deion shared that he has come up with some restorative processes on his own. "I have talked with my victim's family that is now incarcerated. During the court proceedings, it's difficult as many things have been left out. The victim's family has been incarcerated at the same correctional facility that I am in. There were a lot of key facts that have now surfaced. One of my codefendants was in a juvenile facility with the victim that was killed and they had had an altercation there, so there was a previous relationship there. But this evidence was not allowed into the courtroom. I became aware of one of my codefendant's gang affiliations after I came to prison, but I was not aware of this at the time of the incident. One of my codefendants committed suicide last year, but one is still alive and has now come forward to let officials know that I did not know about what they were planning on doing that day."

Summary of Listening Session with "Elijah"

Personal Background:

Elijah grew up in North Minneapolis and is one of a combined household of 23 children. He had a close relationship with his mother and most of his siblings. His father was not involved in his life until he was in his late teens. At the time of the incident, Elijah was married and had 4 biological children and 6 step-children. His wife and children were very supportive during the legal process and early on his incarceration.

Because the case involved his nephews, all siblings except two of his sisters, have halted all contact with him. He still has intermittent conversations with his two sisters. He had frequent connections with his wife and children early in his incarceration and it became more sporadic as years went by, and since COVID, he no longer has any connections with his wife and very few connections with his children. Elijah became very emotional when talking about this.

Elijah has suffered 3 strokes since 2016 and is no longer able to walk and is blind in one eye. He also has experienced significant hearing loss. He spent 2019 and 2020 in recovery and rehabilitation at MCF-OPH. His memory has been affected, but he was able to recall most of the events in his case.

Facts of the Case:

On August 14th, 2011, it was Elijah's nephew's birthday and he and two of his nephews, and co-defendants, were on their way to his nephew's home for a party. He indicated that on their way to south Minneapolis, they decided to stop by "the projects" to buy some "weed." He indicated that his niece worked at the office at the projects and they were going to talk with her. When they arrived at the projects, there was a group of men standing by the fence outside of the office. Elijah says he did not know any of the men, but one of his nephews did and got out to talk with the men. When he returned to the car, he said no one had weed and they were going to have to check with some other friends. He indicated that they stopped at a total of two houses and at the second house, they encountered the victim in his case. His codefendant knew the victim. However, Elijah and the other codefendant in this case, did not know the victim. Elijah indicated that some memories of that day have been impacted by his stroke. He has read reports and believes he has pieced together the memories he has. At some point, both of his nephews and Elijah walked into the alley next to the 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 was not sure where it had come from. Elijah began running away from the location as he believed someone had shot at him. He talked about being a track star in high school and shared that he was able to sprint fast, despite one of his legs being slightly shorter than the other. At that time, he heard someone call his name and he turned to see his two nephews running toward him. Before they caught up with him, a police car pulled in front of Elijah, with him on one side of the squad car and his nephews on the other. All three were taken into custody and taken to the Hennepin County jail. He was questioned by the police and indicated he was not in the alley and did not know who had shot the gun. Before he was taken to booking, he asked to hug his nephew, when he hugged him, his nephew whispered that his other nephew had shot the victim because they had an ongoing dispute. Elijah then told him that his other

nephew needed to "come clean." It was later discovered that the nephew whom Elijah had hugged was the shooter, not the other nephew. Elijah states that he did not know his nephew had a firearm and if he had known, he would have taken it away.

Other Charges:

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. Even though witnesses said they saw three men kicking the victim's head "like a soccer ball," Elijah had no blood splatter, contact DNA, or GSR on his clothes or hands. He indicated he was wearing white tennis shoes and if he had been in the alley, kicking the victim, he would have had blood and DNA on his clothes. He also offered that he suffers from a skin disorder that causes the skin on his hands to peel easily. Had he touched the victim in any way, his DNA would have been found on the victim, and it was not.

Elijah does not feel that he had good communication with his attorney. He talked about disagreeing with the jury instructions that were given, and he shared that his attorney did not do anything about the jury instructions not being what they had agreed to. Elijah went to trial and was found guilty of first-degree premeditated murder (Minn. Stat. § 609.185(a)(1) (2014),) and first-degree felony murder during the commission of an aggravated robbery (Minn. Stat. § 609.185(a)(3). Elijah was sentenced to life in prison without the possibility of release.

Both codefendants in this case were offered plea deals that included testifying against their uncle.

The principal in this crime (shooter) pleaded guilty and was sentenced to 40 years. The other codefendant pleaded guilty and was sentenced to 25 years.

Elijah does not believe his sentence reflects his level of culpability in the case.

During Incarceration:

Elijah has lost much during his incarceration: relationships, health, several family members who have passed, including a grandchild. During his incarceration two of his sons have also become incarcerated. He became very emotional when sharing this.

He says he believes "God put him in prison for a reason." He says he has learned a lot about not taking life, relationships, and opportunities for granted. He completed the mentorship program and was a mentor for newly incarcerated men for over 5 years. Since suffering his strokes, he has not been able to participate in the mentorship program. He is currently trying to get into the higher education program and wants to be a role model for younger men. He says that he is "trying to be as much of a support to them that I can," and he believes he has a duty to "guide, provide, and protect" anyone who comes into his life. His youngest daughter was 7 years old at the time of the incident and that at certain times he is able to call his wife or children but most often he is not able to. He shared that it has been difficult as "you cannot raise a child from prison."

Elijah also indicated he would like assistance getting access to his pathology reports. He also indicated he wanted his medical records from his emergency room visits when he suffered his strokes.

Summary of Listening Session with "Gary"

Personal Background:

Gary was born in West Virginia, and during his early childhood, his family moved often. They lived in Montgomery & Mobile Alabama, Jacksonville, Florida, and then the family moved to Olivia, Minnesota when he was six years old. Gary was born the second of five siblings, and he has 3 brothers and 1 sister. His mother and father were severely abusive during Gary's childhood. He sustained a traumatic brain injury at the age of five when he was hit on the top of the head with an axe by his father. Gary states that he spent a large part of his childhood being locked in a closet underneath a staircase, only being let out in between drunken fits of rage by his father, which most often resulted in additional severe beatings, where he was then locked back in the closet. Ultimately, his parents were charged with Felony Child Abuse, Child Neglect, and Malicious Punishment of a Child, and subsequently were sent to Prison. After this time, Gary became a ward of the state and lived in three different foster care homes, before coming to Howard Lake, Minnesota, where he was ultimately adopted by a foster family at age of 11. Howard Lake, Minnesota is where Gary considers most of his growing up to have taken place. Due to his first six years of life, Gary suffered from severe anxiety and PTSD, while the TBI caused learning disabilities as well as other emotional disturbance behavior issues. Gary attended elementary school in Howard Lake, Minnesota and Middle and High School in Delano. He spent some time his junior year attending an ALC, and he graduated in 1999 from Dassel Cokato High School.

Gary was raised as the oldest child in his foster care family along with his two younger biological siblings, his sister and brother. Gary struggled severely with Mental Health and Substance Abuse, and at the age of 15 his adoption failed and he again became a ward of the state and was placed in a boys' group home in Dassel Cokato, where he remained until age 18. Gary's biological father was a Vietnam veteran and a first-generation American whose family had immigrated to Cleveland Ohio, from Hungary, pre-World War II. Upon reflection, Gary believes that some of the severe abuse inflicted upon him by his father may have been due to his father's traumatic experiences of having been in the military.

Gary feels that his adoptive family was as supportive as they could be during his legal proceedings. He shares that they were physically present, but neither his biological brother nor sister could do much because they were 15 and 16 at the time of the incident. His adoptive parents came to court hearings, but they were not mentally or emotionally supportive during this time. Had his family taken the opportunity to assist in retaining defense counsel, he says his court case may have turned out differently.

The Case and Facts:

This case takes place over the course of a three-day time span that began on July 18, 1999. Gary was at an arcade in Cokato, Minnesota. A friend came to the arcade and told him that another friend wanted to talk to him. The friend lived in Hutchinson Minnesota with her fiancé. Gary and his friend got into a car and then drove to the home where his friend was present and where the incident took place. Gary shared that he had been trying hard to get sober and that the home where they were going to was used as a drug circle, or meeting spot. When Gary got to the house to speak to his friend, there were several

people already there—he estimates about 15 people, which included his friend's fiancé and the victim in this case who shared the home with Gary's friends.

There were two levels of the home and Gary, and his friends were all downstairs. Shortly after arriving at the residence, they went upstairs. It was upstairs that Gary saw the victim sitting on the floor with his hands taped in front of him. Gary's friend was questioning the victim about some drugs and money that had gone missing a few days previously. The victim said he did not know where the missing drugs and money were, so everyone present began punching and hitting the victim. Gary punched the victim because he did not want to look like he had been the one that had stolen the money or drugs. He also shared that he had been at a hotel a few weeks prior where they had been raided and the police did not find any drugs. Gary said that because of this, he was then considered to this group of friends to be "hot." The interrogation of the victim continued for quite some time.

Gary's pregnant friend had asked him to stay at that house where this was going on because she did not feel safe. So, he stayed while the interrogation of the victim was going on to protect and watch over his pregnant friend. Gary said that all he was thinking about was making sure that his friend was safe. He did not want anything to do with the mistreatment of the victim. Most of the beating of the victim occurred upstairs while Gary was downstairs. He shared that "My convoluted 18-year-old mind thought if you sold drugs you deserved to be beat up." Over the course of the next few days Gary was forced to watch the victim.It was during this time that he gave the victim food, water, and pain medication.

On day three, Gary's codefendants had called him back upstairs as they were trying to force the victim into a duffle bag. After seeing this, Gary went back downstairs. He told his codefendants, "I do not want anything to do with what they were doing." The codefendant's in this case told him, "You can either stay and clean up the house or you can come with us." Gary did not want to go with the codefendants, so he stayed at the house and cleaned the carpet upstairs. There was blood on the carpet upstairs from when his codefendants had beaten the victim with a closet rod. Gary states that the last time he saw the victim, the victim was in the duffle bag and was moving and talking. Gary's codefendants in this case were gone for a long time, and when they returned to the house later that day, they did not have the duffle bag or the victim with them. Gary did not ask them where the victim was. He told them he needed to leave, as he had a court hearing for an underage consumption case in Buffalo, Minnesota that morning. Gary's codefendants told him that he could take the victim's car and leave. Gary then drove the victim's car from Hutchinson to Buffalo to attend his court hearing.

When Gary was asked why he did not leave the residence the first day immediately after he saw what was occurring, he shared that he was using methamphetamines during this time and he also was concerned for his own safety. He did not have transportation, and he said, "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."

Other Charges:

Gary was arrested a couple of weeks later, while working at a Casey's general store in Cokato, Minnesota. He was told that five of the other codefendants had already been arrested. He was taken to

the Wright County Jail for what he was told was Probable cause Auto Theft, because he had driven the victim's car from Hutchinson to Buffalo. Three days later, he was transferred to McLeod County Jail where Gary was informed that he was being charged with first-degree Murder.

There were 9 total codefendants in this case. The other Codefendants were charged with the following:

Kidnapping charges: 3 or 4 years.

Codefendant 1: 81 months

Codefendant 2: Received Life with Parole, but then was resentenced and acquitted.

Codefendant 3: Received Life without Parole, but then was resentenced and pled to second-degree murder: 30 years.

Codefendant 4: Received 36 years for second degree murder with the presumption if she was charged with another case that she would receive time served.

Codefendant 5 was a Minor and took the case to trial and the charges were dismissed.

Codefendant 6, the principal got: Life without Parole.

Gary: Life without Parole.

The very first plea offer came only after 6-7 months in the McLeod County Jail. The offer was 30 years. At the time this plea deal was given, Gary was on a significant amount of mental health medication. A psychological evaluation, Presentence Investigation, and/or Rule 20 were not done for Gary and cannot be found as part of his original court record. Gary was at least 10 years younger than the principal in this case and he was younger than 7 of the other 9 codefendants. Gary and the Principal in this case were the only two codefendants whose families were not rooted in the community where this crime took place.

During Incarceration:

Gary has served 25 years of a life sentence. He shares that the most difficult part of his journey has been the "loss of his own life." "My brother and sister have had kids and their kids are now adults. The ongoing legal process has been very mentally draining. I came in here not being able to grow a beard and now I have gray hair."

Gary has earned his bachelor's degree while incarcerated and graduated summa cum laude. He has 8 years' experience teaching Art in facilities as well as completing chemical dependency and substance use disorder programming. He has also completed the Peer Recovery Specialist program. He has spent several years working with Mental Health and assisted in co-writing the Long-term offender program. Gary is currently part of the Restorative Justice Council at the facility where he resides. Gary shares that he wants to live in a way that reflects the loss of the victim and says, "Not being able to make amends with the victim's family has weighed heavily on me