No. _____

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

TIANA WOOD-SIMS

Petitioner/Appellant.

PETITION FOR REVIEW

Jeffrey Erwin Ellis
Attorney for Ms. Wood-Sims
1500 SW First Ave. Ste 1000
Portland OR 97201
503.222.9830 (o)
JeffreyErwinEllis@gmail.com

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A. IDENTITY OF PETITIONER

Tiana Wood-Sims asks this court to accept review of the decision designated in Part B of this motion.

B. COURT OF APPEALS DECISION

On December 30, 2024, the Court of Appeals dismissed Ms. Wood-Sims' appeal. A copy is attached.

C. ISSUE PRESENTED FOR REVIEW

Is the presumptive punishment for a second-degree felony murder constitutionally disproportionate as applied to an accomplice to a non-violent predicate crime who does not personally participate in the homicidal act or intend that others do so?

D. STATEMENT OF THE CASE

Tiana Wood-Sims was charged in King County with second-degree felony murder. The amended information alleged:

That the defendant Tiana Rose Wood-Sims in King County, Washington, on or about June 3, 2013, together with others, while committing and attempting to commit the crime of Theft in the First Degree, and in the course of and in furtherance of said crime and in immediate flight therefrom, did cause the death on or about June 3, 2013, of Latasha Walker, a human being, who was not a participant in the crime;

CP 1.Ms. Wood-Sims was 23 years old at the time of the crime. CP 36-43.

On August 20, 2015, Ms. Wood-Sims pleaded guilty. Her guilty plea statement set forth the factual basis for her plea.

I helped arrange and I assisted Corey Mann, Gary Sanders, and Michael Galloway so that they could carry out a theft in the first degree of Latasha Walker. I was to receive a portion of the proceeds from the theft. During the theft, while the men were in the bedroom, at least one of the men assaulted Latasha. Latasha died as a result of the injuries she received during this theft which I helped accomplish.

CP 2-27. The plea agreement incorporated the State's probable cause statement for purposes of sentencing. CP 2-27. That statement described how Ms. Wood-Sims, together with three others, helped plan the theft of the victim and how, when the men arrived, they assaulted Ms. Walker, causing her death. *Id.*

At sentencing, Ms. Wood-Sims sought an exceptionally lenient sentence, arguing among other factors—the disproportionality that frequently results in a felony murder conviction which was pronounced in this case:

> Even when there's a crime and someone dies, it's felony murder, but it's a less culpable thing when these four things are present. One is that when there's many people committing a crime, the person in question did not commit the homicidal act, and there's no question that Tiana did not commit any homicidal act toward Latasha Walker.
>
> Second, Tiana did not, in any way, solicit, command, request, importune, cause, or aid in the commission of a homicidal act toward Latasha Walker.
>
> Third, Tiana was not armed with a deadly weapon or any instrument or article or substance that was readily capable of causing death or serious physical injury.
>
> And fourth, Tiana had no reasonable grounds to believe that any other participant was armed. In fact, they weren't armed. There was no weapon, instrument, article, or substance used.

> Finally, Tiana had no reasonable grounds to believe that any other person intended to engage in conduct likely to result in death or serious physical injury, and this is the critical point. There was no need for anyone to hurt Latasha Walker and no reason for Tiana to believe that Latasha was going to get hurt at all.

RP 32- 33. See also RP 34 ("Your Honor, those proportionality cases that I was able to find and cite to the Court are relevant because the entire purpose of this sentencing requirement says that proportionality is relevant, and it should be considered.").

The judge rejected the request for an exceptional sentence reasoning that "Ms. Wood-Sims' culpability is higher…because she is the instigator of the felony that caused this, so I have…decided that I am going to give her kind of a mid-range sentence of 175." The judge then indicated that she required Ms. Wood-Sims "to have intervened," even "put herself at risk," but

because “she didn't,” the court rejected the defense argument. RP 42-43.

The court sentenced Ms. Wood-Sims, who had no criminal history, to 175 months in prison—a mid-range murder sentence. CP 36-43.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Introduction

The felony-murder doctrine is a stark exception to the fundamental principle of criminal law that someone’s culpability depends on their own actions and state of mind. The imposition of a murder-level sentence for someone who planned only a theft, did not participate in the homicidal act, did not intend to kill, and where the death was not reasonably foreseeable is both disproportionate and cruel. There is an unacceptable risk that such a sentence was improperly influenced by extralegal factors, including racial bias.

In this Petition for Review,[1] Ms. Wood-Sims contends that where a judge imposes a sentence for second-degree felony murder she must recognize and give mitigating effect to the reduced culpability for a minor accomplice to a non-violent crime who did not personally participate in the homicide and who did not possess any mens rea related to homicide. Put another way, because that did not happen here, Ms. Wood-Sims' sentence is constitutionally disproportionate.

Broadly speaking, this is hardly a novel claim, although it appears not to have been raised in

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[1] Ms. Wood-Sims again narrows her appeal. In her reply to the Court of Appeals, she withdrew her claim that her guilty plea contained insufficient facts to support a guilty finding. Here, she removes her claim that the crime of felony-murder is unconstitutional when based on a non-violent predicate crime. She does so not because she no longer contends those claims do not merit relief, but because her focus has always been on the unfairness of her sentence—one that treats her as equally culpable to someone who personally kills and acts with intent to kill.

Washington. As the United States Supreme Court held more than 40 years ago:

> It is fundamental that "causing harm intentionally must be punished more severely than causing the same harm unintentionally." H. Hart, Punishment and Responsibility 162 (1968). Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike and attributed to Enmund the culpability of those who killed the Kerseys. This was impermissible under the Eighth Amendment.

Enmund v. Florida, 458 U.S. 782, 798 (1982).

Starting with the recognition of decreased culpability in *Enmund*, this claim then adopts the rationale set forth in *State v. Houston-Sconiers,* 188 Wash. 2d 1, 21, 391 P.3d 409 (2017), that under these circumstances a sentencing court must consider and give mitigating effect due to the reduced culpability and "must have discretion to impose any sentence below the otherwise applicable SRA range."

Here, the trial judge stood this caselaw on its head concluding that Wood-Sims was equally culpable as someone who intentionally murdered because she set into motion a course of action that led to the victim's murder, even if she did not commit any act associated with the homicide and reasonably could not have foreseen that result.

The Court of Appeals abdicated, concluding that it was bound by the trial judge's findings regardless of whether the conclusion that followed was contrary to the law. *Opinion*, at 9 ("The record, however, shows the trial court considered Wood-Sims' request for an exceptional sentence and declined to grant it based on its assessment of Wood-Sims' level of culpability. This by definition is an exercise of the trial court's discretion.").

.

This Court should accept review to decide this important and recurring, if overlooked, constitutional issue, especially given that it conflicts, in part, with United States Supreme Court precedent. RAP 13.4.

2. Felony Murder Produces Disproportionate and Frequently Racially Disparate Outcomes

It is important to accurately set the stage.

Few common law doctrines and statutory definitions of crime have come under as much scholarly and public criticism as the felony murder rule.

That criticism has reached a fevered pitch over the last several years. See *e.g.*, Cohen, G. Ben and Levinson, Justin D. and Hioki, Koichi, *Racial Bias, Accomplice Liability, and the Felony Murder Rule: A National Empirical Study*, 101 Denver Law Review 65 (2024); Perry Moriearty, Kat Albrecht, and Caitlin Glass, *Race, Racial Bias, and Imputed Liability*

Murder, 51 Fordham Urb. L.J. 675 (2024); Nazgol Ghandnoosh, Emma Stammen and Connie Budaci, *Felony Murder: An On-Ramp for Extreme Sentencing* (https://www.sentencingproject.org/reports/felony-murder-an-on-ramp-for-extreme-sentencing/).

The Felony Murder Reporting Project represents an effort to collect national data regarding state sentencing impacts. https://felonymurderreporting.org/.

After collecting conviction and sentencing information from the Washington Dept. of Corrections that it described as "among the highest [quality] in the country," the Project found that in Washington, "you are 12.9625 times more likely to be incarcerated for felony murder if you are Black than if you are white." "They make up 4% of Washington citizens and 31% of those incarcerated for felony murder." The *Project* also found the median age for felony murder is 25.

felonymurderreporting.org/states/wa/. See also Beth Caldwell, *The Twice Diminished Culpability of Juvenile Accomplices to Felony Murder*, 11 U.C. Irvine L. Rev. 905, 907 (2021) (noting that "an estimated twenty to twenty-six percent of all juveniles prosecuted for murder are charged under felony murder theories"); Kat Albrecht, *The Stickiness of Felony Murder: The Morality of A Murder Charge*, 92 Miss. L.J. 481, 521 (2023) ("What the case of felony murder does do, however, is demonstrate that the formalized letter of the law may not eliminate inequality but rather serves to legally legitimate a moral decision about culpability in a way that systematically harms Black defendants.").

Ms. Wood-Sims was 23 at the time of her crime and has a mixed-race (African American, Native American, and Mexican American) background.

The authors of the article, *Race, Racial Bias, and Imputed Liability Murder* concluded that the felony murder and accomplice liability murder doctrines result in prosecutors basing charging decisions on subjective, extra-legal proxies, like "dangerousness" and "group criminality." Multiple studies have shown that decision-makers are more likely to attribute these proxies to Black defendants and, in turn, treat them more punitively. 51 Fordham Urb. L.J. at 676.

Racial disparities in felony murder convictions and sentences are due in part to the collision of two factors: the uniquely broad prosecutorial discretion that felony murder affords prosecutors, and the biases (both implicit and explicit) operating throughout the criminal legal system. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the*

Exercise of Prosecutorial Discretion, 35 Seattle U. L. Rev. 795, 797 (2012).

In other words, the felony murder rule presents an opportunity for implicit and explicit bias to thrive.

To make matters worse, accomplice liability, acting in concert with the felony murder doctrine, can render a person guilty of murder even where the defendant did not commit, assist, or expect the homicidal act—a huge deficiency in the otherwise applicable proof concerning the actus reus and mens rea. Cohen, G. Ben and Levinson, Justin D. and Hioki, Koichi, Racial Bias, *Accomplice Liability, and the Felony Murder Rule: A National Empirical Study,* 101 Denver Law Review 65 (2024)

It is true that felony murder requires at least that the person be an accomplice to the predicate felony. However, it requires no actus rea or mens rea

related to the homicide to render someone guilty of murder. And, for second-degree felony murder, the predicate crime can be a non-violent crime that ordinarily does not present any appreciable or foreseeable risk that a murder will follow.

This is not only an academic discussion. The sentencing judge viewed Ms. Wood-Sims, a young, mixed-race woman, as equally culpable as the actual killers, because "she is the instigator of the felony that caused this." Ms. Wood-Sims "could have intervened." "She might have put herself at risk had she gone back there and said, 'Stop,' but she could have done that, and she didn't." RP 42. It simply does not follow that the instigator of a non-violent crime is equally culpable as someone who acts with unexpected, unforeseen, and unnecessary (to the accomplishment of the predicate crime) intent. *Enmund* says exactly that.

On the other hand, the sentencing judge's brief comments are entirely consistent with the burgeoning scholarly criticisms of the outcomes produced by the felony murder rule.

Treating Wood-Sims as equally culpable as the murderers because she put into motion a non-violent crime reveals likely unconscious, but explainable bias. Entitativity is the perception of group cohesiveness, which leads to equal treatment for disparate conduct. It can apply to racial groups. People tend to perceive groups with shared physical characteristics, like skin color, as more entitative. Todd D. Nelson, Ed., *Handbook of Prejudice, Stereotyping, and Discrimination* (2009); Agadullina ER, Lovakov AV, *Are people more prejudiced towards groups that are perceived as coherent? A meta-analysis of the relationship between out-group entitativity and*

prejudice. Br J Soc Psychol. (2018) at 703-731. Simply put, racial minorities are often viewed as having shared intent, while white individuals are judge independently. This helps explain why courts impose more severe punishments for high entitativity (vs. low entitativity) perpetrator groups, particularly in the presence of morally mitigating circumstances that typically lessen punitiveness. Reiman, Anna-Kaisa & Sawaoka, Takuya & Dovidio, John, *Why do we punish groups? High entitativity promotes moral suspicion.* Journal of Experimental Social Psychology (2012) at 931–936.

3. Minor Accomplices are Less Culpable

Such a practice cannot withstand constitutional scrutiny, as race is a quintessentially arbitrary and pernicious factor that has nothing to do with individual moral culpability. See *Buck v. Davis*, 580 U.S. 100, 123

(2017) (explaining that "a basic premise of our criminal justice system" is that the law must "punish[] people for what they do, not who they are").

It is not enough to conclude that the sentencing judge considered and rejected Ms. Wood-Sims' request for an exceptional sentence. The sentencing judge did so after concluding that Ms. Wood-Sims failed to act to stop the homicide or to protect the victim, an express element of the statutory mitigating factor. Certainly, if Wood-Sims had done so, her culpability would be even more reduced—if the homicidal intent was not refocused on her, a dynamic that the judge recognized may have resulted, but Wood-Sims was nevertheless required to take such action to avail herself of the mitigating factor specified by statute.

Instead, Wood-Sims seeks a rule that requires a court to consider and give mitigating weight for all

sentencing hearings involving felony murder where the defendant did not personally cause the death of the victim but was only an accomplice to the underlying predicate crime. While a judge can still weigh that mitigating factor with any aggravating factor, the sentencing court must recognize the decreased culpability for such a person in comparison to others who commit murder. See e.g., *State v. Bassett,* 192 Wash. 2d 67, 87, 428 P.3d 343 (2018) (LWOP barred for juveniles because "children are less criminally culpable than adults.").

To be clear, Wood-Sims is not seeking a categorial exemption from a standard range sentence, only the requirement to consider and give appropriate mitigating effect in every such case.

F. CONCLUSION

Based on the above, this Court should grant review.

CERTIFICATE OF WORD COUNT

This Petition has 2377 words.

DATED this 27th day of January 2025

RESPECTFULLY SUBMITTED:

s/Jeffrey Erwin Ellis
Jeffrey Erwin Ellis #17139
Attorney for Ms. Wood-Sims

1500 SW First Ave. Ste 1000
Portland OR 97201
JeffreyErwinEllis@gmail.com

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TIANA ROSE WOOD-SIMS, Appellant.	No. 84075-4-I DIVISION ONE UNPUBLISHED OPINION

COBURN, J. — Tiana Rose Wood-Sims pleaded guilty to an amended charge of felony murder in the second degree under RCW 9A.32.050(1)(b) based on her accomplice liability for theft in the first degree. She now appeals her conviction, contending that felony murder in the second degree based on accomplice liability is an unconstitutional violation of due process and cruel punishment protections.[1] Alternatively, she appeals her sentencing, contending that the standard sentencing range for felony murder in the second degree is unconstitutional and the trial court abused its discretion by refusing to consider her request for an exceptional sentence. We disagree and affirm the conviction and sentencing.

[1] Because Wood-Sims in her reply brief withdraws her initially briefed challenge to the sufficiency of her guilty plea, we do not address this argument.

FACTS

In March 2014 Wood-Sims was charged with felony murder in the first degree for the death of Latasha Walker. See RCW 9A.32.030(1)(c). The predicate felony was robbery in the first degree. In August 2015 Wood-Sims pleaded guilty to the amended charge of felony murder in the second degree pursuant to plea negotiations. See RCW 9A.32.050(1)(b). The predicate felony was theft in the first degree.

In her statement of defendant on plea of guilty, Wood-Sims admitted on June 3, 2013 she "participated in arranging for Corey Mann, Gary Sanders, and Michael Galloway to commit a theft in the first degree from my friend Latasha Walker at her home." Wood-Sims told Mann where Walker's home was and that he could find $7,000 and pills in Walker's bedroom dresser. Wood-Sims admitted she was in contact with Mann throughout the day of the crime while she was with the victim.

Wood-Sims' plea statement continues:

> When Latasha and I arrived back.at her apartment, Corey Mann, Gary Sanders, and Michael Galloway came to Latasha's apartment door. I pretended that I did not know why they were there, and I asked Latasha if it was OK to let them in. She was fooled and said OK, and I let them inside. Latasha was in her bedroom. All three men eventually went into Latasha's bedroom and I stayed in the living room. I knew they were looking for her money and pills to steal from her in her bedroom. I heard noises like things being knocked around in the room, and I heard Latasha call for me to help her. I did not help her. I did not go in the bedroom. While in the bedroom the men stole hats, a computer, some DVDs, a cell phone, and jewelry from Latasha's person. Corey Mann or one of the others took my cell phone too, to make it look like I was a victim of the crime.
>
> ....
>
> I helped arrange and I assisted Corey Mann, Gary Sanders, and Michael Galloway so that they could carry out a theft in the first degree of Latasha Walker. I was to receive a portion of the proceeds from the theft. During the theft, while the men were in the bedroom, at least one of the men

> assaulted Latasha. Latasha died as a result of the injuries she received during this theft which I helped accomplish.

Galloway pleaded guilty to murder in the second degree in April 2015. Sanders and Mann were convicted of murder in the first degree in March 2016. Wood-Sim's plea agreement also incorporated the State's probable cause statement for the purpose of sentencing. According to the statement, Wood-Sims is Mann's cousin. On the day of the crime, Mann told Galloway his cousin texted him "it's ready" before Galloway, Mann, and Sanders went to Walker's apartment. Cell phone records showed that Wood-Sims and Mann communicated 62 times on the day of the crime, with their communication ceasing at the time of the crime.

In March 2016 Wood-Sims requested an exceptional mitigated sentence "at the bottom of the standard range [of 123 to 220 months] or below that range." The State requested Wood-Sims be sentenced at the standard range maximum of 220 months. During the sentencing hearing, the trial court acknowledged "[t]here can be an argument for below the [sentencing] range" but rejected Wood-Sims' argument. The trial court stated that "the difficulty with the crime of felony murder is that no one ever goes into a felony planning on murdering someone." "Of course the death was not intended. That's not the basis for reducing the sentence." The court looked at the issue of sentencing proportionality in Wood-Sims' case and although it initially had questions about her culpability the court explained:

> ... I continued to read, and quite frankly, I think that, but for Ms. Wood-Sims' actions, no one would be here; that she was the person that initiated, that caused ... this felony to occur and the death to occur, and without her Latasha would be alive today.

The trial court differentiated Wood-Sims' crime from other felony murders where a defendant brings a gun and "it is anticipated that a deadly weapon is going to be at least shown," which can result in someone being shot. However, the trial court stated if Wood-Sims "had just not opened" the apartment door then "maybe, all through that intent, we would not be here today, but she made the choice to do that." "Wood-Sims' culpability is higher ... because she is the instigator of the felony that caused this." "I don't think she deserves the low end of the sentence because she instigated this; she is the cause of why we are here." The trial court also stated as part of its sentencing decision that "Wood-Sims could have intervened" while Walker was being attacked.

The court denied Wood-Sims' motion for an exceptional sentence and sentenced her to "a mid-range sentence of 175 [months]" as "proportionate to the sentencing guidelines." Wood-Sims appeals.[2]

DISCUSSION

Felony Murder

A. Due Process and Police Powers

Relying on State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021), Wood-Sims contends the absence of a homicidal mens rea within the felony murder in the second degree statute exceeds state police powers in violation of due process. We disagree.

"[T]he State's police power is limited by the due process clause or 'by constitutional protection afforded certain personal liberties.'" Id. at 179 (quoting State v. Talley, 122 Wn.2d 192, 199, 858 P.2d 217 (1993)). In Blake, our state Supreme Court

[2] Wood-Sims filed her untimely notice of appeal in May 2022. After reviewing declarations from Wood-Sims and her attorney who represented her at sentencing, this court's commissioner granted Wood-Sims' request to enlarge the time to file an appeal.

reiterated that a state's police power, as "'an essential element of the power to govern,'" empowers it to restrain harmful conduct. Id. at 177 (quoting Shea v. Olson, 185 Wn.2d 143, 153, 53 P.2d 615 (1936)). A state's police power is only restricted by the requirements that it must reasonably tend to rectify "'some evil,'" or promote the state's interest, and that it be employed within constitutional bounds. Id. (quoting Shea, 185 Wn.2d at 153). The Blake court held that while the state may create strict liability crimes, it may not criminalize "wholly innocent and passive nonconduct." Id. at 193. "[E]ntirely passive" conduct is not "calculated to harm." Id. at 180-81; City of Seattle v. Pullman, 82 Wn.2d 794, 795, 514 P.2d 1059 (1973).

Wood-Sims does not argue that felony murder in the second degree is a strict liability crime that criminalizes wholly passive conduct. She concedes that, under the felony murder rule, culpability is based on the predicate felony conduct. See State v. Carter, 154 Wn.2d 71, 79, 109 P.3d 823 (2005). Instead, Wood-Sims misinterprets Blake as applying to a "nonkiller participant" whose mens rea is only based on the predicate felony. See id.

In fact, the Blake court confirmed its holding did "nothing ... to disturb the legislature's power to enact strict liability crimes." 197 Wn.2d at 193. A state may opt to create a strict liability crime, or "'public welfare offense,'" based on various nonexclusive factors, including "the seriousness of the harm to the public" or the importance of "stamp[ing] out harmful conduct at all costs." State v. Bash, 130 Wn.2d 594, 605-06, 925 P.2d 978 (1996) (quoting 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW § 3.8, at 341-44 (1986)). Rather, in its voiding of a simple drug possession statute that made it "unlawful for any person to possess a controlled

substance," the court acknowledged the statute allowed Blake to be convicted merely for wearing jeans with pockets. Blake, 197 Wn.2d at 176, 195. Conversely, "[v]alid strict liability crimes require that the defendant actually perform some conduct." Id. at 195.

Our state Supreme Court has held that "[b]ecause Washington's felony murder statute clearly holds felons strictly responsible for any deaths occurring under the conditions specified by the statute, the issue is whether … [the defendant's] actions fall within the statute." State v. Dennison, 115 Wn.2d 609, 616, 801 P.2d 193 (1990). Thus, the predicate felony constitutes the necessary criminal conduct for the strict liability crime of felony murder. See RCW 9A.32.030(1)(c), .050(1)(b).

In regard to mens rea, Wood-Sims also cites State v. Cronin for the principle that criminal liability should be imposed for accomplices only if the accomplice has general knowledge of "the crime" for which they are charged. 142 Wn.2d 568, 579, 14 P.3d 752 (2000). But Cronin is inapposite. The Cronin court addressed jury instructions for co-defendant's charges for assault and premeditated murder in the first degree based on accomplice liability. Id. at 580-81. The court held that each jury instruction departed from the accomplice liability statute, RCW 9A.08.020, by allowing the jury to convict if they found the defendant knew his actions would promote or facilitate "a crime" as opposed to "the crime" for which he was specifically charged. Id. at 580-82, 586 (emphasis added).

In charging felony murder in the second degree, the government is not required to prove intent to kill or any mental element in regard to the actual killing. State v. Gamble, 154 Wn.2d 457, 468, 114 P.3d 646 (2005). Rather, as a strict liability crime, the felony murder rule aims to deter offenders from accidentally, negligently, or

recklessly causing deaths by holding them accountable for such killings. Dennison, 115 Wn.2d at 615-16; Bowman v. State, 162 Wn.2d 325, 333, 172 P.3d 681 (2007). "The state of mind necessary to prove a felony murder is the same state of mind necessary to prove the underlying felony." State v. Osborne, 102 Wn.2d 87, 93, 684 P.2d 683 (1984); see also State v. Carter, 119 Wn. App. 221, 231, 79 P.3d 1168 (2003) (stating felony murder "is a strict liability crime for which the only mens rea that need be shown is that necessary to prove the predicate felony"), aff'd, 154 Wn.2d 71 (2005) (citing State v. Roberts, 142 Wn.2d 471, 511 n.14, 14 P.3d 713 (2000)). Therefore, under the accomplice statute, the underlying offense for felony murder is "the crime" a defendant commits "with knowledge" that their conduct "will promote or facilitate" its commission. RCW 9A.08.020, see RCW 9A.32.030(c), .050(1)(b). "The predicate felony merely substitutes for the mental state the State is otherwise required to prove" to establish murder culpability.[3] State v. Kosewicz, 174 Wn.2d 683, 692, 278 P.3d 184 (2012).

In the instant case, the underlying felony to Wood-Sims' felony murder conviction is theft in the first degree wherein there must be intent to deprive the victim of property or services. RCW 9A.56.020(1). Because Wood-Sims does not otherwise challenge her accomplice liability for the underlying offense of theft in the first degree, her argument necessarily fails.

On the issue of mens rea, Wood-Sims also argues the statutory affirmative defense to felony murder in the second degree improperly shifts the burden of proof in violation of due process by requiring the defendant to prove by preponderance of the evidence that the defendant "[h]ad no reasonable grounds to believe that any other

[3] Wood-Sims concedes this point in her reply brief.

participant intended to engage in conduct likely to result in death or serious physical injury."[4] RCW 9A.32.050(1)(b)(iv).

However, "[t]he State is foreclosed from shifting the burden of proof to the defendant only 'when an affirmative defense ... negate[s] an element of the crime.'" Smith v. United States, 568 U.S. 106, 110, 133 S. Ct. 714, 184 L. Ed. 2d 570 (2013) (quoting Martin v. Ohio, 480 U.S. 228, 237, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987) (Powell, J., dissenting)). As discussed above, felony murder is a strict liability crime that does not require its own mental element separate from the mens rea required by the predicate felony. The "allocation of the burden of proof raises a due process question only if the absence of an essential element of the crime is an affirmative defense." State v. Peyton, 29 Wn. App. 701, 719, 630 P.2d 1362 (1981); see State v. Gilcrist, 25 Wn. App. 327, 328-29, 606 P.2d 716 (1980). Because "Washington courts have long held that the underlying elements of the predicate felony are not essential elements of felony murder," Kosewicz, 174 Wn.2d at 692, the statutory defense to felony murder in the second degree does not fall into that category.[5] See also Blake, 197 Wn.2d at 188

[4] The statutory affirmative defense to felony murder in the second degree requires the defendant to prove four elements by preponderance of evidence; that the defendant:

> (i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and (ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and (iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and (iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

RCW 9A.32.050(1)(b).

[5] Wood-Sims' briefing also comments that the statutory defense under RCW 9A.32.050(1)(b) "can be defeated if any participant is armed with a weapon, a constitutionally protected right." Wood-Sims does not include authority to support this particular constitutional argument, nor does she present a substantive argument other than observing an asserted

(holding that because the simple possession statute lacked a mens rea element, "placing the burden to prove unwitting possession on the defendant does not 'negate' any existing element of the crime").

For the foregoing reasons, we conclude that felony murder in the second degree under RCW 9A.32.050 does not violate due process.

B. Cruel Punishment

Wood-Sims next contends that the application of the felony murder rule to accomplices of an underlying non-violent predicate felony is unconstitutional under the "evolving standards of decency" and the state constitution prohibiting cruel punishment. Wood-Sims argues that accomplices to a non-violent offense should be categorically exempt from the felony murder rule.

This court reviews a statute's constitutionality de novo. State v. Reynolds, 2 Wn.3d 195, 201, 535 P.3d 427 (2023). Article I, section 14 of the Washington Constitution states, "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." Our state Supreme Court has "repeated[ly] recogni[zed] that the Washington State Constitution's cruel punishment clause often provides greater protection than the Eighth Amendment." Roberts, 142 Wn.2d at 506. Both the federal and state cruel punishment protections "categorically bar sentences that are disproportionate to the crime of conviction and the culpability of the offender." Reynolds, 2 Wn.3d at 203.

Traditionally, the test to determine if a sentence is grossly disproportionate, the Fain test, requires a consideration of the nature of the offense, the legislative purpose

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conflict. We do not address undeveloped constitutional arguments. King County Dep't of Adult & Juv. Det. v. Parmelee, 162 Wn. App. 337, 353, 254 P.3d 927 (2011).

behind the statute, the punishment the defendant would have received in other jurisdictions, and the punishment meted out for other offenses in the same jurisdiction. State v. Fain, 94 Wn.2d 387, 397, 617 P.2d 720 (1980); see also State v. Bassett, 192 Wn.2d 67, 84-85, 428 P.3d 343 (2018) (discussing the Fain test). But our state Supreme Court has identified a different test to determine whether a sentence is categorically unconstitutional. The categorical bar test under State v. Bassett, 192 Wn.2d 67, requires a court to "address (1) whether there are 'objective indicia of a national consensus against the sentencing practice' and (2) whether our independent judgment, based on controlling precedent and our understanding and interpretation of the cruel punishment provision's text, history, and purpose, weighs against the sentencing practice." Reynolds, 2 Wn.3d at 203-04 (citing Bassett, 192 Wn.2d at 83).

The first step requires a review of objective evidence of society's standards as reflected in states' legislation and practice. Bassett, 192 Wn.2d at 85. The question is "not so much the number of these States that is significant, but the consistency of the direction of change." Id. at 86 (quoting Atkins v. Virginia, 536 U.S. 304, 315, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)); see also Graham v. Florida, 560 U.S. 48, 62, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) ("Actual sentencing practices are an important part of the Court's inquiry into consensus."). The second step requires a "consideration of 'the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question' and 'whether the challenged sentencing practice serves legitimate penological goals.'" Bassett, 192 Wn.2d at 87 (quoting Graham, 560 U.S. at 67).

Our state Supreme Court has recently confirmed that although a "showing of a national consensus is entitled to great weight," it does not on its own establish a punishment as cruel. Reynolds, 2 Wn.3d at 207; State v. Moretti, 193 Wn.2d 809, 823, 446 P.3d 609 (2019). Wood-Sims only addresses the first national consensus step of the Bassett inquiry and fails to explain how our state's "precedent, goals, history, and values" supports a categorical bar of felony murder based on accomplice liability for a non-violent offense.[6] See Reynolds, 2 Wn.3d at 207. Without sufficient argument before us, we are unable to apply our independent judgment under the Bassett test. See id. at 202-03, 207-10 (analyzing defendant's arguments regarding juveniles' reduced culpability and reduced retributive justification for life without possibility of parole sentencing under three strikes rule). Thus, we do not address the merits of Wood-Sims' national consensus argument.[7]

At oral argument, Wood-Sims appeared to back away from her reliance on Bassett, and instead, for the first time asserted that the more appropriate analytical lens is provided by State v. Gregory, 192 Wn.2d 1, 18-19, 427 P.3d 621 (2018), wherein our state Supreme Court struck down the death penalty as unconstitutional under article I, section 14.[8] Contrary to RAP 10.3(a)(6), Wood-Sims did not cite to Gregory in her

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[6] Notably, Wood-Sims also does not acknowledge in her cruel punishment argument the existence of Washington's statutory affirmative defense to felony murder in the second degree. See RCW 9A.32.050(b).

[7] The parties appear to agree that the majority of states criminalize felony murder, with only five states having abolished the rule. See LINDSAY TURNER, WILDER RSCH., TASK FORCE ON AIDING AND ABETTING FELONY MURDER: REPORT TO THE MINNESOTA LEGISLATURE 28 (Feb. 1, 2022), https://www.wilder.org/sites/default/files/imports/AAFM-LegislativeReport_ACCESSIBLE_2-22.pdf [https://perma.cc/PZ3J-P729].

Wood-Sims cites to a task force report to the Minnesota legislature in 2022 to argue that six states impose additional requirements—that do not exist under Washington law—that must be met to support a felony murder conviction "of any degree." Id. at 30-31.

[8] At oral argument, Wood-Sims analogized the Gregory court's analysis of the racial disparities involved in the imposition of the death penalty to Washington state studies ostensibly

briefing, which would have allowed the State to respond and this court to consider a properly briefed argument. We refrain from addressing constitutional arguments when they have not been adequately briefed. City of Spokane v. Taxpayers of City of Spokane, 111 Wn.2d 91, 96, 758 P.2d 480 (1988); see Pub. Hosp. Dist. No. 1 of King County v. Univ. of Wash., 182 Wn. App. 34, 49, 327 P.3d 1281 (2014) ("'[N]aked castings into the constitutional seas are not sufficient to command judicial consideration and discussion.'") (alteration in original) (quoting State v. Johnson, 179 Wn.2d 534, 558, 315 P.3d 1090 (2014)). Because Wood-Sims has not presented adequate argument to allow review of her cruel punishment challenge, her claim necessarily fails.

Sentencing Range

Alternatively, Wood-Sims contends that the standard sentencing range for felony murder in the second degree is unconstitutional or should otherwise be limited when the predicate felony is based on accomplice liability for a non-violent offense.

The State argues Wood-Sims' contentions conflict with the mandates of the Sentencing Reform Act (SRA) of 1981, chapter 9.94A RCW. Our legislature's primary purpose in enacting the SRA was to implement a determinate system with a focus on "'proportionality, equality and justice'" rather than rehabilitation. State v. Garcia-

showing a racial disparity in felony murder convictions. Wash. Court of Appeals oral argument, State v. Woods-Sims, No. 84075-4-I (Nov. 11, 2024), at 3 min., 38 sec. through 4 min., 10 sec., video recording by TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2024111132/?eventID=2024111132; see Gregory, 192 Wn.2d at 19-21. Notably, Wood-Sims offers additional commentary in her briefing regarding criticism of the felony murder rule, including that the United States is the only common law country to maintain the rule, and that recent studies have demonstrated a connection between the felony murder rule and racially disproportionate outcomes as well as the rule's common application to adolescent defendants. Our ruling is not a comment on the validity of such purported concerns. Rather, because Wood-Sims does not explain in her briefing how these considerations fit within or apply to this court's mandated Bassett framework, or any other constitutional framework, we do not address them.

Martinez, 88 Wn. App. 322, 327, 944 P.2d 1104 (1997) (quoting State v. Barnes, 117 Wn.2d 701, 710, 818 P.2d 1088 (1991)). "By limiting judges' discretion to sentence a defendant outside the standard range and precluding appeals regarding the length of a standard range sentence, the Legislature sought to ensure that punishment for each criminal offense would be commensurate with that imposed on others with similar criminal histories committing a similar offense." Id. at 328 (citing RCW 9.94A.010(3)). Even so, the SRA provides that those charged with felony murder in the second degree may pursue an affirmative defense under RCW 9A.32.050(1)(b), and those sentenced for committing felony murder in the second degree may seek an exceptional sentence below the standard range where mitigating circumstances are established by a preponderance of the evidence, RCW 9.94A.535(1).

Contrary to the State's assertion, the SRA only bars appellate review of the convicted individual's challenges to their sentencing duration when it is within the standard range. Garcia-Martinez, 88 Wn. App. at 329. A defendant may still appeal their sentence as a challenge to the constitutionality of its basis. Id.; see also State v. McNeair, 88 Wn. App. 331, 337-38, 944 P.2d 1099 (1997) (rejecting argument that a defendant may not challenge the constitutionality of sentencing statute). However, the defendant shoulders the burden to overcome the presumption that a sentencing range is constitutional. Garcia-Martinez, 88 Wn. App. at 329. "It is the Legislature's prerogative to determine the presumptive sentence ranges for each crime." Id.

Wood-Sims' contention is apparently premised on a majority of states reportedly placing limits on liability or punishment for aiding and abetting felony murder by statute or case law. See TURNER, supra, at 31. Wood-Sims cites to the task force report to the

Minnesota legislature in 2022. But the report does not specify sentencing ranges in its discussion of "maximum allowed liability" for aiding and abetting felony murder[9] and Wood-Sims does not otherwise explain how such states' ostensible practices establish the unconstitutionality of Washington's sentencing range for felony murder in the second degree under the SRA. Id.; see RCW 9.94A.505(2)(a)(i), .515 (designating murder in the second degree as seriousness level XIV for the purposes of sentencing under SRA), .510 (stating sentencing range of 123 to 220 months for offender score of zero under seriousness level XIV). Instead, the one paragraph in Wood-Sims' opening brief devoted to her sentencing range argument is devoid of authority. Because Wood-Sims fails to offer authority to specify the grounds of, or precedent for, the unconstitutionality of the standard sentencing range for RCW 9A.32.050(1)(b), she has not met her burden to overcome the presumption that her sentencing range is constitutional.

Denial of Exceptional Sentence

Lastly, Wood-Sims contends the trial court did not meaningfully consider her exceptional sentence request. The State argues Wood-Sims may not appeal her "mid-range" sentence of 175 months because it is within the standard 123 to 220-month range. See RCW 9.94A.585(1).

[9] The task force report seems to use "maximum liability" to include, depending on the state, the level of offense or punishment a defendant may receive for aiding and abetting felony murder. TURNER, supra, at 31. The report states that six states have mental state or act requirements for a defendant to be liable for felony murder in the first degree for aiding and abetting felony murder. Id. According to the report, 31 states require a predicate felony be part of a statutorily enumerated list for a defendant to be, depending on the state, liable for felony murder in the first degree, liable for felony murder in the second degree, or sentenced to capital murder for aiding and abetting felony murder. Id. "In other[] [states], the predicate felony being part of this statutorily enumerated list will be considered as an aggravating factor at sentencing." Id.

As referenced above, "[t]he Legislature by establishing presumptive sentence ranges has structured the trial court's discretion." State v. Ammons, 105 Wn.2d 175, 182-83, 713 P.2d 719 (1986); see State v. Hunter, 102 Wn. App. 630, 636, 9 P.3d 872 (2000); State v. Murray, 118 Wn. App. 518, 522, 77 P.3d 1188 (2003); RCW 9.94A.010, .505(2)(a)(i), .510. "So long as a court imposes a sentence within the presumptive range and a defendant has not alleged that any mitigating factors exist, a court cannot be said to have abused its discretion, since it has neither exercised nor refused to exercise discretion." Garcia-Martinez, 88 Wn. App. at 329. Therefore, "[w]hen the sentence given is within the presumptive sentence range[,] … as a matter of law there can be no abuse of discretion and there is no right to appeal that aspect." Ammons, 105 Wn.2d at 183.

However, an appellant is not barred from challenging the procedure by which a trial court imposed a sentence within the standard range. Id. "While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). "When a trial court is called on to make a discretionary sentencing decision, the court must meaningfully consider the request in accordance with the applicable law." State v. McFarland, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017).

An appellate court reviews a trial court's denial of a defendant's request for an exceptional sentence below the standard range for an abuse of discretion. See Grayson, 154 Wn.2d at 342. In this context, a court has abused its discretion if it "refused to exercise [such] discretion at all or … relied on an impermissible basis for

refusing to impose an exceptional sentence below the standard range." Garcia-Martinez, 88 Wn. App. at 330 (emphasis added).

A trial court "refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances; i.e., it takes the position that it will never impose a sentence below the standard range." Id. Additionally, a court's erroneous belief that it is limited to a standard range sentence is an improper use of a trial court's sentencing discretion. McFarland, 189 Wn.2d at 55-56. A trial court relies on an impermissible basis if it, for example, decides "that no drug dealer should get an exceptional sentence" below the standard range or the court "refuses to consider the request because of the defendant's race, sex or religion." Garcia-Martinez, 88 Wn. App. at 330.

In the instant appeal, Wood-Sims does not seem to suggest that the trial court relied on an impermissible basis when it denied her an exceptional sentence. Rather, she argues the trial court refused to exercise its discretion in considering an exceptional sentence based on her purported lesser culpability as an accomplice to a non-violent predicate offense. Wood-Sims does not cite to the record to support her assertion of the trial court's alleged categorical refusal and instead asks this court to conclude that the facts conclusively show Wood-Sims' lesser culpability.

The record, however, shows the trial court considered Wood-Sims' request for an exceptional sentence and declined to grant it based on its assessment of Wood-Sims' level of culpability. This by definition is an exercise of the trial court's discretion. See id. at 330-31. "[A] trial court that has considered the facts and has concluded that there is

no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling." Id. at 330.

At Wood-Sims' sentencing, the trial court explained its initial reaction contained questions about Wood-Sims' culpability but, after reviewing the information, the court concluded "but for" Wood-Sims' conduct, such as opening the victim's apartment door, "no one would be here." Additionally, the trial court considered Wood-Sims' lack of intervention while the events causing the victim's death unfolded.

The trial court exercised its discretion by considering the facts and concluding that an exceptional sentence was not appropriate.

We affirm.

Coburn, J.

WE CONCUR:

Feldman, J.

Mann, J.

ALSEPT & ELLIS

January 27, 2025 - 10:59 AM

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