IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL PATINO,
PETITIONER,

v.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,
RESPONDENT,

Petition for a Writ of Certiorari to the Supreme Court of the State of Rhode Island and Providence Plantations

PETITION FOR WRIT OF CERTIORARI

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Table of Contents

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

TREATISES

UNITED STATES SUPREME COURT CASES

Questions Presented for Review

I. Whether, in a murder trial, under the Rhode Island general murder statute, there was a deprivation of the accused's right to Due Process provided in the 5th Amendment to the United States Constitution as applied to the States through the 14th Amendment, where the trial court raised, sua sponte, second degree felony murder as a basis for conviction for a violation of **R.I. Gen. Laws § 11-9-5.3. Child abuse--Brendan's Law** an allegation which was not charged in the Indictment or argued by the State. The Rhode Island Supreme Court answered that question in the negative.

II. Whether, the accused was similarly deprived of his right to Due Process where the trial court instructions to the jury on second degree felony murder basis on Brendan's Law included that: "The only intent required is that the Defendant intended to commit the underlying felony, one that is inherently dangerous or reflects conscious disregard for the risk to human life. I instruct you that under Rhode Island law, whenever a person having care of a child, knowingly or intentionally inflicts any physical injury, upon a child, however slight, he or she is guilty of a felony unless the following exception applies:…(the exception is with regard to corporal punishment)?

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

NO.

MICHAEL PATINO,
PETITIONER,

vs.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND

This petitioner, Michael Patino, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Rhode Island entered on September 29, 2018.

OPINION BELOW

On June 29, 2018 the Supreme Court of Rhode Island and Providence Plantations entered its judgment affirming the judgment of the Rhode Island Superior Court. A copy of the Opinion of the Court is attached hereto as Appendix A.

JURISDICTION

On June 29, 2018, the Supreme Court for the State of Rhode Island entered its judgment affirming verdict and the judgment of the Rhode Island Superior Court sitting in the County of Providence finding the Defendant The defendant, Michael Patino, appeals from a judgment of conviction for second-degree murder, in violation of G.L. 1956 § 11–23–1. This Court has jurisdiction pursuant to 28 USC § 1257 and as recognized in Rule 10 (c) of the United States Supreme Court Rules.

CONSTITUTIONAL PROVISIONS

The right to Due Process of the Fifth Amendment as applied to the States through the 14th Amendment to the United States Constitution, requires that adequate notice of the offense with which the accuse is charged and the elements of that offense that must be proved. The high Court in Rhode Island has said that in State v. Oliveira, 882 A.2d 1097, 1118, fn. 9 (R.I. 2005) this Court explained that: "Second-degree felony murder is not a lesser-included offense to first-degree felony murder because it requires proof of an additional fact—a determination that the crime was committed in an inherently dangerous manner. *See State v. Briggs,* 787 A.2d 479, 487 (R.I.2001)." The Rhode Island's court upholding the conviction here under the murder statute based on second degree felony murder fails to reconcile the requirement that the charge, because it is not a lesser included charge of first degree felony murder and requires an additional fact to be proved must therefore be charged in the Indictment, setting forth the inherently dangerous felony. Further instruction that explained that the injury caused however slight shall be sufficient to sustain a conviction of that felony relieves the State of the burden of proving

the elements of the case beyond a reasonable doubt all in violation of the Defendant's stated right to due process under the Fifth Amendment and the protection guaranteed by the Sixth Amendment that elements be proved beyond a reasonable doubt.

STATEMENT OF THE CASE

Marco Nieves died on October 4, 2009, at six years of age. Rescue services were called to the family home at 6:08 a.m. in the morning of that day by his mother, Trish Oliver. She reported that her child was not breathing and to send help. Rescue responded to the call and, in standard operating procedure, so did the police. Cranston rescue and fire personnel attempted to resuscitate to no avail. Marco was promptly carried to the rescue for transport to the hospital. On route efforts to resuscitate continued with no success.

At 6:26 the rescue arrived at Hasbro Children's Hospital where Marco was in the care of Dr. Linda Snelling, the Chief of the Pediatric Intensive Care Unit. For the ensuing forty-five minute period, there continued to be no pulse. A femoral pulse was then found and the child was revived. Dr. Snelling, who remained with Marco Nieves for over seven and a half hours, ordered his admission to the Pediatric Intensive Care Unit, where he was to have a CAT scan and full workup. A breathing tube was placed. Dr. Snelling noticed a firm and distended abdomen and bruise pattern to the shoulder and ear. Late that afternoon, it was clear to his physician that Marco would not survive and life-saving measures were concluded, including removal of the breathing tube.

On October 5, 2009, the Chief Medical Examiner in Rhode Island, Dr. Gilson, performed the autopsy. The chief finding he noted was the presence of a liter and a half

of pus in the abdominal cavity. Dr. Gilson determined the source of the pus to be a perforation of the duodenum, the small intestine. The cause of the pus was determined to be peritonitis. Peritonitis is caused by the irritation and inflammation of the lining of the abdominal cavity called the peritoneum. The peritonitis lead to septic shock and death. Dr. Gilson concluded the perforation of the duodenum was caused by blunt force trauma, a sudden force. The nature of the injury, in Dr. Gilson's opinion indicated child abuse. Having reviewed the matter, he ruled the death a homicide.

Marco Nieves was the child of Trish Oliver and Rafael Nieves. The relationship between Ms. Oliver and Mr. Nieves ebbed, but at that time Marco continued to see his father, including in December 2008 and January 2009. By all accounts, Marco Nieves enjoyed being with his father and his girlfriend at that time, Alexandria Correia. Sunday dinners were had at the home of Alexandria's mother, Guida Andrade. In that time frame, an occasion was recalled by Guida Andrade that, when it was time to go home and with his mother waiting to take him, Marco Nieves became emotionally and physically opposed to the idea. Guida Andrade said Marco said that he didn't want to go with Mommy. "I want to stay here with you and Alex. I don't want to go home with Mommy and her boyfriend because he beats me." The situation continued for ten or fifteen minutes until he left with his mother.

Sgt. Kite remained at the apartment after Marco and his mother left. Also present was Michael Patino and Jazlyn, the eighteen-month-old daughter of Michael Patino and Trish Oliver. The home at 575 Dyer Avenue, Apartment B-18, was Trish Oliver's where she lived with the two children. Michael Patino came to the home earlier that morning.

Prior to leaving, Trish Oliver told Sgt. Kite what had happened with Marco

Nieves the prior evening. She reported that Marco had been vomiting and that the soiled sheets were rolled up on the floor of the bedroom. She also reported that Marco had vomited in the toilet which had not been flushed. Kite started looking for potential causes of the child's illness, including household chemicals in the kitchen area.

Dr. Elizabeth Laposata, who was the Medical Examiner in Rhode Island for twenty-three years. At the trial, she appeared as a witness for the defense offering a contrary view to Dr. Gilson's, the medical examiner's, opinion. Dr. Laposata held the opinion that the cause of the death of Marco Nieves was neglect for lack of medical treatment. She reviewed all the reports from the hospital and the medical examiner and assessed the autopsy photographs. Dr. Laposata explained the five classifications of injuries.

Dr. Laposata determined, with regard to the bruising seen on the body, apart from the injury to the duodenum, that it was minor and not life threatening. In reviewing the classification of the injury sustained to the duodenum, it was not a massive injury. She described the subdermal contusion to the fat pad lying below the skin. She also noted the physiology of a young child and specifically the vulnerability of the duodenum due to the wide and flared nature of the rib margins at that age of development. The duodenum is a particularly vulnerable spot in the illustration she supplied of the body. Dr. Laposata reasoned that, given the lack of injury to nearby organs, it should not have been a massive punch as Dr. Gilson held.

Dr. Laposata described the perforation of the duodenum that had occurred as treatable with emergency surgery to sew up the perforation and drain the pus in the abdominal cavity. The delay of medical treatment caused the death of Marco Nieves.

Vol. IV, p. 827-829.

Remote exchanges in relevant times surrounding the events between Trish Oliver and Michael Patino were observed from text messages they were sending each other. They ranged from friendly to arguing.

It should be noted that Ms. Oliver and Mr. Patino send text messages in such a way that they are frequently laced with foul language. Initial text message a period where Trish Oliver was out grocery shopping saying the place she was going was packed and, at 12:14 a.m., that she had to park a distance from the store. Mr. Patino inquires at 12:46 where she is at. She writes that Price Rite is packed. He responds someone tried to call and get over here quickly please. At 12:49 she writes okay. At 12:52 Mr. Patino writes "Are you almost done. You're mad slow." She responds at 12:52 "On my way." At 1:10 he responds with "Finally".

Ms. Oliver texts for Mr. Patino to come out and help her in a couple of minutes. He responds that the is sending Polo out (a nickname for Marco with reference to explorer Marco Polo). That was at 1:11:12. Then she texts "Come out and give me a hand." It's 1:21 and Trish Oliver writes "Come on. I'm not getting wet no more." And at 1:22 "Come out now." Mr. Patino is in the house with 14-month-old baby Jazlyn and Marco during the exchange.

Later things get tense between them. Michael Patino had left the apartment. At 3:53 p.m. she writes you have to go through my …, and the friction and nasty messages start. (Exhibit 67). Mr. Patino now calls referring to her as white bitch, which much is made of. They are both white. The timeframe is 3:54 p. Ms. Oliver complains to Mr. Patino, you don't need to take my shit, and the insults fly. Ms. Oliver, "Don't touch my

shit or take any of my shit when you going that ____ shit". Then, leave, I hate you. That is 5:57 p.m. Mr. Patino, "how many times do I have to tell you shit." referring to not smoking marijuana with the …, and the messages continue. He makes a comment about her being retarded. The time is 4:58 p.m. A time gap ensues because she went to Mass. She is looking for her blunt, which she says "And for your information, that's what Liz left me the other night." Referring to marijuana. This was the crux of their argument.

Ms. Oliver is texting about marijuana. Marco Nieves at the time is in pain and he's throwing up. Trish Oliver texted Michael Patino about the marijuana. "You know what, Mike, go F yourself. I'm tired of you trying to control my life. You're nothing but a F-in jerk all the time. I'm sick of it. I don't have to listen to you…"

"Blanket in his room. Please tell me where is my blunt. Cuz I'm stressed life WTF. I cut down a whole lot, Mike. Like seriously, I take on or two hits and it relaxes me." That is at 5:17 p.m. Marco, at the time, is in the house with her in pain and throwing up.

The argument continues and Mr. Patino says he punched Marco. Marco turned. I meant to hit him in the back. I hit him in the stomach bad. Police later would find and test marijuana in Ms. Oliver's bedroom.

And investigation done by Detective Cordone confirmed that Trish Oliver went to church. People at church said to her, "Everyone at church said he didn't look good. He was passing out. What's wrong but he's in pain." 5:11 p.m. She had used her car to drive to church. At this point Marco Nieves received no medical attention.

Mr. Patino had been out that afternoon working on his car with friends and told police in a recorded statement the people he was with including Roberto, Giovanni,

William, Mario Palacio, also known as Copa, and Mario Plaza who owned the place. Mr. Patino was confirmed to be there at 6:00 p.m. through 10:00 p.m. There was an 8 minute and 27 second call between him and Ms. Oliver where they weren't arguing, and the ensuing text messages after that were no argumentative. Mr. Patino made reference to medical attention as attested by Detective Cardone.

Mr. Patino recounts a time of drinking Heineken and what turned out to be Chivas Regal Scotch whiskey. Mr. Patino recounted to police that Trish Oliver had a nursing background and experience. She had certificates, medical/training.

Mr. Patino came to Trish Oliver's apartment in the early morning sometime between three to five. It was not clear. He saw Marco for a brief second and got up and went to the bedroom. It is unknown if Marco exhibited symptoms at the time.

Mr. Patino was in Central Falls during the time Marco Nieves developed apparent symptoms. Marco was in Cranston with his mother. There was one call between them at eight in the evening and no further calls, no texts or conversations. When he did get to the house in the early morning hours, there is no evidence that he observed the vomit or sheets that were later discussed. He went into the bedroom, sat down on the floor for a half hour and fell asleep. He woke to Trish Oliver's screaming hysterically with Marco on the couch. He did tell her to call 911.

He did tell her what had happened at 5:09 p.m. "I told you I went to punch him on his back again and he moved, and I hit him on his stomach." The injuries to the back are not significant because there was no red mark. At 5:10 pm. In the afternoon, Mr. Patino had texted, "It's probably since he ate dat why. My bad, I'm really sorry about it."

Mr. Patino had no key and did not live with Ms. Oliver at the time.

Trish Oliver said Marco was vomiting, foaming at the mouth, eyes rolling in the back of his head". "Mad dirty shit."5:10 pm. It's probably since he at dat why. My bad. I'm really sorry about that." Marco's eyes keep rolling in the back of his head. He was throwing up foam. He's making sounds. He's in pain." 5:13 p.m. Mr. Patino – "Just let it be for now and let da hit and the food settle. Give him some water." 5:42 - Just wake him up and have him drink water with lemon. 5:44 – Rub his stomach and ___". 5:43 – did you give him some water. 5:55 – Make him like exercise. 6:00 Please I need help will you come? Will you come? Finally says "All right over".

At six when he's awake he attempts CPR kind of touches the stomach. He tells Trish to call 911.

There was testimony elicited from Ms. Correia girlfriend to Rafael Nieves about an earlier time as to bruise marks then observed on Marco, wherein she heard Marco responding to his father, "Mommy's boyfriend hit me." and that he was upset and sad.

It is the case that the State here conceded that it did not raise as a theory to prove, Second Degree Murder, via the felony murder rule. It acknowledges that this theory was raised by the Trial Justice in her jury instructions. The Trial Justice acknowledged as much saying that no one had talked to her about charging lesser included offenses and that no one has talked to her about charging first, second or anything else. The Trial Justice resolved to do what she wants to do because nobody had given here any other suggestions. (Tr. IV, 786-87). The fact is that the state did not request a jury instruction on the theory of second degree felony murder. The Supreme Court in its opinion readily acknowledges these facts. State v. Patino, 188 A.3d 646, 657 (R.I. 2018)

Further it is acknowledged by both the Rhode Island Court and the State that in its opening statement, laying out its expected evidence and what it hoped to prove, never once laid out a violation of Brandon's Law as the underlying felony that would warrant a finding of Second Degree Murder. It was not mentioned to the jury at all. Again, in the closing argument the Prosecution team made no mention of Brandon's Law, its elements, how the defendant violated the law or even the idea of felony murder. (Tr. Vol. 5: 948-970) Indeed the Rhode Island Supreme Court acknowledged: "It is true that the indictment in this case did not expressly charge defendant with second-degree felony murder or with felony child abuse, but only that he caused the death of Marco Nieves, in violation of § 11–23–1, which proscribes murder in both the first and second degree." State v. Patino, 188 A.3d 646, 657 (R.I. 2018)

REASONS FOR GRANTING THE WRIT

Basic due process requires notice of the charges one is facing in order to mount a defense. The defendant is similarly protected by the requirement that the State must prove the elements of the case against him with proof beyond a reasonable doubt. The fundamental requisite of **due process** of law is the opportunity to be heard,' Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914) , a right that 'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest.' Mullane v. Central Hanover Trust Co., supra, 339 U.S. at 314, 70 S.Ct. at 657. See also Armstrong v. Manzo, 380 U.S. 545, 550, 85 S.Ct. 1187, 1190, 14 L.Ed.2d 62 (1965); Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168—169, 71 S.Ct. 624, 646—647, 95 L.Ed. 817 (1951) Rhode Island also recognizes

this basic premise. In State v. Saluter, 715 A.2d 1250, 1252 (R.I. 1998) oft recognized bedrock principle was set out that: "Minimal due process requires that a defendant be afforded "adequate notice of the offense with which he is charged." *State v. Hendershot,* 415 A.2d 1047, 1048 (R.I.1980)."

The Rhode Island Supreme Court rejected a due process violation for the failure to charge the violation of Brendan's Law as the basis for second degree murder conviction. Rather it held: As we have explained, "[m]urder is defined by § 11–23–1 as '[t]he unlawful killing of a human being with malice aforethought.' " *State v. Diaz*, 46 A.3d 849, 861 (R.I. 2012). Under § 11–23–1, "first-degree murder is '[e]very murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing' or any murder committed during the commission of certain enumerated felonies." *Id.* (quoting § 11–23–1). Second-degree murder, on the other hand, is "any killing of a human being committed with malice aforethought that is not defined by statute as first-degree murder." *Id.* at 862 (quoting *State v. Parkhurst*, 706 A.2d 412, 421 (R.I. 1998)). Of particular relevance to this case, it is well settled that "[t]his Court has recognized three possible 'theories of second-degree murder, each grounded in a different aspect of malice aforethought.' " *Id.* (quoting *State v. Gillespie*, 960 A.2d 969, 976 (R.I. 2008)). We have distilled those theories of second-degree murder to the following formulation:

"The first theory involves those killings in which the defendant formed a momentary intent to kill contemporaneous with the homicide. * * * The second theory includes felony murder for inherently dangerous felonies that are not expressly listed within the

statutory definition of first-degree murder. * * * The third theory of second-degree murder involves those killings in which the defendant killed with wanton recklessness or conscious disregard for the possibility *657 of death or of great bodily harm." *Id.* (internal quotation marks omitted). State v. Patino, 188 A.3d 646, 656–57 (R.I. 2018)

The net result of allowing the jury to convict on the basis of second degree felony murder is that of removing the malice aforethought proof requirement and instead allowing conviction of second-degree murder, upon proof that the defendant violated a criminal statute which proscribed, inter alia, similar actions. It was maintained below that this result runs afoul of the merger doctrine and while grounded in precedent, conflicts with long standing principles of criminal law. Most states hold that per the merger doctrine, which holds that a criminal assault cannot serve as the predicate felony for the felony murder rule. Bonnie, R.J. et. Al. Criminal Law, Second Edition, Foundation Press, New York, N.Y. 2004, p. 865. The question of charging the degree of homicide in a felony murder has always been troublesome.

The merger doctrine holds that the felony murder may not be dedicated upon a felony that "is an integral part of the homicide and is an offense included in fact with the offense charged. People v. Ireland 70 Cal. 2d 522,539 (1969) (applying the principle where the felonious assault and the homicide were committed against the same victim, holding the defendant could not be convicted of felony murder for the killing of his wife by assaulting her with a deadly weapon. Illustrative of the damage to the defendant's due process rights is the holding of the Supreme Judicial Court in Commonwealth v. Brown, 477 Mass. 805, 832, 81 N.E.3d 1173, 1196 (2017):

"We have recognized that the application of the felony-murder rule erodes "the relation between criminal liability and moral culpability." Matchett, 386 Mass. at 507, 436 N.E.2d 400, quoting People v. Washington, 62 Cal.2d 777, 783, 44 Cal.Rptr. 442, 402 P.2d 130 (1965). It is time for us to eliminate the last vestige of these two abandoned principles and end their application in our common law of felony-murder. Doing so means that criminal liability for murder in the first or second degree will be predicated on proof that the defendant acted with malice or shared the intent of a joint venturer who acted with malice. The sole remaining function of felony-murder will be to elevate what would otherwise be murder in the second degree to murder in the first degree where the killing occurs during the commission of a life felony.[4]

Commonwealth v. Brown, 477 Mass. 805, 832, 81 N.E.3d 1173, 1196 (2017)

In Brown the court explained: "We have noted that, in this regard, our common law of felony-murder is an exception to our general rule that "we require proof of a defendant's intent to commit the crime charged, and do not conclusively presume such intent from the intent to commit another crime." Tejeda, 473 Mass. at 276, 41 N.E.3d 721. In fact, we have said, "A felony-murder rule that punishes all homicides committed in the perpetration of a felony whether the death is intentional, unintentional or accidental, without the necessity of proving the relation of the perpetrator's state of mind to the homicide, violates the most fundamental principle of the criminal law—'criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result.' " Matchett, 386 Mass. at 506-507, 436 N.E.2d 400, quoting Aaron, 409 Mich. at 708, 299 N.W.2d 304.

The consequence of this exception to "the most fundamental principle of the criminal law" is that, if a defendant drops his or her firearm and accidentally shoots someone during the commission of a felony, the defendant is guilty of both the underlying felony and felony-murder if the shooting proves fatal. But if the victim survives, the defendant is guilty only of the underlying felony, and is not criminally responsible for the shooting. The defendant's liability for the shooting rests, not on the defendant's conduct, but on whether the victim lives or dies. See, e.g., Hanright, 466 Mass. at 308-309, 994 N.E.2d 363 ("The intent to commit armed robbery, although sufficient to support liability for felony-murder on a theory of joint venture, is insufficient to support liability for" additional offenses against other, surviving police officers who attempted to apprehend accomplice); Richards, 363 Mass. at 302, 307-308, 293 N.E.2d 854 (defendant who was waiting near getaway vehicle in armed robbery may be found guilty of assault with intent to murder police officer committed by accomplice only if defendant had specific intent to kill police officer)."

Commonwealth v. Brown, 477 Mass. 805, 831–32, 81 N.E.3d 1173, 1195–96 (2017)

Where a defendant participates in an armed robbery but does not have the requisite intent for murder, the defendant will be found guilty of involuntary manslaughter if he or she acted wantonly or recklessly. Where a defendant does not participate in the killing or otherwise lacked the intent required to prove murder or manslaughter, the defendant will not go free because he or she can still be convicted of the underlying armed robbery he or she committed, and a judge in setting the sentence on that underlying felony can take into account the aggravating factor that the felony resulted in a victim's death. Where the defendant is found guilty of murder and the

murder is committed "in the commission or attempted commission of a crime punishable with ... imprisonment for life," the defendant will be guilty of murder in the first degree, regardless of whether the murder was premeditated or committed with extreme atrocity or cruelty. G.L.c. 265, § 1. In the instant matter a fair trial for the Defendant ought to have been charged in this manner. Indeed, that is what the defendant asked for. . Defendant urged that the use of felony murder rule was not indicated here and had the Trial Justice accepted that the state would have been left to the proof structure set out in Brown. Given that the Trial Justice's fears articulated in support of the second degree felony murder instructions were decidely unfounded.

In Brown, the S.J.C. reasoned: "We are not the first to do this. Great Britain has abolished felony-murder liability by statute, providing that "[w]here a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought ... as is required for a killing to amount to murder when not done in the course or furtherance of another offence." Homicide Act of 1957, 5 & 6 Eliz. 2, c. 11, § 1. See Tejeda, 473 Mass. at 277 n.9, 41 N.E.3d 721. Michigan has abolished felony-murder liability under its common law, id., citing Aaron, 409 Mich. at 727-729, 299 N.W.2d 304, and Hawaii and Kentucky have abolished felony-murder liability by statute. Tejeda, supra, citing 7A Hawaii Rev. Stat. § 707-701 commentary, and Ky. Rev. Stat. Ann. § 507.020, 1974 commentary. Other States have not abolished the doctrine but have significantly departed from the traditional formulation. See Tejeda, supra, citing State v. Doucette, 143 Vt. 573, 582, 470 A.2d 676 (1983) (holding that felony-murder requires proof of malice, but that malice can be inferred "from evidence presented that the defendant intentionally set in motion a chain

of events likely to cause death or great bodily injury, or acted with extreme indifference to the value of human life"), Del. Code Ann. tit. 11, §§ 635, 636 (2007) (requiring defendant to act with recklessness, for murder in the first degree, or criminal negligence, for murder in the second degree), and N.Y. Penal Law §§ 125.25(3), 125.27 (McKinney 2009) (setting forth affirmative defense where joint venturer rather than defendant commits act causing death). The Model Penal Code also has abandoned the traditional doctrine of felony-murder, requiring the homicide to be purposeful, knowing, or reckless in order to constitute murder, but providing for a rebuttable presumption of recklessness where the homicide occurred *834 during the commission of certain felonies. Model Penal Code §§ 1.12(5), 210.2(1)(b) (Official Draft and Revised Comments 1985). See Matchett, 386 Mass. at 503 n.12, 436 N.E.2d 400."Commonwealth v. Brown, 477 Mass. 805, 833–34, 81 N.E.3d 1173, 1197 (2017)

It is respectfully submitted the compelling reasoning behind these changes is grounded in fundamental fairness and due process. The substitution of proof of malice aforethought by virtue of the felony murder rule for violation of a till then unnamed statute is an evident denial of due process.

Rhode Island's own precedent supports this thesis; in State v. Stewart, 663 A.2d 912, 916 (R.I. 1995) unlike here the defendant was charged with second degree murder: "Ten months after Travis's death defendant was indicted on charges of second-degree murder, wrongfully causing or permitting a child under the age of eighteen to be a habitual sufferer for want of food and proper care (hereinafter sometimes referred to as "wrongfully permitting a child to be a habitual sufferer"), and manslaughter. The

second-degree-murder charge was based on a theory of felony murder. The prosecution did not allege that defendant intentionally killed her son but rather that he had been killed during the commission of an inherently dangerous felony, specifically, wrongfully permitting a child to be a habitual sufferer. Moreover, the prosecution did not allege that defendant intentionally withheld food or care from her son. Rather, the state alleged that because of defendant's chronic state of cocaine intoxication, she may have realized what her responsibilities were but simply could not remember whether she had fed her son, when in fact she had not."

Here the crux of the court's felony murder charge is the reference the Court first introduces as Brendan's Law. While the statutory reference did not appear in the record it seems clear that it is **R.I. Gen. Laws § 11-9-5.3. Child abuse--Brendan's Law**[1]. Its

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[1] (a) This section shall be known and may be referred to as "Brendan's Law".
(b) Whenever a person having care of a child, as defined by § 40-11-2(2), whether assumed voluntarily or because of a legal obligation, including any instance where a child has been placed by his or her parents, caretaker, or licensed or governmental child placement agency for care or treatment, knowingly or intentionally:
(1) Inflicts upon a child serious bodily injury, shall be guilty of first degree child abuse.
(2) Inflicts upon a child any other physical injury, shall be guilty of second degree child abuse.
(c) For the purposes of this section, "serious bodily injury" means physical injury that:
(1) Creates a substantial risk of death;
(2) Causes protracted loss or impairment of the function of any bodily parts, member or organ, including any fractures of any bones;
(3) Causes serious disfigurement; or
(4) Evidences subdural hematoma, intercranial hemorrhage and/or retinal hemorrhages as signs of "shaken baby syndrome" and/or "abusive head trauma."
(d) For the purpose of this section, "other physical injury" is defined as any injury, other than a serious bodily injury, which arises other than from the imposition of nonexcessive corporal punishment.
(e) Any person who commits first degree child abuse shall be imprisoned for not more than twenty (20) years, nor less than ten (10) years and fined not more than ten thousand dollars ($10,000). Any person who is convicted of second degree child abuse shall be imprisoned for not more than ten (10) years, nor less than five (5) years and fined not more than five thousand dollars ($5,000).

clear that the state did not base its case on this theory in its presentation nor as well did the defense in defending it. It is clear that the statute may be violated in a number of ways with certain exceptions ranging from serious bodily injury to other bodily injury except for that occasioned by non-excessive corporal punishment. It is manifestly evident that the trial justice injected this uncharged statute into the case as discussed above to fill a perceived need of it in the Jury Instructions:

> "So my concern , and I actually
> articulated it into the night , was if I don't charge
> felony murder second degree , there would be a situation,
> a huge gap in my Instructions whereby the jury could
> determine that the Defendant acted without malice."

Trial Justice jury Instructions. Vol. V. P. 912.

The Rhode Island Supreme Court in State v. Patino, 188 A.3d 646, 659 (R.I. 2018) held that: When she instructed the jury, the trial justice quoted directly from

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(f) Any person who commits first degree child abuse on a child age five (5) or under shall not on the first ten (10) years of his or her sentence be afforded the benefit of suspension or deferment of sentence nor of probation for penalties provided in this section; and provided further, that the court shall order the defendant to serve a minimum of eight and one-half (8 ½) years or more of the sentence before he or she becomes eligible for parole.
(g) Any person who has been previously convicted of first or second degree child abuse under this section and thereafter commits first degree child abuse shall be imprisoned for not more than forty (40) years, nor less than twenty (20) years and fined not more than twenty thousand ($20,000) dollars and shall be subject to subsection (f) of this section if applicable. Any person who has been previously convicted of first or second degree child abuse under this section and thereafter commits second degree child abuse shall be imprisoned for not more than twenty (20) years, nor less than ten (10) years and fined not more than ten thousand ($10,000) dollar

11 R.I. Gen. Laws Ann. § 11-9-5.3 (West)

Brendan's Law in defining "serious bodily injury."[8] It follows, then, that anything other than a "serious bodily injury"—meaning *any* "other physical injury"—could be understood as a physical injury "however slight" inflicted upon a child. Although those are not the precise words set forth in the statute, in our view, the trial justice's characterization of "any other physical injury" as being synonymous with an injury "however slight" did not so distort the statute's language as to mislead or confuse the jury. Petitioner disagrees and maintains that where the jury was allowed to consider second degree felony murder he was entitled at the very least that the jury be required to find that he committed an inherently dangerous felony, not actions that however slight cause injury in substitute.

By analogy reference my be made to this task of discerning which predicate state and federal offenses were "violent felonies" for Armed Career Criminal sentencing enhancement purposes. This Court hasstated: When the adjective "violent" is attached to the noun "felony," its connotation of strong physical force is even clearer. See *id.*, at 1188 (defining "violent felony" as "[a] crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a dangerous weapon"). Johnson v. United States, 559 U.S. 133, 138–41, 130 S. Ct. 1265, 1270–71, 176 L. Ed. 2d 1 (2010). Surely a felony described as "inherently dangerous to human life" connotates a similar degree of violence. The Supreme Court, Justice Scalia for the Court, held that defendant's prior battery conviction under Florida law was not a "violent felony" under the ACCA.

In Johnson v. United States, the U.S. Supreme Court stated:

"Section 924(e)(2)(B)(i) does not define "physical force," and we therefore give the phrase its ordinary meaning. *Bailey v. United States,* 516 U.S. 137, 144–145, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995). The adjective "physical" is clear in meaning but not of much help to our inquiry. It plainly refers to force exerted by and through concrete bodies—distinguishing physical force from, for example, intellectual force or emotional force. It is the noun that poses the difficulty; "force" has a number of meanings. For present purposes we can exclude its specialized *139 meaning in the field of physics: a cause of the acceleration of mass. Webster's New International Dictionary 986 (2d ed.1954) (hereinafter Webster's Second). In more general usage it means "[s]trength or energy; active power; vigor; often an unusual degree of strength or energy," "[p]ower to affect strongly in physical relations," or "[p]ower, violence, compulsion, or constraint exerted upon a person." *Id.,* at 985. Black's Law Dictionary 717 (9th ed.2009) (hereinafter Black's) defines "force" as "[p]ower, violence, or pressure directed against a person or thing." And it defines "physical force" as "[f]orce consisting in a physical act, esp. a violent act directed against a robbery victim." *Ibid.* All of these definitions suggest a degree of power that would not be satisfied by the merest touching.

There is, however, a more specialized legal usage of the word "force": its use in describing one of the elements of the common-law crime of battery, which consisted of the intentional application of unlawful force against the person of another. See 2 W. LaFave & A. Scott, Substantive Criminal Law § 7.15(a), p. 301 (1986 and Supp.2003); accord, Black's 173. The common law held this element of "force" to be satisfied by even the slightest offensive touching. See 3 W. Blackstone, Commentaries on the Laws of England 120 (1768) (hereinafter Blackstone); *Lynch v. Commonwealth,* 131 Va. 762,

765, 109 S.E. 427, 428 (1921); see also 2 LaFave & Scott, *supra,* § 7.15(a). The question is whether the term "force" in 18 U.S.C. § 924(e)(2)(B)(i) has the specialized meaning that it bore in the common-law definition of battery. The Government asserts that it does. We disagree.

Although a common-law term of art should be given its established common-law meaning, *United States v. Turley,* 352 U.S. 407, 411, 77 S.Ct. 397, 1 L.Ed.2d 430 (1957), we do not assume that a statutory word is used as a term of art where that meaning does not fit. Ultimately, context determines meaning, *Jarecki v. G.D. Searle & Co.,* 367 U.S. 303, 307, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961), and we "do not force term-of-art definitions into contexts where they plainly *140 do not fit and produce nonsense," *Gonzales v. Oregon,* 546 U.S. 243, 282, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006) (Scalia, J., dissenting). Here we are interpreting the phrase "physical force" as used in defining not the crime of battery, but rather the statutory category of "violent felon[ies]," § 924(e)(2)(B). In *Leocal v. Ashcroft,* 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004), we interpreted **1271 the statutory definition of "crime of violence" in 18 U.S.C. § 16. That provision is very similar to § 924(e)(2)(B)(i), in that it includes any felony offense which "has as an element the use ... of physical force against the person or property of another," § 16(a). We stated:

"In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.' The ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes...." 543 U.S. at 11, 125 S.Ct. 377.

Just so here. We think it clear that in the context of a statutory definition of "*violent* felony," the phrase "physical force" means *violent* force—that is, force capable of causing physical pain or injury to another person. See *Flores v. Ashcroft,* 350 F.3d 666, 672 (C.A.7 2003) (Easterbrook, J.). Even by itself, the word "violent" in § 924(e)(2)(B) connotes a substantial degree of force. Webster's Second 2846 (defining "violent" as "[m]oving, acting, or characterized, by physical force, esp. by extreme and sudden or by unjust or improper force; furious; severe; vehement ... "); 19 Oxford English Dictionary 656 (2d ed.1989) ("[c]haracterized by the exertion of great physical force or strength"); Black's 1706 ("[o]f, relating to, or characterized by strong physical force"). When the adjective "violent" is attached to the noun "felony," its connotation of strong physical force is even clearer. See *id.,* at 1188 (defining "violent felony" as "[a] crime characterized by extreme physical force, such as murder, forcible rape, and *141 assault and battery with a dangerous weapon"); see also *United States v. Doe,* 960 F.2d 221, 225 (C.A.1 1992) (Breyer, C.J.) ("[T]he term to be defined, 'violent felony,' ... calls to mind a tradition of crimes that involve the possibility of more closely related, active violence"). (underlining added). Johnson v. United States, 559 U.S. 133, 138–41, 130 S. Ct. 1265, 1270–71, 176 L. Ed. 2d 1 (2010) In the context of a case founded on transferred intent, to form the basis for malice aforethought due process requires that for a conviction of second degree murder, no less a rigorous analysis should apply. That analysis makes clear that where the perpetration of the underlying felony can be occasioned by injury no matter how slight, it cannot meet the definition for 'inherently dangerous felony' in its manner of commission. In describing it to do so basic due process was violated and the jury left unable to discharge its duty to determine whether

the elements of the offense charged were proved beyond a reasonable doubt, the bedrock expectation of a criminal trial.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Rhode Island be granted.

Respectfully Submitted,

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