STATE OF WISCONSIN : CIRCUIT COURT : OUTAGAMIE COUNTY
BRANCH 02, HONORABLE NANCY J. KRUEGER

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 2017 CF 411

HENRY NELLUM,

Defendant.

MOTION CHALLENGING THE CONSTITUTIONALITY OF THE FELONY MURDER STATUTE

TO: Wisconsin Attorney General Office
Outagamie County District Attorney Office
Appleton County, WI

The defendant, appearing specially by his attorney and reserving his right to challenge the court's jurisdiction, moves the court for an order dismissing this action. This motion is brought pursuant to sec. 971.31(2) and (5), Stats., on the grounds that the court lacks jurisdiction over the defendant because the statute the defendant is alleged to have violated is unconstitutional under federal law pursuant to the Sixth, Eighth and Fourteenth Amendments. Pursuant to the Supremacy Clause, this court must follow the U.S. Supreme Court's interpretation of the Federal Constitution. ***Cooper v. Aaron,*** 358 U.S. 1 (1958). State courts have both the power and the duty to enforce obligations arising under federal law. ***Claflin v. Houseman,*** 93 U.S. 130 (1876); ***Testa v. Katt,*** 330 U.S. 386 (1947). The legal authority for this motion is set forth in the attached brief which is incorporated by reference to this motion.

Dated at Oconomowoc, Wisconsin this 9th day of September, 2017.

Respectfully submitted,

HENRY NELLUM, Defendant
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BRANCH 02, HONORABLE NANCY J. KRUEGER

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 2017 CF 411

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Defendant.

BRIEF IN SUPPORT OF DEFENDANT'S MOTION CHALLENGING THE CONSTITUTIONALITY OF THE FELONY MURDER STATUTE

TO: Wisconsin Attorney General Office
Outagamie County District Attorney Office
Appleton County, WI

FACTS

Around 11:00 pm Saturday, May 20, 2017 Henry Nellum and his girlfriend, Dree Sullivan, went to Jack's Apple Pub to have a couple of drinks. Between May 22, 2016 and May 22, 2017 there were 75 police service calls to Jack's Apple Pub. This is the most police service calls of the 20 downtown Appleton bars. The majority of calls to Jack's — 29 — were related to disturbances at the bar. Other calls were for welfare checks, suspicious situations, battery or disorderly conduct, theft or assist calls.

Nellum and Sullivan were having a good time alone at Jack's Apple Pub. In the early morning of May 21, 2017, they were confronted by Leander M. Moffitt in the bar. About one month prior to the incident, in Winnebago County, Moffitt had been convicted of his third operating while under the influence charge, contrary to Wisconsin Statutes Sec. 346.63(1)(a). Moreover, Moffitt may have a homicide conviction as well as over 20 other criminal convictions from North Carolina. However, the defense has not been able to verify that since, despite filing a discovery demand requesting a NCIC report on Moffitt, the prosecution has not provided that information to the defense as required by statute and constitutional law. Interestingly, however, Green Bay Detectives investigating this officer involved shooting may have a connection with the Chatham County North Carolina Sheriff's Office.

Given Mr. Moffitt had just been convicted of his third operating while under the influence charge a month previously, a large question exists why he was in Jack's Apple Pub on May 21, 2017. Why someone just convicted of drunk driving is in a Appleton bar has not been questioned by law enforcement. Regardless, Mr. Moffitt has a problem with alcohol. That alcohol problem likely

led him to start saying abusive things to Nellum. In fact, on that night, Moffitt went so far as to tell Nellum that Sullivan should be out on the corner working as a prostitute. Nellum told Moffitt to stop talking like that and asked Moffitt to leave. Moffitt said OK because he had to go to the bathroom but abruptly punched Nellum in the face as Nellum was seated in the chair. The punch had such force that it sent Nellum crashing to the floor. A fight thereafter breaks out between Moffitt and Nellum. Witnesses report Nellum pulls a gun and shoots toward Moffitt. Moffitt is not concerned or bothered by the gunshot as he continues to fight Nellum. Moffitt and Nellum fall to the floor fighting.

The fight and the threat caused by the fight between Nellum and Moffitt ends by Dree Sullivan pulling Nellum off Moffitt. Nellum starts walking towards the back door of Jack's Apple Pub with Sullivan behind him. Despite the fight being over between Moffitt and Nellum who is walking to the back door, more shots are fired by Appleton Police Lt. Steinke, who has his gun drawn out on the sidewalk and is running to the door of Jack's Apple Pub, enters Jack's Apple Pub without his partner. There is no evidence that as Lt. Steinke enters Jack's Apple Pub shooting his gun, Lt. Steinke gave any commands to Nellum to drop his gun or raise his hands, determine whether other reasonable options were available to avoid using deadly force against Nellum and finally if Lt. Steinke ever isolated Nellum before shooting at him so no one else was in harm's way of the bullets' shot by Lt. Steinke. Moreover, there is no objective record of what Lt. Steinke sees upon entering Jack's Apple Pub and shooting his gun since Lt. Steinke's body camera was not activated for recording at that time he entered Jack's Pub.

Nellum is hit by Lt. Steinke's shots and falls to the floor at the door. Sullivan is shot in the leg. From the floor, Nellum hands Sullivan the gun. According to public statements by Appleton Police Chief Todd Thomas, Appleton Police Lt. Steinke had entered the South State Street door, saw a male with a gun and fired his weapon at the male. He then sought cover outside the building, Police Chief Thomas said. Further, Chief Thomas stated Lt. Steinke encountered an active shooter situation and used his firearm to stop a threat in an extremely dynamic and chaotic situation. While Lt. Steinke is shooting at Nellum who is walking towards the back door with Sullivan behind him after the fight is over, one of these shots from Lt. Steinke kills an innocent bystander, Jimmie Sanders.

Henry Nellum is now charged with felony murder based on Lt. Steinke killing Sanders.

ISSUE

I. Does Wis. Stat. § 940.03 distort a defendant's right to a fair adversary process by excluding a category of evidence that would demonstrate innocence?

II. Does Wis. Stat. § 940.03 contain a conclusive presumption regarding mens rea contrary to the Fourteenth Amendment as interpreted in *Sandstrom v. Montana,* 442 U.S. 510, 99 S. Ct. 2450 (1979)?

III. Does Wis. Stat. § 940.03 violate the Eighth and Fourteenth Amendment guarantees of proportional punishment by not containing a requirement of mens rea?

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Conclusion

LAW AND ARGUMENT

I. The United States is the *only* western country to embrace the misguided concept of felony murder. Wisconsin has one of the more sweeping felony-murder statutes in the United States.

To be convicted of felony murder in Wisconsin, a defendant does not have to have any intent or mens rea to commit a homicide. Wis. Stat. § 940.03; ***State v. Oimen,*** 184 Wis. 2d 423, 435, 516 N.W.2d 399 (1994); WIS. JI – CRIMINAL 1030, 1031. Mens rea refers to all mental influences and thinking of someone who has engaged in wrongful or harmful conduct deemed to be blameworthy, and, therefore, deserving of punishment. Mens rea also is understood to comprise the purpose, knowledge, recklessness, or negligence necessary to prove a given element of a crime. See, Douglas Husak, "Broad" Culpability and the Retributivist Dream, 9 OHIO ST.J.CRIM.L. 449, 454-60 (2012); Sanford Kadish, The Decline of Innocence, 26 CAMBRIDGE L.J. 273, 274-75 (1968). In Wisconsin, what divides the more serious homicides from the less serious homicides is the different levels of mens rea. However, Wisconsin's felony murder is anomalous in that no mental culpability is required with respect to the death caused by a defendant; the crime is assigned a high degree of penal sanction because of a circumstance element-the commission of one of several felonies named in the statute, each of which incorporates a set of elements, including mens rea. Gegan, Lesser Included Crimes Under Felony Murder Indictments in New York: The Past Speaks to the Present, 66 ST. JOHN'S L. REV. 329, 330 (2012). Since the felony murder statute does not contain a mens rea requirement for the homicide, it is therefore a strict liability homicide.

That makes a defendant charged with felony murder guilty of a killing regardless if the killing was accidental, reckless or intentional. Felony murder liability is extended to all those who intended to commit the underlying felony. This is a form of group criminal liability rather than individual liability. Michael J. Roman, Once more unto the breach, dear friends, once more: a call to re-evaluate the felony-murder doctrine in Wisconsin in the wake of ***State v. Oimen*** and ***State v. Rivera***, 77 MARQ. L. REV. 785, 819 (1994). "If it is established that the defendant had the requisite intent to commit the underlying felony, the felony murder rule then operates as a conclusive presumption that he had the intent necessary for the [felony] murder." Barry B. Klopfer, The California Supreme Court Assaults the Felony-Murder Rule, 22 STANFORD L. REV. 1059, 1059 n. 2 (1970). The "[conclusive] presumption is not mentioned in the statute itself but is rather the underlying rationale which surfaces upon analysis by the courts." Comment,

Constitutional Limitations Upon the Use Of Statutory Criminal Presumptions and the Felony Murder Rule, 46 MISS. L. J. 1021, 1036 (1975). See, ***State v. Wanrow,*** 588 P. 2d 1320, 1325 (Wash. 1978) (The intent necessary to prove the felony murder is the intent necessary to prove the underlying felony.").

The concept of felony murder liability is "is misguided in principle, unnecessary in practice, and inappropriate in symbolism." James J. Tomkovicz, The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law, 51 WASH. & LEE L. REV. 1429, 1430 n.8 (1994). The drafters of the Model Penal Code, which strongly influenced Wisconsin's homicide law revision, Dickey, Schultz, Fullin, Jr., The Importance of Clarity in the Law of Homicide: The Wisconsin Revision, 1989 WIS. L. REV. 1323, 1368-69 and n. 151, declared that "[p]rincipled argument in favor of the felony-murder doctrine is hard to find." MODEL PENAL CODE § 210.2 note 6, at 37 (1980). See also Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 YALE L.J. 1325, 1387 (1979) (noting "at least fifty years of sustained academic and judicial hostility" to felony-murder rule); H.M. Hart, The Aims of the Criminal Law, 23 LAW & CONTEMP. PROBS. 401, 422 (1958) ("there can be no moral justification for [strict liability], and ... there is not, indeed, even a rational, amoral justification"). "While it is understandable that little compassion may be felt for the criminal whose innocent victim dies, this does not justify ignoring principles underlying our system of criminal law." ***People v. Aaron,*** 409 Mich 672, 710 (1980). As Professor Hall argues in his treatise on criminal law:

> The underlying rationale of the felony-murder doctrine-that the offender has shown himself to be a 'bad actor,' and that this is enough to exclude the niceties bearing on the gravity of the harm actually committed-might have been defensible in early law. The survival of the felony-murder doctrine is a tribute to the tenacity of legal conceptions rooted in simple moral attitudes. For as long ago as 1771 the doctrine was severely criticized by Eden (Baron Auckland), who felt that it 'may be reconciled to the philosophy of slaves; but it is surely repugnant to that noble, and active confidence, which a free people ought to possess in the laws of their constitution, the rule of their actions.' Hall, General Principles of Criminal Law (Indianapolis: Bobbs-Merrill, 1947), p. 455, cited in ***Aaron,*** 409 Mich at 710-11.

America is the *only* western country which allows "that the most serious sanctions known to law might be imposed for accidental homicide." Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 YALE L. J. at 1383. The felony murder doctrine is unknown in France and Germany and England, which created the idea, abolished felony murder in 1957. Homicide Act of 1957, 5 & 6 Eliz 2, ch. 11 § 1 (England) (requiring malice aforethought for a killing to amount

to murder in furtherance of another offense); George Fletcher, Reflections on Felony Murder, 12 SW. U. L. REV. 413, 415 (1980-1981). Interestingly, the reason the felony murder rule was rarely invoked in England in the years preceding its abolition has been explained as a "natural distaste" for the constructive theory of crime. Prevezer, The English Homicide Act: A New Attempt to Revise the Law of Murder, 57 COLUM. L. REV. 624, 635 (1957) The climate of international opinion concerning the acceptability of a particular punishment is an important consideration in deciding the constitutionality of that punishment. ***Enmund v. Florida,*** 485 U.S. 782, 799-800 n. 22 (1982). Wisconsin's felony murder rule is based on the abolished English rule. ***State v. Noren***, 125 Wis. 2d 204, 209, 371 N.W.2d 381, 384 (Ct. App. 1985) (***Regina v. Serne,*** 16 Cox Crim. Cases. 311, 313 (Central Crim. Ct. 1887) was the English case upon which the Wisconsin common law crime of felony murder had developed). Since Wisconsin's felony murder rule is based on the English rule which has been abolished, Wisconsin should do the same. Gerber, The Felony Murder Rule: Conundrum without Principle, 31 ARIZ. ST. L.J. 763 (1999)

Whatever the origin of the felony murder rule, "[h]istorians and commentators have concluded that the rule is of questionable origin and that the reasons for the rule no longer exist, making it an anachronistic remnant, 'a historic survivor for which there is no logical or practical basis for existence in modern law.'" ***Aaron,*** 409 Mich. at 689 (1980) (judicially abolishing felony murder in Michigan). The felony murder rule is an anachronistic remnant since "at the time the doctrine originated there were very few crimes classified as felonies, and all of these were capital crimes. Thus, 'it made no difference whether a felon was executed for one felony or another.' Therefore, the harsh nature of the rule was curtailed by the fact that only the most egregious crimes carried with them the possibility of the felony-murder penalty." Michael J. Roman, Once more unto the breach, dear friends, once more: a call to re-evaluate the felony-murder doctrine in Wisconsin in the wake of ***State v. Oimen*** and ***State v. Rivera***, 77 MARQ. L. REV. at 788-89. Citations omitted.

Two states have statutorily abolished felony murder. Haw. Rev. Stat. 707-711 (1972), Ky. Rev. Stat. Ann. 507.020 (Baldwin 1985). Other states, like Minnesota, have limited the application of the felony-murder rule. See ***State v. Nunn,*** 297 N.W.2d 752, 754 (Minn. 1980). One state, Ohio, has incorporated felony murder into its involuntary manslaughter statute, thereby effectively eliminating it. Note, Felony Murder: A Tort Law Reconceptualization, 99 HARV. L. REV. 1918,

1918 n.2 (1986). Thus, a majority of the states have not repealed the felony murder rule outright, but a majority of the states have *limited* the felony murder rule. ***State v. Doucette,*** 470 A. 2d 676, 680 (Vt. 1983).

Sadly, Wisconsin is acting contrary to a majority of states that have *limited* the felony murder rule. Wisconsin has statutorily *expanded* the felony murder rule. Wisconsin Legislative Council Act Memo to 2005 Wisconsin Act 313 [2005 Assembly Bill 717] (Act 313 *expands* the list of crimes that are subject to the felony murder statute). In fact, Wisconsin has "one of the more sweeping felony-murder statutes in the United States." Once more unto the breach, dear friends, once more, 77 MARQ. L. REV. at 820. This is an ironic result for a statute that had as its genesis a Wisconsin Legislative Council committee that originally recommended the abolishment of the felony-murder doctrine. Id. It is Wisconsin's expansion of the felony murder rule which requires judicial re-evaluation of whether the doctrine is an appropriate part of the Wisconsin criminal code. Id.

II. Courts are to exercise "special diligence" in reviewing the constitutionality of statutes. Moreover, a court is to have an inhospitable attitude to non-mens rea offenses and limit them to regulatory offenses which are different than criminal statutes.

The constitutionality of a statute is a question of law. ***State v. Post,*** 197 Wis. 2d 279, 301, 541 N.W.2d 115 (1995). Ordinarily, there is a presumption of constitutionality for a legislative enactment. Id. In most circumstances, those challenging the constitutionality of a statute have the burden to prove that the statute is unconstitutional beyond a reasonable doubt. ***Norquist v. Zeuske,*** 211 Wis. 2d 241, 250, 564 N.W.2d 748 (1997). However, because courts are to have an inhospitable attitude to non-mens rea offenses, the presumption of constitutionality cannot be applied when reviewing the constitutionality of a strict liability statute. ***United States v. United States Gypsum Co.,*** 438 U.S. 422, 438 (1978).

Moreover, the judiciary is required to exercise "special diligence" when reviewing the constitutionality of a statute:

> That issue confronts us, and the task of resolving it is inescapably ours. This task requires the exercise of judgment, not the reliance upon personal preferences. Courts must not consider the wisdom of statutes, but neither can they sanction as being merely unwise that which the Constitution forbids. We are oath-bound to defend the Constitution. This obligation requires

> that [legislative] enactments be judged by the standards of the Constitution. *The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights. When the Government acts to take away [fundamental rights], the safeguards of the Constitution should be examined with special diligence.* The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation. They are the rules of government. When the constitutionality of [a statute] is challenged in this Court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice. When it appears that [a statute] conflicts with one of these provisions, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation. ***Trop v. Dulles,*** 356 U.S. 86, 103-04 (1958). Emphasis added.

In ***Morissette v. United States***, Justice Jackson defined the increasing creation and utilization of strict liability crimes, stating:

> [L]awmakers, whether wisely or not, have sought to make...regulations more effective by invoking criminal sanctions to be applied by the familiar technique of criminal prosecutions and convictions. This has confronted the courts with a multitude of prosecutions, based on statutes or administrative regulations, for what have been aptly called 'public welfare offenses.' These cases do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals...penalties commonly are relatively small, and conviction does not grave damage to an offender's reputation. Under such considerations, courts have turned to construing statutes and regulations which make no mention of intent as dispensing with it and holding that the guilty act alone makes out the crime. This has not, however, been without expressions of misgiving. ***Morissette,*** at 254-56.

As noted by the ***Morissette*** court, as the need for business regulation developed in America, so did the need to regulate business with criminal sanctions for the public good. In the mid-19th century, some states for the first time enacted police regulations that punished certain conduct without proof of a mens rea. In a law review article that became a classic, Professor Francis B. Sayre coined the term "public welfare offenses" to describe these strict-liability offenses. The article distinguished these "regulatory offenses'' from "true crimes." Although some strict-liability offenses carried possible imprisonment, Sayre reiterated the traditional understanding that it is unjust to punish without proof of criminal intent:

> To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure. Crimes punishable with prison sentences, therefore, ordinarily require proof of a guilty intent. Legislative Testimony of Dr. John S. Baker, Visiting Professor, Georgetown Law School, before the Committee on the Judiciary U.S. House of Representatives Task Force on Over-criminalization July 19, 2013, quoting Francis B. Saye, Public Welfare Offenses, 33 COLUM. L. REV.55, 72 (1933)

The laws to regulate business were often written without any mens rea requirement. For instance, in ***United States v. United States Gypsum Co.,*** 438 U.S. 422 (1978) the Court reviewed the

Sherman Anti-Trust Act. It was held that proof of the defendant's specific intent to fix prices was required for criminal convictions under the Sherman Anti-Trust Act. Id. at 443. The defendant had been convicted through the use of a conclusive presumption of wrongful intent that effectively negated any requirement of proof of intent. Id. at 446. The ***Gypsum*** court stated "the familiar proposition that '[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.' " Id. at 436. The Court then emphasized its "generally inhospitable attitude to non-mens rea offenses," id. at 438, except in "limited circumstances." Id. at 437. These "limited circumstances" were regulatory crimes where inquiry into intent was unnecessary. Id. at 440-41.

There are "limited circumstances" where regulatory crimes exist so that inquiry into intent is unnecessary. ***West Allis v. Megna,*** 26 Wis. 2d 545, 133 N.W.2d 252 (1965) (statute prohibiting minors to be on tavern premises and held it imposed strict liability on tavern keepers acceptable exercise of police power); ***State v. Dried Milk Products Co-operative,*** 16 Wis. 2d 357, 114 N.W.2d 412 (1962) (weight limitations for vehicles operated on the highways without intent acceptable as public welfare statute); ***State v. Hartfiel,*** 24 Wis. 60 (1869) (prosecution of a saloon keeper for serving a minor when statute did not include the words "knowingly" or "wilfully" upheld as a police regulation).

However, even strict liability police regulations may be required by due process to work a mens rea requirement into the regulation. ***United States v. Int'l Minerals & Chemical Corp.,*** 402 U.S. 558, 564-565 (1971); ***State v. Collova,*** 79 Wis. 2d 473, 255 N.W.2d 581 (1977) (to save constitutionality of statute, mens rea element read into statute by court). Even regarding police regulation statutes, courts “are unwilling to conclude that the legislature intended to subject a defendant who is innocent of any negligent or intentional wrongdoing to the harsh consequences a conviction.” ***Collova,*** at 486. Finally, it must be emphasized that a police regulation is vastly different than a criminal statute imposing a prison penalty. “Crimes created primarily for the purpose of singling out individual wrongdoers for punishment or correction are the ones commonly requiring mens rea; police offenses of a merely regulatory nature are frequently enforceable irrespective of any guilty intent." Sayre, Public Welfare Offenses, 33 COLUM. L. REV. 55, 72 (1933).

Thus, pursuant to the Due Process Clause of the Fourteenth Amendment, Wisconsin is not given complete freedom to write statutes defining criminal offenses without any element of *scienter*. ***Patterson v. New York,*** 432 U. S. 197, 201-202 (1977); ***Smith v. California,*** 361 U.S. 147, 150-51 (1959). A statute which criminalizes conduct and carries strict liability cannot deprive a citizen of his "opportunity either to avoid the consequences of the law or to defend any prosecution brought under it" by not giving notice of what conduct is prohibited. Id., citing ***Lambert v. California,*** 355 U.S. 225, 228-29 (1957). Vagueness is thus compounded by strict liability. ***Colaotti v. Franklin,*** 439 U.S. 379, 392-97 (1979). See also, ***Village of Hoffman Estates,*** 455 U.S. 489, 499 (1982) ("a scienter requirement may mitigate a law's vagueness"). .

III. Wisconsin's felony murder rule distorts a defendant's right to fair adversary process by excluding a category of evidence that would demonstrate innocence.

Wisconsin's expansion of the felony murder rule is particularly insidious. The logic of vicarious liability which finds that if a police officer shot and killed someone at the scene of a felony, all the co-defendants would be accountable for murder ignores principles underlying our system of criminal law and continues to shock the conscience of many legal commentators. ***People v. Aaron,*** 409 Mich 672, 710 (1980) ("While it is understandable that little compassion may be felt for the criminal whose innocent victim dies, this does not justify ignoring principles underlying our system of criminal law."); Reflections on Felony Murder, 12 SW. U. L. REV. at 423.

Despite near universal condemnation of the felony murder rule as an intellectually bankrupt principle, the Wisconsin legislature has romanced the felony murder rule *at the insistence of Wisconsin prosecutors*. The Importance of Clarity in the Law of Homicide: The Wisconsin Revision, 1989 WIS. L. REV. at 1369. It is at the insistence of Wisconsin prosecutors that the Wisconsin legislature and courts have *not* sought to bring Wisconsin's felony-murder rule into line with well-accepted criteria of individual accountability and proportionate punishment. Reflections on Felony Murder, 12 SW. U. L. REV. at 418. Protection of individual human rights is the very heart of the adversary system by which a free society is maintained. As stated in the MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble:

> The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

See also, ***United States v. Cordoba-Hincapie,*** 825 F. Supp. 485, 495 (E.D.N.Y. 1993) (explaining that mens rea requirements "flows from our society's commitment to individual choice."). America's adversary system, with its emphasis of individual human rights, stands in stark contrast to legal system of the former Soviet Union described by Alexander Solzhenitsyn:

> On the threshold of the classless society, we were at last capable of realizing the conflictless trial-a reflection of the absence of inner conflict in our social structure-in which not only the judge and the prosecutor but also the defense lawyers and the defendants themselves would strive collectively to achieve their common purpose. Alexander Solzhenitsyn, GULAG ARCHIPELAGO 374 (Thomas P. Whitney trans., Harper & Row, 1974), *quoted in* Ralph J. Temple, *In Defense of the Adversary System,* 2(2) ABA LITIGATION**,** 43, 44 (Winter 1976).

Similarly, the Chinese legal system does not endorse the adversary process. Defense lawyers conduct no investigations of their own, object to no prosecution questions, cross-examine no prosecution witnesses, and call no witnesses at a trial. Defense attorneys do not even meet with their clients. "The police and the prosecutors worked on the case a very long time, and the evidence they found which wasn't true they threw away." Chinese Lawyer Has High Hopes For His Country, N.Y. TIMES, Jan. 6, 1982, at B5. This system apparently continues. Sheryl Wu Dunn, In Murky Trials, China Buries Tiananmen Affair, N.Y. TIMES**,** Jan. 20, 1991, at L10 (describing the trials of the leaders of the 1989 democracy movement).

The primacy of a fair adversary process to the American criminal justice system, like the concept of mens rea, is not a new idea. Adversary method and philosophy as it is generally known today developed in England primarily during the 17th and 18th centuries. Development of the system was propelled by a variety of largely social influences, including the English reform movements of the 1760's and 1770's which used the legal system to address numerous social injustices of the day, scholarly writings on the adversarial nature of trials, scholastic reconceptualization of the rules of evidence, "the rise of dynamic individualism [and] the growth of a market economy". Stephan Landsman, The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England, 75 CORNELL L. REV. 497, 572-603 (1987). Justice Black explained that a fair

adversary system is “designed to protect ‘freedom’ by insuring that no one is criminally punished unless the State has first succeeded in the admittedly difficult task of convincing a jury that the defendant is guilty.” ***Williams v. Florida,*** 399 U.S. 78, 113-14, 90 S. Ct. 1893, 1912 (1970) (concurring in part and dissenting in part). Our sense of fair play dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load." 8 Wigmore, Evidence (McNaughton rev., 1961) 317. This is done out of our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life." ***United States v. Grunewald,*** 233 F.2d 556, 581-582 (Frank J., dissenting), rev'd, 353 U.S. 391. These values are intrinsic to the adversary process due largely to a general distrust of governmental power. See, e.g., ***Apodaca v. Oregon,*** 406 U.S. 404, 410, 92 S. Ct. 1628, 1632 (1972); ***Duncan v. Louisiana,*** 391 U.S. 145, 155, 88 S. Ct. 1444, 1451 (1968).

By the adversary process requiring the prosecution to convince a jury a person is guilty protects the rights of the innocent as well as guilty. Given the times we live in today, it may not be a popular idea to say that the rights of guilty people should be protected as much as the innocent. But as we have seen, without an adversary system which protects both innocent and guilty, “we are close to those totalitarian states where accusation equals guilt or the criminal defense lawyers are but an adjunct prosecutor expected to make the client confess and aid in his or her rehabilitation." John Wesley Hall, Jr.**,** PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER § 9:12, at 297-98 (2d ed. 1996). The true strength of the adversary system is not that it guarantees a meaningful defense to the innocent, but that the innocent are not required to defend themselves. We seek through the adversary system "to preserve the integrity of society itself... [by] keeping sound and wholesome the procedure by which society visits its condemnation on an erring member." Lon L. Fuller, The Adversary System, in TALKS ON AMERICAN LAW 35 (Harold Berman ed., 1960); Laurence H. Tribe, Trial by Mathematical Precision and Ritual in the Legal Process, 84 HARV. L. REV. 1329, 1391-92 (1971).

The Supreme Court has repeatedly recognized the constitutional status of a fair adversarial adjudication. ***Strickland v. Washington,*** 466 U.S. 668, 685 (1984)("[a] fair trial is one in which

evidence subject to adversarial testing is presented to an impartial tribunal. . . . "); ***Nix v. Williams,*** 467 U.S. 431, 453 (1984) ("The Sixth Amendment guarantees that the conviction of the accused will be the product of an adversarial process . . ."); ***Garner v. United States,*** 424 U.S. 648, 655 (1976) ("[T]he fundamental purpose of the Fifth Amendment [is] the preservation of the adversary system of criminal justice . . ."); ***Herring v. New York,*** 422 U.S. 853, 857, 862 (1975) ("[T] he adversary factfinding process . . . has been constitutionalized in the Fifth and Fourteenth Amendments" so that that "the very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free"); ***Faretta v. California,*** 422 U.S. 806, 818 (1975) (Sixth Amendment rights "are basic to our adversary system of criminal justice" and "guarantee that a criminal charge may be answered . . . through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the [Sixth] Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it"). See also, Rubenstein, Procedural Due Process and the Limits of the Adversary System, 11 HARV. C.R. - C.L. L. REV. 48 (1976) ("[i]t is common to equate the adversary system with the idea of due process itself"); Geoffrey C. Hazard, Jr., ETHICS IN THE PRACTICE OF LAW 122, 123 (1978) (the adversary system "stands with freedom of speech and the right of assembly as a pillar of our constitutional system.) Clearly, "[t]he Constitution recognizes an adversary system as the proper method of determining guilt. . ." ***Singer v. United States,*** 380 U.S. 24, 36 (1965).

Given the Wisconsin legislatures capitulation to Wisconsin prosecutors in maintaining the felony murder rule, it is important to recall that while due process does not "bar States from making changes . . . that have the effect of making it easier for the prosecution to obtain convictions," ***McMillan v. Pennsylvania,*** 477 U.S. 79, 89 n.5 (1986), a rule whose sole purpose is to boost the State's likelihood of conviction distorts the adversary process. Cf. ***Washington v. Texas,*** 388 U. S. 14, 25 (1967) (due process clause forbids the barring of the testimony of a witness called by the defendant but allowing testimony if called by the prosecution) (Harlan, J., concurring in result). The sole purpose for having a felony murder rule without a mens rea requirement is to keep from the jury's consideration a category of evidence that is a fundamental principle of justice, i.e., mens rea, that would help the defendant's case and weaken the government's case. Such a distortion of

the adversary process offends the fragile balance between prosecution and defense which the pursuit of truth and fairness in our adversarial proceedings mandates. This unfair adversary system will ultimately not advance the public interest in truth and fairness. ***Polk County v. Dodson,*** 454 U.S. 312, 318 (1981).

A distortion of the adversary process is a concern in other systems -- expressed in Germany, for example, as *Waffenungleich-heit*, or unequal weaponry -- over the effect of a mismatch in the abilities of opposing counsel as well as over an imbalance in the procedural rights of each side. Langbein, The German Advantage in Civil Procedure, 52 U. CHI. L. REV. 823, 843 (1985). Wisconsin's felony murder statute which exists at the insistence of prosecutors distorts the adversary process by boosting the State's likelihood of a criminal conviction by eliminating a mens rea requirement found in all other Wisconsin homicide statutes.

IV. A principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental is that a defendant must be "blameworthy in mind" before he can be found guilty.

The Supreme Court has held that the government must prove each element of an offense beyond a reasonable doubt. ***Patterson v. New York,*** 432 U.S. 197, 210 (1977); ***In re Winship,*** 397 U.S. 358, 364 (1970). How a legislature defines an offense determines which elements the government must prove beyond a reasonable doubt. But states, like Wisconsin, are not completely free to define "the degree of culpability attaching to the criminal homicide," even regarding definitions of criminal homicide that have been in existence for "more than a century." ***Mullaney v. Wilbur,*** 421 U.S. 684, 696, 688 (1975). The ***Mullaney*** court unanimously held that Maine could not, by defining a criminal offense, relieve the prosecution of its duty to prove a state of mind beyond a reasonable doubt if it is properly presented. Stated simply, the state must disprove beyond a reasonable doubt *all* affirmative defenses relating to culpability once they are raised by the defendant. Id. at 698. ***Mullaney*** teaches that judicial authority exists to review and rule upon the substantive adequacy of legislative definitions of criminal offenses and the related legislative or judicial doctrines of procedure that govern adjudication under those statutes. The ***Mullaney*** rejection of total legislative control was most recently vindicated in a set of cases culminating with ***United States v. Booker,*** 543 U.S. 220, 125 S. Ct. 738 (2005) which rejected legislative diminution in judicial authority occasioned by the contraction of sentencing discretion.

Obviously, it is easier for a state to convict if the burden of proof of innocence is on the defense, but, under ***Winship***, such a rule would be unconstitutional. Similarly, the Court has recognized that there are limits to a legislature's power to define an offense, ***Patterson,*** 432 U.S. at 211 n.12, stating that "in certain limited circumstances ... [the] reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged.'" ***McMillan v. Pennsylvania,*** 477 U.S. 79, 86 (1986). Unless there is a constitutional limit on how a state may define criminality, the difference between guilt and innocence, a state could achieve such a result by a minimal definition of the basic elements of an offense. "[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." ***McFarland v. American Sugar Rfg. Co.,*** 241 U.S. 79, 86 (1916). The legislature cannot "validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt." ***Tot v. United States,*** 319 U.S. 463, 469 (1943). See also ***Speiser v. Randall***, 357 U.S., at 523-525. ***Morrison v. California,*** 291 U.S. 82 (1934), also makes the point with sufficient clarity." ***Patterson,*** 432 U.S. at 210. Therefore, a legislature's ability to define elements of an offense and the burden of proof necessary to establish such an offense may violate the Due Process Clause by "'offend[ing] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Id. at 85 (quoting ***Speiser v. Randall,*** 357 U.S. 513, 523 (1958)). "Historical practice is probative of whether a procedural rule can be characterized as fundamental." ***Medina v. California,*** 505 U. S. 437, 446 (1992).

A fundamental principle of justice in Anglo-American criminal jurisprudence is proof of the existence of mens rea. ***Dennis v. United States,*** 341 U.S. 494, 500 (1951). Anglo-American courts "ha[ve] long considered a defendant's intention—and therefore his moral guilt—to be critical to 'the degree of [his] criminal culpability." ***Enmund v. Florida,*** 458 U.S. 782, 800 (1982). The "central thought" is that a defendant must be "blameworthy in mind" before he can be found guilty. ***Elonis v. United States,*** 575 U.S. ___, 135 S. Ct. 2001, 2003, 2009 (2015); ***Morissette v. United States,*** 342 U.S. 246, 251 (1952) (noting that liability requires the "concurrence of an evil-meaning mind with an evil-doing hand"); ***People v. Valley Steel Prods. Co.,*** 375 N.E.2d 1297, 1305 (Ill. 1978) ("It would be unthinkable to subject a person to a long term of imprisonment for an offense he might commit unknowingly."). The "general rule" is that a guilty mind is "a necessary element

in the indictment and proof of *every* crime." ***Elonis***, id. Emphasis added. The principle of proportional mens rea is therefore "[d]eeply ingrained" in the Anglo-American "legal tradition." ***Tison v. Arizona,*** 481 U.S. 137, 156 (1987).

The ascertainment of criminal guilt based on moral blameworthiness was a principle developed by 18th century criminal law scholars. William Blackstone noted that "to constitute a crime against human laws, there must be first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will." 4 WILLIAM BLACKSTONE, COMMENTARIES. See also ***State v. Rutley,*** 171 P.3d 361, 363 & n.3 (Or. 2007) (citing Blackstone's remark to support the statement that "[i]n Oregon, criminal liability generally requires an act that is combined with a particular mental state"). See also, Brett, AN INQUIRY INTO CRIMINAL GUILT, (1963) p.37-41 (18th century scholars belief that mens rea was necessary to assign criminal fault or blameworthiness). See, 1 W. Hawkins, PLEAS OF THE CROWN I (n.p. 1716), quoted in Brett, at 39; M. Foster, CROWN LAW 279 (3d ed. 1809), quoted in Brett, at 39; 4 W. Blackstone, COMMENTARIES *20-21, quoted in Brett, at 40 (And, as a vicious will without a vicious act is no civil crime, so, on the other hand, *an unwarrantable act without a vicious will is no crime at all.*) The standard common law test as given by Coke of criminal liability is expressed in the Latin phrase *"Actus non facit reum, nisi mens sit rea*, i.e. "the act is not culpable unless the mind is guilty". E. Coke, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND *6, '107 (1628-1644). Clearly, 18th century scholars assigned criminal fault based on a defendant's guilty mind or mens rea.

Like the term "beyond a reasonable doubt," the term "mens rea" does not appear in the United States Constitution (the Constitution also does not expressly mention the right to privacy, or the right of people to adopt, or seek an abortion, however, these rights are inferred by the Constitution itself). Mens rea was such a basic principle in the 18th century that its existence was taken for granted. Moreover, mens rea was not discussed when the Constitution was adopted since strict liability crimes were not in existence. Brett, at 40. However, the requirement of mens rea in a statute is "no provincial or transient notion. It is as *universal and persistent in mature systems of law as belief in freedom of the human will* and a consequent ability and duty of the normal individual to choose between good and evil." ***Morissette v. United States,*** 342 U.S. 246, 250-51, 253-55 (1952). Emphasis added. Requiring the presumption that mens rea is necessary for

culpability in a criminal statute can be inferred from the Due Process Clause and the Sixth amendment.

Just as in 1970 when the Court read "beyond a reasonable doubt" into our constitutional law, ***In Re Winship,*** 397 U. S. 358, 374 (1970) (citing C. McCormick, Evidence § 321, pp. 681-682 (1954); see also 9 J. Wigmore, Evidence § 2497 (3d ed. 1940), the concept of mens rea can be explicitly read into our constitutional law. ***McCulloch v. Maryland,*** 17 U.S. 316 (1819) (federal government has implied powers for implementing the Constitution's express powers). Nor can it be legitimately argued that mens rea cannot be required for criminal culpability because that would cause confusion in the courts. The same argument was made and rejected regarding requiring proof "beyond a reasonable doubt" for sentencing facts, even at the cost of throwing American law into far reaching and disturbing confusion. ***Blakely v. Washington,*** 542 U.S. 296 (2004) (O'Connor, J., dissenting, Section IV A).

"[T]he holding in ***Morissette*** can be fairly read as establishing, at least with regard to crimes having their origin in the common law, an interpretative presumption that mens rea is required" in a criminal statute. ***United States Gypsum Co.,*** 438 U.S. at 437. "[M]ere omission ... of intent [in the statute] will not be construed as eliminating that element from the crimes denounced." Id. Simply because the legislature fails to include a mens rea requirement in a statute does not signal a departure from the universal and persistent notion that an injury can amount to a crime *only when inflicted by intention*. ***Liparto v. United States,*** 471 U.S. 419 (1985). In this way, mens rea is equated with culpability and culpability without mens rea is "irrational in the substantive due process sense of the word." Packer, Mens Rea and the Supreme Court, 1962 SUP. CT. REV. 107, 152.

In the words of Chief Justice Roberts:

> We have repeatedly held that "mere omission from a criminal enactment of any mention of criminal intent" should not be read "as dispensing with it." ***Morissette v. United States,*** 342 U.S. 246, 250, 72 S.Ct. 240, 96 L.Ed. 288 (1952). This rule of construction reflects the basic principle that "wrongdoing must be conscious to be criminal." Id., at 252, 72 S.Ct. 240. As Justice Jackson explained, this principle is "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." Id., at 250, 72 S.Ct. 240. *The "central thought" is that a defendant must be "blameworthy in mind" before he can be found guilty*, a concept courts have expressed over time through various terms such as mens rea, scienter, malice aforethought, guilty knowledge,

> and the like. Id., at 252, 72 S.Ct. 240; 1 W. LaFave, Substantive Criminal Law § 5.1, pp. 332–333 (2d ed. 2003). Although there are exceptions, *the "general rule" is that a guilty mind is "a necessary element in the indictment and proof of every crime*." ***United States v. Balint,*** 258 U.S. 250, 251, 42 S.Ct. 301, 66 L.Ed. 604 (1922). We therefore generally "interpret[ ] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." ***United States v. X–Citement Video, Inc.,*** 513 U.S. 64, 70, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994). ***Elonis v. United States,*** 575 U.S. ___, 135 S. Ct. 2001, 2003, 2009 (2015). Emphasis added. See also ***Liparota v. United States,*** 471 U.S. 419 (1985); ***Cheek v. United States,*** 498 U.S. 192, 203 (1991) (forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision)

Therefore, ***Morissette-Gypsum-Elonis*** tells Wisconsin trial courts that, under federal law, the rule is that evidence that a defendant acted with "a guilty mind" is a fundamental requirement of justice in the indictment and proof of *every* crime, *even if a statute omits that element*. Wisconsin's felony murder statute offends a fundamental principle of justice by punishing a homicide without any mens rea. Note, The Felony-Murder Rule: In Search of a Viable Doctrine, 23 CATH. LAWYER 133 (1978) (felony-murder rule is contrary to fundamental principles of our legal system). This does not mean that a defendant must know that his conduct is illegal, but a defendant must have knowledge of 'the facts that make his conduct fit the definition of the offense.' ***Staples v. United States,*** 511 U.S. 600, 608, n.3 (1994) ("we have interpreted statutes defining public welfare offenses to eliminate the requirement of mens rea; that is, the requirement of a "guilty mind" with respect to an element of a crime. Under such statutes we have not required that the defendant know the facts that make his conduct fit the definition of the offense.")

The nature of Wisconsin's felony murder statute violates the Due Process Clause by avoiding the requirement of mens rea for the homicide charge. If one had to choose the most basic principle of the criminal law in general it would be that criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result. Gegan, Criminal Homicide in the Revised New York Penal Law, 12 N.Y.L.F. 565, 586-87 (1966) "Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished" ***Tison v. Arizona,*** 481 U.S. 137, 156 (1987). American criminal law "has long considered a defendant's intention—and therefore his moral guilt—to be critical to 'the degree of [his] criminal culpability.'" ***Enmund v. Florida,*** 458 U.S. 782, 800 (1982) (quoting ***Mullaney v. Wilbur,*** 421 U.S. 684, 698 (1975)). Because of the requirement of mens rea is deeply ingrained in the American legal tradition, courts have found strict liability statues unconstitutional as violating due process, reasoning that these statutes are vague and lack notice, ***Gonzales v. Carhart,*** 550 U.S. 124, 149

(2007) (stating that *mens rea* requirements "alleviate vagueness concerns"); ***State v. Prince***, 52 N.M. 15, 189 P.2d 993 (1948); that these statutes create an unreasonable and arbitrary conclusive presumption of scienter and arbitrary attach criminal responsibility, ***People v. Nangapareet***, 210 N.Y.S.2d 446 (Sup. Ct. 1960); that these statutes are an unreasonable and arbitrary exercise of the police power, ***People v. Estreich***, 75 N.Y.S.2d 267, 272 App. Div. 698 (1947).

This position has been endorsed and expressed in a number of state criminal codes inspired by the American Law Institute's (ALI's) Model Penal Code (MPC), which was first published in 1962. The MPC is not law in any jurisdiction of the United States; however, it served and continues to serve as a basis for the replacement of existing criminal codes in over two-thirds of the states. Professor Paul H. Robinson, University of Pennsylvania, Criminal Law: Cases and Controversies, 24 (2005). Advocates of the MPC stress that the law must be clearly defined to prevent arbitrary enforcement, or a chilling effect on a population that does not know what actions are punishable. This is known as the legality principle. Id. at 39. See, e.g., N.J. STAT. ANN. § 2C:2-2(a) (West 2005) (generally, "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently . . . with respect to each material element of the offense"). The MPC advocated a criminal law committed to a pervasive requirement of subjective culpability with respect to every significant element of every offense. Herbert L. Packer, The Model Penal Code and Beyond, 63 COLUM. L. REV. 594, 594–95 (1963) ("The most important aspect of the Code is its affirmation of the centrality of mens rea, an affirmation that is brilliantly supported by its careful articulation of the elements of liability and of the various modes of culpability to which attention must be paid in framing the definitions of the various criminal offenses."); Sanford H. Kadish, Fifty Years of Criminal Law: An Opinionated Review, 87 CALIF. L. REV. 943, 948 (1999) ("The success of the [MPC] in stimulating American jurisdictions to codify or recodify their criminal law was unprecedented.").

The MPC's centrality of mens rea for establishing criminal guilt provides its normative appeal: the degree of liability and punishment will be proportionate to culpability and limited by it. As will be explained in greater detail later in this brief, the constitutional principle of proportional culpability applies to felony murder offenses. See, e.g., ***Enmund v. Florida,*** 458 U.S. 782, 800 (1982) ("American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to 'the degree of [his] criminal culpability,' and the Court has found

criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing." (alteration in original) (citation omitted) (quoting ***Mullaney v. Wilbur,*** 421 U.S. 684, 698 (1975)). The requirement of intentional wrongdoing rejects the state's power to use individuals for public ends, even for a laudable goal like crime prevention. Andrew Ashworth, A Change of Normative Position: Determining the Contours of Culpability in Criminal Law, 11 NEW CRIM. L. REV. 232, 238 (2008) (criminal liability should not be imposed in respect of a given harm unless [the defendant] intended to cause or knowingly risked causing that harm . . . ."). "The combination of stigma and loss of liberty involved in a conditional or absolute sentence of imprisonment sets that sanction apart from anything else the law imposes. Here at the very least the line should be drawn. No one should be sentenced to imprisonment without being afforded the opportunity to litigate the issue of mens rea." Packer, Mens Rea and the Supreme Court, 1962 SUP. CT. REV. 107, 150.

V. Wisconsin's felony murder rule operates as a conclusive presumption of a defendant's culpability regarding state of mind.

In ***Sandstrom v. Montana***, 442 U.S. 510, 520-524, 99 S. Ct. 2450 (1979), the Supreme Court held that, because the state is required to prove every element of an offense beyond a reasonable doubt, it is a violation of due process for a state to either create a conclusive presumption or to use a presumption to relieve the state of its burden of proving every element of the offense.

In ***Sandstrom***, the jury, in a homicide case in which intent was an element of the crime charged, was instructed that "the law presumes that a person intends the ordinary consequences of his voluntary acts." This instruction was constitutional error. ***Sandstrom v. Montana,*** 442 U.S. at 520-521 (although defendant admitted killing victim, he claimed that he had not done so "purposely or knowingly," and therefore was not guilty of deliberate homicide but of a lesser crime, so his intent was "the lone element of the offense at issue in Sandstrom's trial."). The ***Sandstrom*** Court found that a reasonable juror might have interpreted the judge's instruction as a mandatory presumption or direction that either was "conclusive," that is, irrebuttable, id., at 517 ("not technically a presumption at all, but rather an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption") or shifted the burden of persuasion to the defendant. Id at 524 (an "interpretation [that] would have deprived defendant of his right to the due process of law"). In either event, the instruction was error. A conclusive presumption is unconstitutional because it conflicts with the presumption of innocence, id. at 523, and invades the

factfinding function of the jury. Id at 522. A presumption that has the effect of shifting the burden of persuasion to the defendant is likewise unconstitutional because it relieves the state of its burden of proving every essential element of an offense beyond a reasonable doubt. Id at 524.

Under ***Sandstrom,*** a jury instruction that can be interpreted as creating either a conclusive presumption or a mandatory presumption that relieves the state of the burden of persuasion on an element of the offense violates due process. Id. at 526 ("even if a jury could have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they did do,") For example, a state court's jury instruction, in a murder prosecution, that malice may be inferred from unlawful killing created a mandatory rebuttable presumption, which shifted the burden of disproving malice to the defendant. This was constitutional error, because the evidentiary presumption relieved the prosecution of its burden to prove each essential element of the crime beyond a reasonable doubt. ***Medina v. Matesanz,*** 298 F.3d 98 (1st Cir. 2002).

Sandstrom demonstrates the constitutional infirmity of allowing Wisconsin's felony murder rule to operate as a conclusive presumption that a defendant had the intent necessary for felony murder by possessing the intent for the underlying felony. "In ***Sandstrom****,* the Court observed: 'Upon finding proof of one element of the crime (causing death), and of facts insufficient to establish the second (the voluntariness and 'ordinary consequences' of defendant's action), Sandstrom's jurors could reasonably have concluded that they were directed to find against defendant on the element of intent.' ***Sandstrom v. Montana,*** 442 U.S. at 523. Likewise, under the felony-murder rule, once a jury finds proof of the basic fact of a killing during the commission of a felony, even without any proof of culpability for the homicide, it also must find that the defendant possessed the mens rea required for murder. Roth & Sundby, Felony-Murder Rule a Doctrine at Constitutional Crossroads, 70 CORNELL L. REV. 446, 469 (1985). The Wisconsin's felony murder rule interferes with jury factfinding by only allowing the jury to deliberate on whether a killing occurred during the commission of a felony. Upon finding that fact, the jury is to automatically find the defendant had a culpable state of mind to kill. Id. at 470.

VI. Because the felony murder statute has little deterrence value and does not impose proportionate punishment, it should be abolished as not within the civilized standards of proportional punishment guaranteed by the Eighth and Fourteenth Amendments.

Justice Holmes questioned the deterrent effect of the felony murder rule: "[I]f a man does an act with intent to commit a felony, and thereby accidentally kills another, . . . [t]he fact that the shooting is felonious does not make it any more likely to kill people. If the object of the rule is to prevent such accidents, it should make accidental killing with firearms murder, not accidental killing in the effort to steal; while, if its object is to prevent stealing, it would do better to hang one thief in every thousand by lot." O. Holmes, THE COMMON LAW 57-58 (1881). Justice Holmes believed that blaming someone for an accidental killing in the same way as an intentional killing was like not knowing the difference between stumbling over and kicking your dog. Id. at 2-3.

At least Holmes' dog has enough sense to realize what some do not realize: an act without a mental state is usually not a crime. The act may still cause harm, but the absence of a mental state renders it generally non-culpable and non-criminal. See Jenny E. Carroll, Brain Science and the Theory of Juvenile Mens Rea, 94 N.C. L. REV. 539, 545 (2016). The United States Supreme Court made the distinction between stumbling over and kicking your dog when it held that "[i]t is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.' ***Enmund v. Florida,*** 458 U.S. 782, 798 (1982) (quoting H. Hart, Punishment and Responsibility 162 (1968))

The deterrence argument has come under much criticism when applied to accidental killings:

> The illogic of the felony-murder rule as a means of deterring killing is apparent when applied to accidental killings occurring during the commission of a felony. Quite simply, how does one deter an unintended act? A similar deterrence problem arises when the felony-murder rule is used to convict the defendant for murder when a third party, such as the victim or a policeman, committed the killing. The defendant has no control over the acts of the third party and thus the rule cannot deter this sort of killing. Moreover, any potential deterrence effect on unintentional killings is further reduced because few felons either will know that the felony-murder rule imposes strict liability for resulting deaths or will believe that harm will result from commission of the felony. Nelson E. Roth & Scott E. Sundby, The Felony-Murder Rule: A Doctrine at Constitutional Crossroads, 70 CORNELL L. REV. 446, 451-52 (1985)

In fact, an evidence-based analysis of felony murder rule demonstrates that the felony murder rule has little deterrence value. After all, how does one deter an unintended act? Comment, Merger and the Felony Murder Rule, 20 U.C.L.A. L. REV. 250, 258-59 n. 41(1972). The "felony-murder rule has a relatively small effect on criminal behavior: it does not substantially affect either the overall felony or felony-murder rate. Second, the effects of the rule vary by type of felony. While it has the positive effect of reducing deaths during burglaries, larcenies and auto thefts, it may have

the perverse effect of increasing the number of robbery homicides. The rule has little effect on rapes." Anup Malani, Does the Felony-Murder Rule Deter? Evidence from FBI Crime Data (unpublished manuscript N.Y. Times May 25, 2007), http://www.nytimes.com/packages/pdf/national/malani.pdf. The United States Supreme Court has used similar statistics to reject the idea that a disproportionate number of killings occur during felonies. ***Enmund v. Florida,*** 485 U.S. at 799-800 nn. 23, 24 (1982). Finally, the abolition of the Wisconsin felony murder rule would have no detrimental effect on Wisconsin crime rates. Convictions for felony-murder can ordinarily rest on other grounds. See Comment, Felony-Murder in Illinois, 1974 U. ILL. L. REV. 685, 693.

Since the felony murder rule does not substantially affect either the overall felony or felony-murder rate, the felony murder rule does not impose a proportionate punishment for the violation of the statute. The constitutional basis for the proportionality argument against the felony murder rule is found in the Eighth Amendment. The felony murder rule directly implicates proportionality principles at both the guilt and penalty phases of this case by creating both the possibility that the defendant may be convicted of an otherwise unavailable charge and that the defendant will receive a significantly harsher sentence. Roth & Sundby, Felony-Murder Rule a Doctrine at Constitutional Crossroads, 70 CORNELL L. REV. 446,483 n.205 (1985).

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII. The prohibition against cruel and unusual punishment is applicable to Wisconsin through the Fourteenth Amendment. See ***Robinson v. California,*** 370 U.S. 660, 666-67 (1962) (cruel and unusual to impose even one day of imprisonment for the status of drug addiction). The Eighth Amendment language was derived from a provision in the Virginia Constitution, which in turn was taken directly from the English Bill of Rights of 1689. ***Solem v. Helm,*** 463 U.S. 277, 285 n.10 (1983). "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." ***Trop v. Dulles,*** 356 U.S. 86, 100 (1958).

The civilized standards for western countries is a rejection of the felony murder rule. America is the *only* western country which allows "that the most serious sanctions known to law might be

imposed for accidental homicide." Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 YALE L. J. at 1383. The felony murder doctrine is unknown in France and Germany and England, which created the idea, abolished felony murder in 1957. The climate of international opinion concerning the acceptability of a particular punishment is an important consideration in deciding the constitutionality of that punishment. ***Enmund v. Florida,*** 485 U.S. 782, 799-800 n. 22 (1982) (death sentence for felony murder, unconstitutional on disproportionality grounds, where there had been no proof of an intent to murder.) Wisconsin's felony murder rule is based on the abolished English rule. ***State v. Noren****,* 125 Wis. 2d 204, 209, 371 N.W.2d 381, 384 (Ct. App. 1985) (***Regina v. Serne,*** 16 Cox Crim. Cases. 311, 313 (Central Crim. Ct. 1887) was the English case upon which the Wisconsin common law crime of felony murder had developed). Since Wisconsin's felony murder rule is based on the English rule which has been abolished, Wisconsin should do the same. Gerber, The Felony Murder Rule: Conundrum without Principle, 31 ARIZ. ST. L.J. 763 (1999)

Justice Powell reviewed the history of the Eighth Amendment in ***Solem v. Helm,*** supra., and noted that the principle of proportionality, evident in three chapters of the Magna Carta of 1215, was a widely accepted postulate at the time of the drafting of the English Declaration of Rights of 1689. ***Solem,*** 463 U.S. at 284-86. Justice Powell found that because the language of the Eighth Amendment is similar to that of the English Declaration of Rights, the founding fathers must have intended to include the requirement of proportionality of sentencing as part of the Eighth Amendment. Id. It has also been argued that the Eighth Amendment allowed for proportionality because, "[d]uring the 19th century, several states ratified constitutions that prohibited 'cruel and unusual,' 'cruel or unusual,' or simply 'cruel' punishments and required all punishments to be proportioned to the offense." ***Harmelin v. Michigan,*** 501 U.S. 957, 982 (1991); see GA. Const. art. I, § 1, 17 (1983); IND. CONST. art. I, §§ 15, 16 (Michie 1990); ME.CONST. art. I, § 9 (West 1985); OHIO CONST. art. I, § 9 (1993); R.I. CONST.art. I, § 8 (1987); W. VA. CONST. art. III, § 5 (1982).

The Eighth Amendment prohibits punishment "grossly disproportionate" to the severity of the offense in *all* types of cases. ***Harmelin v. Michigan,*** 501 U.S. 957 (1991) (six Justices agreed that the Cruel and Unusual Punishment Clause proportionality analysis applies to noncapital case); ***Solem v. Helm,*** 463 U.S. 277, 288 (1983) (collecting cases); ***Coker v. Georgia,*** 433 U. S. 584, 592

(1977) (Amendment bars not only a barbaric punishment that "(1) makes no measurable contribution to acceptable goals of punishment, and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."); ***Gregg v. Georgia,*** 428 U. S. 153, (1976) (Eighth Amendment is violated when punishment involves the unnecessary and wanton infliction of pain *or* if it was grossly out of proportion to the severity of the crime.); ***Trop v. Dulles,*** 356 U.S. 86, 100 (1958). While Justice Scalia announced the ***Harmelin*** decision, he was only joined by Chief Justice Rehnquist in his radical assertion that ***Solem*** should be rejected because the Eighth Amendment contains no proportionality guarantee. See also, ***Ewing v. California,*** 538 U.S. 11 (2003); ***Lockyer v. Andrade***, 538 U.S. 63 (2003) (Justices Thomas and O'Connor argue similarly).

Thus, the Eighth Amendment contains some form of a proportionality requirement which could come into play *even in nonfelony cases*. ***Rummel v. Estelle***, 445 U. S. 263, 274 n. 11 (1980). In ***Solem*** it was succinctly stated that "[t]here is no basis for the . . . assertion that the general principle of proportionality does not apply to felony prison sentences." ***Solem,*** 463 U.S. at 288. As explained by Justice White, the fact that "the Amendment does not refer to proportionality in so many words, but it does forbid 'excessive' fines, a restraint that suggests that a determination of excessiveness should be based at least in part on whether the fine imposed is disproportionate to the crime committed. Nor would it be unreasonable to conclude that it would be both cruel and unusual to punish overtime parking by life imprisonment, or, more generally, to impose any punishment that is grossly disproportionate to the offense for which the defendant has been convicted." ***Harmelin v. Michigan,*** 501 U.S. at 1009. Citations omitted. Accordingly, the Eighth Amendment imposed a strong proportionality requirement not simply on fines, but on all criminal punishments, including prison terms. Additionally, Justice White explained that when it comes to the Eighth Amendment, a court must employ a flexible and dynamic interpretation:

> The Court therefore has recognized that a punishment may violate the Eighth Amendment if it is contrary to the evolving standards of decency that mark the progress of a maturing society. In evaluating a punishment under this test, we have looked not to our own conceptions of decency, but to those of modern American society as a whole in determining what standards have evolved, and thus have focused not on the subjective views of individual Justices, but on objective factors to the maximum possible extent." ***Harmelin*** at 1015. See also, ***Stanford v. Kentucky,*** 492 U. S. 361, 369 (1989) (Eighth Amendment should not be confined to an interpretation about barbarous' methods that were generally outlawed in the 18th century, but instead be interpreted "in a flexible and dynamic manner.)

Years before ***Solem, Harmelin*** and ***Enmund***, Justice McKenna writing for the Court held that "punishment in the State prison for a long term of years might be so disproportionate to the offence as to constitute a cruel and unusual punishment." ***Weems v. United States,*** 217 U.S. 349, 368 (1910). "[The Eighth Amendment is] directed not only against punishments which inflict torture but *against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged*." Id. at 373, 371. Emphasis added.

Solem held the suggestion that the length of a prison sentence was solely a question of "legislative prerogative" to be meritless. Id at 288 n. 14. In fact, "as a matter of principal," a sentence *must be* proportionate to the crime of which the defendant has been convicted,'" and that *"no penalty is per se constitutional*." ***Solem v. Helm,*** 463 U.S. at 290. Emphasis added. The ***Solem*** majority found "[t]he principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common law jurisprudence." Id. at 284. ***Solem*** based its decision on ***Enmund v. Florida,*** 458 U.S. 782 (1982). These pronouncements require that every criminal defendant has a right to a sentence that is not disproportionate to the crime committed and that each defendant has an equal right to a determination of this question as a matter of federal constitutional law.

The principle that a punishment should be proportionate to the crime was used in ***Enmund v. Florida,*** supra., by the United States Supreme Court to overturn the punishment in a felony murder case. While ***Enmund*** was a death penalty case, Justice White relied on non-death penalty cases to find "American criminal law has long considered a defendant's intention -- and therefore his moral guilt -- to be critical to "the degree of [his] criminal culpability," ***Mullaney v. Wilbur***, . . . and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing." ***Enmund v. Florida,*** 458 U.S. at 800. Based on ***Solem,*** the reasoning of ***Enmund*** requiring a defendant's intent to measure culpability applies to non-death penalty cases as well. Further, there is no logical reason that degree of culpability is measured by a defendant's intent applies to defendant's actions or the actions of another that cause a victim's death.

Therefore, under Eighth Amendment proportionality analysis, Wisconsin's felony murder statute is unconstitutional since it does not have a deterrent effect nor is a defendant's punishment proportionate to his/her culpability as measured by mens rea.

Conclusion

Despite near universal condemnation of the felony murder rule as an intellectually bankrupt principle, the Wisconsin legislature has romanced the felony murder rule at the insistence of Wisconsin prosecutors. This has distorted the fair adversary process to the criminal justice system by excluding a category of evidence to boost the State's likelihood of convictions. "A criminal act is a moral wrong, and, accordingly, conviction of a crime stigmatizes an individual. A system that is respectful of the integrity of criminal convictions is respectful of both victims and individuals suspected of wrongdoing. Just as we are appalled to learn through the work of the- Innocence Project that a number of persons have been wrongly convicted and imprisoned when they were in fact innocent, we should be equally appalled to learn that persons have been wrongly convicted because they were not morally guilty of a crime due to their lack of a mens rea. . . . It is telling that Justice Jackson, the chief prosecutor in the Nuremberg trials and former U.S. Attorney General, wrote the opinion in ***Morissette*** and insisted that a *mens rea* marks the fundamental distinction between guilt and innocence. No defendant should have to rely on the slim chance that his case reaches the Supreme Court and that a majority of the justices decide to follow ***Morissette*.**" Dr. John S. Baker, Jr., William J. Haun, The "Mens Rea" Component Within the Issue of the Over-Federalization of Crime, ENGAGE, THE FEDERALIST SOCIETY Volume 14, Issue 2 (July 2013). Citation omitted. Absence of a mens rea requirement also does not allow for proportionate punishment. For these reasons, and the reasons more fully set forth in this brief, the defense respectfully requests Wisconsin's felony murder statute be declared unconstitutional.

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