CASE NO. 23-12275

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SADIK BAXTER,
Petitioner-Appellant,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent-Appellee.

Appeal from a Judgment of the U.S. District Court for the
Southern District of Florida, Case No. 21-CV-62301-BLOOM

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER-APPELLANT

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January 12, 2024

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule No. 26.1(a)(6), *amicus* certifies that the following persons have an interest in the outcome:

1. Cato Institute, *amicus curiae*
2. Matthew P. Cavedon, counsel for *amicus curiae*

The Cato Institute is a nonprofit entity operating under § 501(c)(3) of the Internal Revenue Code. *Amicus* is not a subsidiary or affiliate of any publicly owned corporation and does not issue shares of stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to *amicus*'s participation.

Respectfully submitted,

Dated: January 12, 2024

/s/ Matthew P. Cavedon

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Cato's Project on Criminal Justice focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

This case concerns Cato because it is unjust to impose strict liability for murder by another that the defendant could not have foreseen.

[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in any part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

One of the most basic tenets of our justice system is that no one should be subject to a criminal conviction unless they acted with a criminal intent. A nexus between a guilty mind and the wrongful act provides a moral justification for punishment.[2]

While amicus is concerned about the gradual dilution of *mens rea* requirements generally, Florida's practical evisceration of them in the felony-murder context takes this trend to an unprecedented extreme. This extraordinary departure from traditional notions of justice for crimes that carry apex punishments also departs from the core underpinnings of the American legal system, and in this case mandated life imprisonment without the possibility of parole for Appellant Sadik Baxter despite him lacking—according to the sentencing court—"a significant involvement" in the deaths for which he is being punished.[3]

The notion that a crime must include criminal intent long predates the founding of the United States and was firmly established in the English common law in the 18th century. The Founders understood that within that tradition a guilty mind

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[2] *See, e.g.*, Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Liability*, 88 CALIF. L. REV. 931 (2000); John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999).

[3] *Quoted in* Order at 10.

was necessary for criminal culpability. Indeed, contemporaneous cases and commentaries proclaim the principle that "wrongdoing must be conscious to be criminal." *Morissette v. United States*, 342 U.S. 246, 252 (1952) (describing American precedent as showing "unanimity" in this regard). And this understanding endured through the end of the 19th century.

It wasn't until the 20th century that legislatures began to adopt strict liability crimes in significant numbers. But even then, the Supreme Court allowed strict liability convictions only for public welfare crimes that imposed small criminal penalties. In the mid-20th century, Professor Herbert Packer summarized the Court's position on *mens rea* by noting that it "is an important requirement, but it is not a constitutional requirement, except sometimes."[4] Even under Professor Packer's equivocal rubric, "sometimes" must surely embrace a potential life sentence. *See, e.g.*, *Staples v. United States*, 511 U.S. 600, 605 (1994) ("'[T]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'" (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978) (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951)))); *Liparota*

[4] Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 107 (1962). Other scholars and commentators have likewise recognized the constitutional dimension of the *mens rea* element in the criminal law. *See* C. Peter Erlinder, *Mens Rea, Due Process, and the Supreme Court: Toward a Constitutional Doctrine of Substantive Criminal Law*, 9 AM. J. CRIM. L. 163, 175–91 (1981); Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and* Mens Rea *since Herbert Packer*, 2 BUFF. CRIM. L. REV. 861, 943–45 (1999).

v. United States, 471 U.S. 419, 426–28 (1985) (holding that statutory ambiguity concerning *mens rea* should be resolved in favor of lenity).

Despite this, Florida treats felony murder as a strict-liability offense, requiring "no showing of causation or active participation by the defendant in the homicide so long as he is proven to have been a participant in the felony out of which the homicide occurred."[5] This departs not only from general *mens rea* doctrines, but from the traditional law of felony murder.

Florida convicted Mr. Baxter for the deaths caused by his co-defendant Obrian Oakley while fleeing dangerously from police—after Mr. Baxter pointed out Oakley's vehicle to police so they could apprehend him. In convicting Mr. Baxter for deaths caused by his fleeing co-defendant, Florida cast *mens rea* completely aside. This is not only an atavistic throwback to the harsh illiberalism of the Dark Ages, it is repugnant to the civilized common law as understood by American lawyers in 1776 and the nation's Founders in 1787. It should be reversed.

[5] *Baker v. State*, 377 So.2d 17, 19 (Fla. 1979), *superseded in other part by statute as noted by State v. Kearney*, 535 So.2d 711, 711–12 (Fla. 2d Dist. Ct. App. 1988); *see also Armenia v. Dugger*, 867 F.3d 1370, 1374 (11th Cir. 1989) (citing *Baker* in characterizing Florida's felony-murder statute as imposing strict liability).

ARGUMENT

I. A GUILTY MIND WAS A NECESSARY CONDITION FOR CRIMINAL PUNISHMENT DURING THE FOUNDING ERA.

The origins of modern *mens rea* doctrine can be traced back millennia. Most scholars trace the emergence of *mens rea* to the rediscovery of Roman law and to canon law.[6] Under early Anglo-Saxon law a man was liable for every homicide he committed, whether intended or not intended (*voluns aut nolens*), unless committed under the king's warrant or in pursuit of justice.[7] "What the recorded fragments of early law seem to show is that a criminal intent was not always essential for criminality and many malefactors were convicted on proof of causation without proof of any intent to harm."[8]

Sayre traces the origins of *mens rea* in English common law to two influences. The Roman notions of *dolus* (evil intent) and *culpa* (fault) were experiencing a secular revival (and attempts were made to graft them into English common law), while at the same time, the Church's measurement of magnitude of sins depended largely on the penitent's state of mind.[9] Under canon law, the mental element was

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[6] *See* Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 982–83 (1932); Albert Levitt, *The Origin of the Doctrine of Mens Rea*, 17 ILL. L. REV. 117 (1922); Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 ST. JOHN'S L. REV. 725, 756 (2004).

[7] *Id.* at 977, 979–80.

[8] *Id.* at 982.

[9] *Id.* at 982–83.

the real criterion of guilt, and the concept of subjective blameworthiness as the foundation of legal guilt was making itself felt. "Small wonder then that our earliest reference to *mens rea* in an English law book is a scrap copied in from the teachings of the church," Sayre observed.[10]

By the 13th century, culpability was becoming entwined with evil intent (*dolus*) or the lack thereof.[11] Cases were brought in which the penalty (death) for felony seemed unwarranted or repugnant to the jury and were thus referred to the king for pardon.[12] In 1203, a case was noted in which "Robert of Herthale, arrested for having in self-defense slain Roger, Swein's son, who had slain five men in a fit of madness, is committed to the sheriff that he may be in custody as before, for the king must be consulted about this matter."[13]

Not long after, and borrowing heavily from Roman law, Henry de Bracton wrote *De Legibus Angliae*, which helped shape the English common law in the 13th century.[14] Bracton said: "[W]e must consider with what mind (*animo*) or with what intent (*voluntate*) a thing is done, in fact or in judgment, in order that it may be

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[10] *Id.* at 983.

[11] *Id.* at 980.

[12] *Id.*

[13] SELDEN SOC'Y, SELECT PLEAS OF THE CROWN 31 (No. 70) (1887) (*cited in* Sayre, *supra*, at 980 n.18).

[14] Sayre, *supra*, at 984.

determined accordingly what action should follow and what punishment."[15] Indeed, the use of *mens rea* to help distinguish the felony of larceny from civil trespass began to emerge a century earlier.[16] Bracton laid down *animus furandi* (literally, "intent to steal") as one of the requisites of the felony of larceny.[17]

By the 17th century, the requirement of a guilty mind for criminal culpability had become a fixture in the common law.[18] Lord Bacon wrote that "all crimes have their conception in a corrupt intent, and have their consummation and issuing in some particular fact."[19] A few years later, Sir Edward Coke declared, "the act does not make a person guilty unless the mind be also guilty."[20]

Criminal intent became ingrained in the literature of punishment in the following hundred years. Writing in the mid-17th century, Sir Matthew Hale said

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[15] 2 HENRY DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 101b (c. 1235) (Twiss trans., 1879) (*quoted in* Sayre, *supra*, at 985).

[16] Sayre, *supra*, at 999.

[17] *Id.*

[18] *Id.* at 993.

[19] FRANCIS BACON, A COLLECTION OF SOME PRINCIPAL RULES AND MAXIMES OF THE COMMON LAWES OF ENGLAND 59 (Reg. 15) (J. More, 1636) (*quoted in* Sayre, *supra*, at 993), *available at* https://archive.org/download/elementsofcommon00baco/elementsofcommon00baco.pdf.

[20] EDWARD COKE, THIRD INSTITUTE 6, 107 (1641) (*quoted in* Sayre, *supra*, at 988).

that "where there is no will to commit an offense, there can be no transgression."[21] William Hawkins similarly wrote that the "Guilt of offending against any Law whatsoever, necessarily supposing a wilful Disobedience thereof, can never justly be imputed to those who are either uncapable of understanding it, or of conforming themselves to it."[22] These commentaries all point to the necessity of a criminal intent to sustain culpability.

Finally, a decade before the American Revolution, William Blackstone observed that "punishments are . . . only inflicted for the abuse of . . . free-will" and "an unwarrantable act without a vitious will is no crime at all."[23] He continued: "to constitute a crime against human laws, there must be, first, a vitious will."[24]

Accordingly, mistake of fact was a proper plea rendering a harmful act noncriminal at common law. Blackstone summarized the law as exempting ignorance of a significant fact (as opposed to ignorance of the law) from criminal liability:

> [I]gnorance or mistake is another defect of will; when a man, intending to do a lawful act, does that which is unlawful. For here deed and the

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[21] Blackstone's quoting of this at 4 COMMENTARIES *20–21 (1854) is in turn quoted in *Salzman v. Lowery*, 405 F.2d 358, 364 n.1 (D.C. Cir. 1968) (Skelly Wright, J., concurring in the judgment).

[22] 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 1 (Eliz. Nutt, 1716).

[23] 4 WILLIAM BLACKSTONE, COMMENTARIES *21, 27.

[24] *Id.* at *21.

> will acting separately, there is not that conjunction between them, which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, and not an error in point of law.[25]

The Framers relied heavily on the common law as a guide for applying the Constitution in the newly independent United States. *See Morissette*, 342 U.S. at 251–52 (explaining how the belief that crime requires "an evil-meaning mind . . . took deep and early root in American soil"). It is no surprise, then, that the Founders similarly condemned liability without culpability. In Federalist No. 62, James Madison warned:

> It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood . . . that no man who knows what the law is to-day can guess what it will be to-morrow.

Madison thus argued that a crime must involve a guilty mind, rejecting the legitimacy of vague laws and strict liability crimes.

Although the Constitution does not discuss principles of criminal responsibility, this silence reflects "consensus about the topic"; it "demonstrate[s] that the 'connection between crime and moral guilt [was] enshrined in the common law.'"[26] For instance, Toulmin and Blair saw "felonious intention" as a "necessary

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[25] *Id.* at *27; *see also Lambert v. California*, 355 U.S. 225, 229–30 (1957); Rollin M. Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35 (1939).

[26] Ann Hopkins, Comment, *Mens Rea and the Right to Trial by Jury*, 76 CALIF. L. REV. 391, 394 (1988) (alteration in original) (*quoting* PETER BRETT, AN INQUIRY INTO CRIMINAL GUILT 38 (1963)).

ingredient in every felony."[27] And nowhere do these authors explicitly identify or justify criminal liability where the defendant bore no fault.[28]

Commentators were not the only ones who recognized the necessity of a criminal mind to sustain punishment. When state legislatures passed laws that authorized punishment without culpability, courts did not hesitate to strike those laws down. In *Ely v. Thompson*, Kentucky's high court held that it would be unconstitutional to punish by lashing a free Black man for exercising the common-law right of self-defense against a white man, even though a criminal statute purported to permit such punishment.[29] Similarly, in *Jones v. Commonwealth*, Virginia's high court declined to abrogate the common-law rule prohibiting the imposition of a joint fine in a criminal case.[30] The court held that imposing a joint fine would be cruel and unusual because it could require some defendants to bear the punishment for others' conduct.[31] Finally, in an early New York case, the court refused to find a defendant strictly liable for a mistake his agent made.[32] James Kent,

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[27] 1 HARRY TOULMIN & JAMES BLAIR, A REVIEW OF THE CRIMINAL LAW OF THE COMMONWEALTH OF KENTUCKY 94 (W. Hunter, 1804).

[28] *See* Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 BUFF. CRIM. L. REV. 691, 722 (2003).

[29] 10 Ky. 70, 70–74 (1820).

[30] 5 Va. 555 (1799).

[31] *Id.* at 556–59 (*seriatim*).

[32] *Sturges v. Maitland*, Ant. N.P. Cas. 153, 154–55 (N.Y. Sup. Ct. 1813).

then Chief Justice of the New York Supreme Court, explained that "all infringements of police laws must be tested by the intention of the party. Without a criminal intent, there is no breach of law."[33] *Mens rea* was required for criminal convictions.

II. THE LIMITED STRICT LIABILITY CRIMES OF THE 19TH CENTURY DID NOT REFLECT A CHANGE IN CRIMINAL LAW.

Proof of the offender's guilty mental state was a prerequisite for conviction for the Constitution's first 80 years. The shift away from this requirement did not become pronounced until the Industrial Revolution.[34] Urbanization and industrialization posed new dangers to the public that legislatures sought to mitigate through state sanction. Because a guilty mind would be difficult to prove for some of these novel offenses, lawmakers sometimes omitted a *mens rea* requirement on the ground that penalties were small and would not stigmatize offenders.[35]

The early strict liability offenses, called public welfare offenses, imposed duties on individuals connected with certain industries that affected public health

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[33] *Id.* at 154; *see also, e.g.*, *United States v. Clarke*, 2 Cranch C.C. 158 (C.C.D.C. 1818) (charging jury to acquit murder defendant if he was "in such a state of mental insanity, not produced by the immediate effect of intoxicating drink, as not to have been conscious of the moral turpitude of the act").

[34] *See* Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 419 (1993); Colin Manchester, *The Origins of Strict Criminal Liability*, 6 ANGLO-AM. L. REV. 277, 279–80 (1977).

[35] Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 67 (1933); *but see* Richard G. Singer, *The Resurgence of* Mens Rea*: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337, 339, 340–73 (1989) (arguing that American strict liability statutes originated instead to allow for stricter regulation of morals).

and welfare. Examples included the illegal sale of alcoholic beverages, sale of impure or adulterated food, violations of traffic regulations and motor vehicle laws, and sale of misbranded articles.[36] Often labeled as the first American strict liability decision, *Barnes v. State* dealt with the sale of liquor to persons addicted to alcohol.[37] But Barnes was not the one who personally sold the alcohol. Instead, his employee sold it, contrary to Barnes's express directions. Connecticut's high court held that Barnes could not be convicted without at least personal recklessness.[38]

Many of the strict liability statutes dealt with the sale of liquor, as in *Barnes*, or the corruption of minors. Of the cases cited by Sayre, 30 percent decided before 1900 dealt with liquor directly, and at least another 10 percent concerned either the transportation of liquor or corruption of minors.[39] Thus, for the first 50 years that legislatures created strict liability crimes, they did so with caution.

Moreover, courts did not simply dispense with the common law's general *mens rea* requirement. As late as 1877, the Supreme Court interpreted a criminal *mens rea* of "knowingly and willingly" to mean "not only a knowledge of the thing,

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[36] Sayre, *Public Welfare Offenses*, *supra*, at 73, 84 (cited by *Morissette*, 342 U.S. at 262 n.20).

[37] 19 Conn. 398 (1849); *see also Morissette*, 342 U.S. at 256; Sayre, *Public Welfare Offenses*, *supra*, at 63.

[38] *Barnes*, 19 Conn. at 407 ("[T]he master is never liable criminally for acts of his servant, done without his consent, and against his express orders.").

[39] Sayre, *Public Welfare Offenses*, *supra*, at 84–88; Singer, *supra*, at 368.

but a determination with a bad intent."[40] In *Felton*, the defendants knowingly violated a statute regulating liquor production in order to avoid the complete loss of the liquor being produced.[41] The Court found that their conduct was justified under the doctrine of necessity and it would shock a universal "sense of justice" for a court to impose criminal punishment without proof of wicked intent.[42] "All punitive legislation contemplates some relation between guilt and punishment," the Court explained.[43] "To inflict the latter where the former does not exist would shock the sense of justice of every one."[44]

State courts also repeatedly emphasized that a guilty mind was fundamental to criminal culpability. In 1873, the New Jersey Supreme Court observed that "[i]n morals it is an evil mind which makes the offence, and this, as a general rule, has been at the root of criminal law."[45] A quarter-century later, the Utah Supreme Court noted that *mens rea* was an indispensable element of a criminal offense. *State v. Blue*, 17 Utah 175, 181 (1898) ("To prevent the punishment of the innocent, there has been ingrafted into our system of jurisprudence, as presumably in every other,

[40] *Felton v. United States*, 96 U.S. 699, 702 (1877).

[41] *Id.* at 701–02.

[42] *Id.* at 702–03.

[43] *Id.* at 703.

[44] *Id.*

[45] *Cutter v. State*, 36 N.J.L. 125, 126 (1873).

the principle that the wrongful or criminal intent is the essence of crime, without which it cannot exist."); *see also Bradley v. People*, 8 Colo. 599, 602 (1885) ("Crime proceeds only from a criminal mind. The doctrine which requires an evil intent lies at the foundation of public justice." (citation omitted)).

Those courts that upheld strict liability statutes did so only in limited circumstances. These cases involved liquor, minors, or the adulteration of milk.[46] In such cases, courts stressed that strict liability was necessary because these offenses: 1) made actual knowledge "difficult to prove"; 2) were "necessary for the public good"; and 3) involved a "small fine," which effectively diluted "the stigmatic effect of conviction."[47]

Given this limited role for strict liability crimes, it is unsurprising that legal commentators at the time did not recognize a broader shift in the principles underlying criminal law. There was simply "no recognition from Wharton, Bishop, or others that a new trend had been set in the criminal law which might be worth considering."[48] There was no acceptance that a broad swath of crimes could abandon the scienter requirement. Instead, only a few specific crimes or offenses that imposed

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[46] *See, e.g.*, *Gourley v. Commonwealth*, 140 Ky. 221, 223, 227 (1910) (sale of alcohol, punished by a fine); *Commonwealth v. Emmons*, 98 Mass. 6, 8 (1867) (minors in billiard halls); *People v. Kibler*, 106 N.Y. 321, 322–24 (1887) (adulterated milk, punished as a misdemeanor).

[47] Singer, *supra*, at 367.

[48] *Id.* at 373.

strict liability for unique reasons were noticed by commentators.[49] Summing up the state of criminal law at that point, Joel Prentiss Bishop remarked: "Neither in philosophical speculation, nor in religious or moral sentiment, would any people in any age allow that a man should be deemed guilty unless his mind was so."[50]

III. STRICT LIABILITY IS APPROPRIATE ONLY FOR OFFENSES WITH SMALL PENALTIES, UNLIKE THIS ONE.

A. The Supreme Court has allowed only a limited exception to the rule that criminal statutes require a guilty mental state.

Precedent from more recent decades confirms that strict liability must remain strictly limited. The number of strict liability criminal offenses ballooned during the 20th century as legislatures created scores of "public welfare offenses" to protect public health and safety. *See Morissette*, 342 U.S. at 253–56. Some legislators increasingly seemed to regard *mens rea* requirements as burdensome obstacles to solving social problems. This attitude led them to more frequently eliminate scienter requirements from criminal statutes. *See id.*

Despite this increase in strict liability statutes, the Supreme Court has never endorsed a broad principle that would justify all strict liability felonies. In 1922's *United States v. Balint*, the defendant was indicted for the sale of drugs, and the

[49] *See id.*

[50] 1 JOEL PRENTISS BISHOP, BISHOP ON CRIMINAL LAW 192 (§ 287) (9th ed., John M. Zane & Carl Zollmann eds., 1923).

indictment did not allege that he knew the items he was selling and possessing were drugs.[51] The Supreme Court reasoned that the question was one of legislative intent and that Congress had already weighed the possible injustice of punishing an innocent person against the evil of exposing the public to the dangers of drugs.[52] It noted: "Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes . . . ."[53] Subsequent cases allowed institutions to be held vicariously and strictly liable for violations of federal consumer protection laws. *United States v. Dotterweich*, 320 U.S. 277 (1943) (concerning a misdemeanor conviction); *United States v. Park*, 421 U.S. 658 (1975) (concerning $50 fines). In *Dotterweich*, Justice Frankfurter noted that under the circumstances of modern industrialism, the government may reasonably step in to protect the "wholly helpless" public.[54]

While the Supreme Court has "upheld the constitutionality of some strict-liability offenses in the past," that precedent does not categorically constitutionalize strict liability for felony offenses. *Rehaif v. United States*, 139 S. Ct. 2191, 2212

[51] 258 U.S. 250, 251 (1922).

[52] *Id.* at 254.

[53] *Id.* at 252.

[54] 320 U.S. at 285.

(2019) (Alito, J., dissenting). Notably, all of these cases concerned public welfare statutes passed to protect the public. Additionally, the punishment for these crimes carried only minor penalties. Thus, these cases merely followed the limited carve-out for strict liability crimes set out in the 19th century. As Francis Sayre noted early on into the rise of strict liability, "[i]t is fundamentally unsound to convict a defendant for a crime involving a substantial term of imprisonment without giving him the opportunity to prove . . . that he acted without guilty intent" and "courts should scrupulously avoid extending the doctrines applicable to public welfare offenses to true crimes. *To do so would sap the vitality of the criminal law.*"[55]

The Supreme Court's later decisions confirm that there is a limit past which strict liability laws violate the Due Process Clause. In *Morissette*, the Court read a requirement of intent into the federal conversion statute under which the defendant had been prosecuted. The Court said:

> The contention that an injury can amount to a crime only when inflicted by intention 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.

342 U.S. at 250. In distinguishing "public welfare offenses" amenable to strict liability from other crimes, the Court considered whether the statute was essentially

[55] Sayre, *Public Welfare Offenses*, *supra*, at 82, 84 (emphasis added).

a matter of regulatory policy, imposed a relatively small penalty, and caused "no grave damage" to the offender's reputation. *Id.* at 255–56.

Morissette reinvigorated the presumption of a *mens rea* requirement in criminal law. Subsequently, the Supreme Court announced the importance of substantive limits on the imposition of strict liability for criminal convictions. *See Staples*, 511 U.S. at 618 ("Our characterization of the public welfare offense in *Morissette* hardly seems apt . . . for a crime that is a felony . . . . After all, 'felony' is, as we noted in distinguishing certain common-law crimes from public welfare offenses, 'as bad a word as you can give to man or thing.'" (quoting *Morissette*, 342 U.S. at 260). In *Lambert v. California*, the Court held that due process requires that an individual may not be convicted of a strict liability felony when the person is "unaware of any wrongdoing."[56]

Mens rea has retained its prominence since then. In *Staples*, due process required the government to prove both that the defendant knowingly possessed the firearm and that he was aware of the weapon's unlawful characteristic.[57] The Supreme Court also decided against strict liability in a case under the Protection of Children Against Sexual Exploitation Act, another case in which a ten-year sentence was possible, holding: "*Staples'* concern with harsh penalties looms equally large

[56] 355 U.S. at 228–29.

[57] 511 U.S. at 619.

respecting [18 U.S.C.] § 2252: Violations are punishable by up to 10 years in prison as well as substantial fines and forfeiture." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994); *see also id.* at 78 (holding that "the term 'knowingly' in § 2252 extends both to the sexually explicit nature of the material and to the age of the performers"); *see also McFadden v. United States*, 576 U.S. 186, 188–89 (2015) (concluding that the government must prove that the defendant "knew he was dealing with a 'controlled substance'"); *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001) ("[C]ore due process concepts of notice, foreseeability, and, in particular, the right to fair warning . . . bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct."); *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 564–65 (1971) ("Pencils, dental floss, paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions if Congress did not require . . . '*mens rea*' as to each ingredient of the offense."). Finally, four years ago, the Court held that a "basic principle underlying the criminal law" is the showing of "a vicious will." *Rehaif*, 139 S. Ct. at 2196 (*quoting* 4 BLACKSTONE, *supra*, at *21); *cf. Rosemond v. United States*, 572 U.S. 65, 76, 78 (2014) ("[A] person aids and abets a crime when (in addition to taking the requisite act) he intends to facilitate that offense's commission. An intent to advance some different or lesser offense is not, or at least not usually, sufficient: Instead, the intent must go to the specific and entire crime charged . . . . * * * [W]hen

an accomplice knows nothing of a gun until it appears at the scene, he may already have completed his acts of assistance; or even if not, he may at that late point have no realistic opportunity to quit the crime. And when that is so, the defendant has not shown the requisite intent to assist a crime involving a gun." (internal citation omitted)).

There may be strict-liability offenses that are constitutionally borderline. But the strong weight of history and precedent indicate that Mr. Baxter's conviction for felony murder is squarely on the unconstitutional side.

B. Felony murder is no categorical exception to the *mens rea* requirement.

Felony murder does not present a categorical exception to the requirement that *mens rea* undergird criminal convictions. As noted in the introduction above, Florida law requires "no showing of causation or active participation by the defendant in the homicide so long as he is proven to have been a participant in the felony out of which the homicide occurred."[58] As applied to this case and others like it, Florida penal law deviates from the traditional law of felony murder.

Blackstone writes that murder and voluntary manslaughter both involve "guilt," in the respective forms of malice and sudden passion.[59] He describes "malice aforethought" as "the grand criterion, which distinguishes murder from other

[58] *Baker*, 377 So.2d at 19.

[59] 4 BLACKSTONE, *supra*, at *190.

killing."[60] While Blackstone does say that there is murder "if one intends to do another felony, and undesignedly kills a man," his examples reflect the transferred intent of the actor who does some inherently dangerous act, such as shooting at—or laying out poison for—one person and killing another.[61] He nowhere anticipates liability arising from an act as far removed from death as was Mr. Baxter's here.[62] There were also inherent common-law limits to felony murder: given the limited number of felonies, the danger inherent in many of them, and the availability of capital punishment for *all* of them, "the typical effect of the rule was to brand as murderers only those who had performed seriously immoral acts of a life-threatening nature, and application of the rule might make no difference in punishment in an individual case."[63]

Guyora Binder notes that the late 18th and early 19th centuries saw the rise of three American approaches to felony murder: "(1) predicating murder liability on

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[60] *Id.* at *198–99.

[61] *See id.* at *201; *accord* Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 978 (2008) ("Felony murder liability was limited from the outset to deaths resulting from acts of violence committed in the furtherance of particularly dangerous felonies."). Binder argues that Blackstone has limited relevance here because American felony-murder rules were creatures of nineteenth-century statutes. *See* Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 72 (2004).

[62] *See* Order at 2.

[63] 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, 1446 (1994).

implied malice as well as a felony . . . ; (2) predicating murder liability on dangerous felonies . . . ; or (3) predicating murder liability on any felony . . . ."[64] In practice, though, dangerousness was decisive: in only six 19th-century reported cases were convictions had for "killing in the course of nonenumerated felonies," with jurisdictions generally requiring some sort of "attempt[] to cause bodily harm" (there were also four convictions predicated on abortion and one on "the obviously reckless felony of arson").[65]

> Overall, sixty-seven of our eighty-five nineteenth century felony murder convictions were predicated on the traditional predicate felonies of robbery, burglary, rape, and arson, with more than half being predicated on robbery. An additional seven convictions were predicated on the obviously dangerous felonies of murder, prison-break or resisting arrest, and inflicting grievous bodily injury. The remaining eleven convictions were based on the more dubious predicates of riot, theft, assault by a tramp, abortion, and suicide.[66]

Likewise, after briefly allowing for felony-murder liability to be based on any felony, Missouri soon narrowed the possible predicates to "arson, burglary, robbery, rape, and mayhem"; in the 19th century, that state had "no reported convictions of . . . murder predicated on nonenumerated felonies."[67] For its part, Florida's sole

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[64] Binder, *Origins*, *supra*, at 121.

[65] *Id.* at 160–61; *see also id.* at 196 ("I think we must assume that those courts that predicated felony murder on abortion did view abortion in this way, as an attack on another person rather than just a dangerous medical treatment of a pregnant woman.").

[66] *Id.* at 189–91.

[67] *Id.* at 177–78.

felony-murder conviction of that era was overturned, while its supreme court "suggested that *dangerous* felonies would give rise to second degree murder liability because they inherently manifested depraved indifference to human life."[68]

Liability for accomplices—like that which led to Mr. Baxter's conviction—was limited as well. "Most jurisdictions that considered the question limited accomplice liability for felony murder to killings that were in furtherance of and foreseeable as a result of the predicate felony."[69] Even New York, the pioneer of broad felony-murder liability, apparently restricted it to accomplices who "aided or encouraged" the killing specifically rather than merely "the underlying felony."[70] There were no 19th-century American cases where someone was convicted based on facts akin to those presented here, where the defendant "participate[d] in a crime which ordinarily does not necessitate violence or risk, and [did] not personally participate in any fatal violence."[71]

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[68] *Id.* at 182 (emphasis added) (*citing Johnson v. State*, 4 So. 535, 538 (Fla. 1888) ("For instance, if a man out of enmity to the owner of a vessel, and desiring to do him injury, should use dynamite, or other explosive to destroy the vessel while he knew passengers were aboard, and death should ensue, to one or more of them, that would be a case of murder in [the second] degree. Every element of the degree, the imminently dangerous act, and the depraved mind, regardless of human life, would be present, although the intent was to destroy property, not life.")).

[69] *Id.* at 199.

[70] *Id.* at 174.

[71] *Id.* at 199–200.

By the end of the 19th century, "American writers reinterpreted enumerated felony murder rules as dangerous-felony murder rules . . . . The treatise literature suggested that a felonious motive could aggravate a homicide, but only if sufficiently malicious or dangerous."[72] Back then, "American felony murder rules were usually limited in two ways: by predicate felony and by means of killing. Each of these limitations effectively conditioned felony murder on culpability requirements and prevented the imposition of strict liability for an accidental death."[73]

This remains so under much modern precedent. While felony murder "does away with the element of intent to kill or inflict great bodily harm, it does not do away with the requirement of a significant criminal intent."[74] Although courts sometimes describe felony murder as dispensing with malice, "the more usual explanation is that the intent to commit" a predicate felony "—itself frequently a dangerous, life-threatening act—constitutes the implied malice required for common law murder."[75] Liability for felony murder frequently "does not apply to murders

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[72] *Id.* at 131.

[73] *Id.* at 186.

[74] *United States ex rel. Staszak v. Peters*, No. 92 C 3228, 1992 U.S. Dist. LEXIS 18106, at *4 (N.D. Ill. Nov. 27, 1992) (discussing Illinois law).

[75] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 489 (8th ed. 2018), *quoted in* Cynthia V. Ward, *Criminal Justice Reform and the Centrality of Intent*, 68 VILL. L. REV. 51, 58 n.32 (2023).

which are not reasonably foreseeable" or "part of one continuous transaction."[76] It extends instead where the defendant, "by his willful conduct, sets in motion a chain of events so perilous to the sanctity of human life that death results therefrom."[77]

Mr. Baxter did no such thing. He rummaged through a vehicle and then walked away. He had no "significant involvement" in the deaths that Florida used to imprison him for life without the possibility of parole—other than pointing out to police his co-defendant Oakley's vehicle so that they could apprehend him.[78] In convicting Mr. Baxter of murder for the deaths that Oakley then caused in his dangerous flight, Florida veered far from the principles of *mens rea* and culpability that properly limit the scope of felony-murder liability.

CONCLUSION

This Court should reverse the judgment below.

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[76] *Ragland v. Hundley*, 79 F.3d 702, 706 n.6 (8th Cir. 1996) (discussing Iowa law); *Huynh v. Lizarraga*, No. 15CV1924-BTM, 2020 U.S. Dist. LEXIS 48714, at *133 (S.D. Cal. Mar. 19, 2020) (citation omitted) (discussing California law).

[77] *Dickens v. Franklin*, No. 06-CV-0065-CVE-FHM, 2009 U.S. Dist. LEXIS 25643, at *15 (N.D. Okla. Mar. 27, 2009) (citation omitted) (discussing Oklahoma law).

[78] Order at 2, 10; *cf.* Binder, *supra*, at 980 ("An emerging cause of undeserved felony murder liability in the twentieth century was the tendency of some courts . . . find increasingly attenuated connections between felonies and [culpable] killings.").

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,159 words, excluding the parts exempted by Fed. R. App. P. 32(f).
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Dated: January 12, 2024 *Counsel for Amicus Curiae Cato Institute*

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on, January 12, 2024, he electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the Eleventh Circuit using the CM/ECF system. The undersigned also certifies that all participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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