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Felony Murder Rule - A Re-Examination, The Notes

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THE FELONY MURDER RULE— A RE-EXAMINATION

The origin of the felony murder rule is said to be that at common law all felonies were punishable by death. Therefore it was of no consequence whether the accused was hanged for the initial felony or for the death resulting from actions connected with its commission.[1] Because of the harshness of this rule the courts have generally tended to restrict its application.[2]

However, a recent California case, through a liberal construction, has broadened the felony murder rule's application. In *People v. Washington*[3] the defendant and his co-felons, one of whom was armed, entered a service station to commit a robbery. The owner of the station, in an attempt to prevent the robbery, pulled out his gun and began shooting. The defendant was shot and his armed co-felon was killed. The defendant was tried and convicted for the murder of his co-felon under the felony murder rule, Section 189 of the California Penal Code.[4] The court held that the tort concept of proximate cause will support a conviction for murder when a co-felon is killed by the intended victim.

The purpose of this paper will be to examine the felony murder rule as applied in California and other jurisdictions, with particular reference to California, and to the question of whether a felon should be convicted for murder when the killing results from the act of someone other than the defendant or his co-conspirators.

With reference to the question of whether a felon should be guilty of murder when a co-felon or innocent third person has been killed by the intended victim or some other third person, the courts have generally taken two separate and distinct paths. Some courts reason that the felon is only responsible for killings committed by the felon or the co-felons in the furtherance of the felony.[5] This is the so-called agency rule. Others have held that the felon is responsi-

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[1] Hitchler, *The Killer and His Intended Victim in Felony-Murder Cases*, 53 DICK. L. REV. 3, 5 (1948).

[2] Note, *A Survey of Felony Murder*, 28 TEMP. L.Q. 453 (1954-55).

[3] 230 A.C.A. 351, 40 Cal. Rptr. 791 (1964).

[4] CAL. PEN. CODE § 189 states:

> All murder which is perpetrated by means of poison, . . . or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem . . . is murder in the first degree; and all other kinds of murders are of the second degree.

[5] See, *e.g.*, Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958); People v. Austin, 370 Mich. 12, 120 N.W.2d 766 (1963).

ble for any killings that result as a natural and probable consequence of the felony, the proximate cause rule.[6]

California Decisions

Where, during the commission of a felony, one of the perpetrators kills a third person, California courts have generally held a co-felon equally guilty of murder.[7] The more interesting question in the applications of the rule arises where the felony results in either an accidental death involving two third persons, or the death of one of the perpetrators. Apparently, only four California cases have considered either of these situations.

The first of these, *People v. Ferlin*,[8] involved a conspiracy to commit arson. The defendant had hired a young man to help him burn down the insured's property. The accomplice burned to death as a result of the fire. The court affirmed an order for a new trial, following a reversal of a conviction for murder (on the basis of the felony murder rule) holding that the death was not in the furtherance of the conspiracy, but was opposed to it.[9]

The next case, *People v. Cabaltero*,[10] involved an attempted robbery by Cabaltero and six co-felons. During the commission of the robbery one of the felons fired two shots to scare some approaching people. One of his accomplices became so enraged at this that he shot and killed the felon who had fired the shots. All six co-felons were tried for murder under the felony murder rule and were convicted. On appeal the decision was affirmed. The court distinguished *Ferlin*, and held that the doctrine that a conspirator is not guilty when one of the conspirators goes beyond the original design did not apply where the killing occurs during the perpetration of a robbery.[11]

In *People v. Harrison*,[12] one of the victims inadvertently shot

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6 See, *e.g.*, Commonwealth v. Thomas, 382 Pa. 639, 117 A.2d 204 (1955).

7 See, *e.g.*, People v. Modesto, 59 Cal. 2d 722, 382 P.2d 33, 31 Cal. Rptr. 225 (1963); People v. Kemp, 55 Cal. 2d 458, 359 P.2d 913, 11 Cal. Rptr. 361 (1961); People v. Whitehorn, 60 Cal. 2d 256, 383 P.2d 783, 32 Cal. Rptr. 199 (1963); People v. Mason, 54 Cal. 2d 164, 351 P.2d 1025, 4 Cal. Rptr. 841 (1960); People v. Chavez, 37 Cal. 2d 656, 234 P.2d 632 (1951); People v. Boss, 210 Cal. 245, 290 Pac. 881 (1930).

8 203 Cal. 587, 265 Pac. 230 (1928).

9 *Id.* at 597, 265 Pac. at 235.

10 31 Cal. App. 2d 52, 87 P.2d 364 (1939).

11 *Id.* at 60, 87 P.2d at 368. Professor Morris in an article, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. Pa. L. Rev. 50, 73 (1956), attacks this reasoning. Thus, if two burglars are robbing a house and one happens to glance out a window, see an old enemy he wants to kill, and kills him, then the other burglar would also be guilty of 1st degree murder.

12 176 Cal. App. 2d 330, 1 Cal. Rptr. 414 (1959).

and killed the other victim while attempting to prevent the felony. In affirming the conviction of murder the court held that the tort concept of proximate cause applied and that the killing was a natural and probable result of the defendant's acts.

Finally, there is the instant *Washington* case which has held that the defendant is guilty of murder when his co-felon is killed by the victim.

These cases suggest that there is no clear application of the felony murder rule in California. However, in light of the recent *Harrison* and *Washington* decisions there seems to be a trend extending the felony murder rule through the concept of proximate cause.

Other Decisions

A series of Pennsylvania cases gradually extended the application of proximate cause to the felony murder rule. In the first of these, *Commonwealth v. Thompson*,[13] the defendant killed one of his victims during a gun battle. In upholding the conviction, the court said the jury must have been satisfied "beyond a reasonable doubt" that it was the defendant's bullet that had caused the death.[14]

In *Commonwealth v. Moyer*[15] the defendant had used the deceased as a shield. The court stated that it was immaterial whether the defendant or one of the intended victims fired the fatal shot. The court expanded saying:

> Every robber or burglar knows that a likely later act in the chain of events he inaugurates will be the use of deadly force against him on the part of the selected victim. For whatever results follow from the natural and legal use of retaliating force the felon must be held responsible.[16]

Thus the elements of proximate cause (foreseeability and natural and probable consequences) began to enter into the reasoning.

The next case, *Commonwealth v. Almeida*,[17] involved the killing of an off duty policeman who was attempting to prevent a robbery. The court once again held that it was immaterial who fired the fatal shot, and it also suggested that the tort and criminal concepts of proximate cause were one and the same.[18] The lower court

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[13] 321 Pa. 327, 184 Atl. 97 (1936).
[14] *Id.*, 184 Atl. at 99.
[15] 357 Pa. 181, 53 A.2d 736 (1947).
[16] *Id.*, 53 A.2d at 742.
[17] 362 Pa. 596, 68 A.2d 595 (1949).
[18] *Id.*, 68 A.2d at 601-02. *But see*, Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. Pa. L. Rev. 50, 52 & n.10 (1956). The footnote cites two other writers who are also in disagreement.

had refused to give instructions on proximate cause, holding this to be a matter of law. This led to a dissent on the appeal by Justice Jones in which he stated:

> Whether the acts of Almeida and his confederates *were sufficient* to constitute the proximate cause of the killing was a question of law but whether they *did constitute* the proximate cause was a question of fact for the jury.[19]

The reasoning in *Almeida* was soon extended to the situation where the co-felon, and not a third party, is killed. *People v. Bolish*,[20] reached this result, with facts quite similar to the California case of *People v. Ferlin*. In *Bolish* one of the felons was killed as the result of an explosion which occurred during the commission of the crime. The Pennsylvania court, using the doctrine of proximate cause, found the defendant guilty of the murder of his co-felon. Justice Bell offered this explanation of the felony murder rule:

> Malice express or implied is the criterion and absolutely essential ingredient of murder. Malice in its legal sense exists not only when there is a wickedness of disposition, hardness of heart, wanton conduct, cruelty, recklessness of consequence and a mind regardless of social duty. . . . If there was an unlawful killing with (legal) malice, express or implied, that will constitute murder even though there was no intent to injure or kill the particular person who was killed and even though the death was unintentional or accidental.[21]

A law review article[22] criticized this reasoning:

> In other words "malice" the *mens rea* of murder is identical with the *mens rea* of larceny—which is absurd. . . . It is the typical semantic error; it is assumed that to each word there is one referent.[23]

Even more controversial was the decision in *Commonwealth v. Thomas*.[24] In that case the defendant and his accomplice robbed a store and after the robbery took different escape routes. During an ensuing pursuit the accomplice was killed by the robbery victim. The defendant was captured, tried and convicted for the murder of his co-felon. The conviction was affirmed by a vote of 4 to 3, with two dissenting opinions and one concurring opinion. One of the dissenters was of the view that the felon who was killed forfeited any right to be protected by the law by engaging in the felony and that therefore the defendant should not be guilty of murder.[25] He also stated

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[19] 362 Pa. 596, 68 A.2d 595, 618 (1949).

[20] 381 Pa. 500, 113 A.2d 464 (1955).

[21] *Id.*, 113 A.2d at 470.

[22] Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50 (1956).

[23] *Id.* at 61.

[24] 382 Pa. 639, 117 A.2d 204 (1955).

[25] *Id.*, 117 A.2d at 221. Query as to whether a law breaker loses his right to

that "The thing which is imputed to a felon for a killing incidental to his felony is *malice* and not *the act of the killing*."[26] He further stated that in his opinion the act must have been committed in furtherance of the felonious undertaking to support a charge of murder.[27] The majority opinion held that proximate cause was a good rule for the law of crimes because ". . . (S)uch a rule is equally consistent with reason and sound public policy, and is essential to the protection of human life."[28]

Justice Bell, in a concurring opinion, enunciated the rule as follows:

> The reason is that (a) any person committing any common law felony or one of the enumerated statutory felonies, possesses a malevolent state of mind which the law calls "malice"; and (b) malice is present in the felon (or felons) actually or by legal implication not only at the time of the original felony but also at the time of the killing; and (c) such person is from time immemorial responsible for the natural and reasonably foreseeable results of his felony.[29]

The decision elicited much comment from the writers[30] and one author specifically took exception with the concurring opinion.[31] He states that the malice requisite for a felony is different from that required for murder, and that for certain killings the intent to kill is allowed to be presumed from the intent to commit the felony. Thus the necessary malice is implied rather than express. The distinction is important, since it allows the felony murder rule to remain as a *mens rea* device and does not permit the court to impute the killing to the felon. What is imputed, however, is the implied intent to kill. Causation must still be proved. As for Justice Bell's third point, this commentator states it had never been true except for the cases where the defendant deliberately exposed another to the threat of death by using him as a human shield and in cases where death resulted from an attempt to escape the danger caused by the defendant.

Another article maintained that the Pennsylvania courts were

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the protection of the law. Does this mean that at some later time an individual may murder a felon and be set free because the law considers the felon's life already forfeited?

[26] 382 Pa. 639, 117 A.2d 204, 215 (1955).

[27] *Ibid.*

[28] *Id.*, 117 A.2d at 205.

[29] *Id.*, 117 A.2d at 207.

[30] See, *e.g.*, 44 GEO. L.J. 529 (1956), 54 MICH. L. REV. 860 (1956), 31 N.Y.U.L. REV. 1125 (1956), 30 So. CAL. L. REV. 357 (1957), 29 TEMP. L.Q. 205 (1956), and 9 VAND. L. REV. 877 (1956). There were at least 26 law review articles written on the case.

[31] Morris, *supra* note 22, at 60-61.

holding that any possible killing in any possible way by any possible person was a probable death which was foreseeable.[32]

Professor Morris states that these cases have resulted in a double application of the felony murder rule. First, the rule is used to hold that the death is foreseeable and therefore is murder. Second, under the statute, the homicide is murder in the first degree. Thus the rule is used to *impute the killing* and also to impute the malice requirement of first degree murder.[33]

In 1958, the case of *Commonwealth v. Redline*[34] came before the court. In this case Redline started a gun battle with police officers in which his accomplice was killed. In reversing a conviction of murder the court expressly overruled *Thomas* as an unwarranted extension of the felony murder rule and limited *Almeida* to its particular fact situation.[35] For the purposes of distinguishing the two cases the court recognized the difference between justifiable and excusable homicide.[36] The court also rejected the proximate cause theory of causation and applied what is sometimes called the *agency* theory. The court said:

> . . . [I]t is to be remembered at all times that the thing which is imputed to a felon for a killing incidental to his felony is *malice* and *not the act of killing*. The mere coincidence of homicide and felony is not enough to satisfy the requirements of the felony-murder doctrine. "It is necessary . . . to show that the conduct causing death was done in furtherance of the design to commit the felony . . . and not merely coincidence. . . ."[37]

Thus Pennsylvania abandoned its attempt to follow a proximate cause theory where a felon is charged with the murder of his accomplice. A later Pennsylvania case, *Commonwealth v. Root*,[38] has finally rejected the theory of proximate cause in all homicides. The court in that case held that proximate cause has no proper place in criminal homicide prosecutions. A more direct causal connection is required.[39]

The so-called agency theory, as employed by *Redline* is best exemplified by a New York decision:

> It is the malice of the underlying felony that is attributed to the felon. . . . Thus, a felony murder embraces not any killing incidentally

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32 Ludwig, *Foreseeable Death in Felony Murder*, 18 U. PITT. L. REV. 51, 59 (1956-57).

33 Morris, *supra* note 22, at 64-65.

34 391 Pa. 486, 137 A.2d 472 (1958).

35 *Id.*, 137 A.2d at 482.

36 *Id.*, 137 A.2d at 483.

37 *Id.*, 137 A.2d at 476.

38 403 Pa. 571, 170 A.2d 310 (1961).

39 *Id.*, 170 A.2d at 314.

> coincident with the felony . . . but only those committed by one of the criminals in the attempted execution of the unlawful end. Although the homicide itself need not be within the common design . . . the *act* which results in death must be in furtherance of the unlawful purpose. . . .[40]

The essential difference between the proximate cause rule and the agency rule thus appears in cases where the act of killing is not that of the defendant. Under the proximate cause theory a defendant would be responsible when an innocent person is killed,[41] but he would not be responsible under the agency rule.[42] If the co-felon is killed by a third party the defendant will be held responsible under the proximate cause theory,[43] but not under the agency rule.[44] And where the co-felon accidentally kills himself under the proximate cause theory the defendant would again be held responsible[45] while under the agency theory he would not be held.[46]

CONCLUSION

The preceding analysis points out the distinction between the agency and proximate cause theories. Under either theory the defendant can be held liable even though the act is that of his accomplice. With these alternatives, there are strong arguments that the felony murder rule should be abolished.

Assuming that deterrence is one the fundamental *bases* of criminal law, and that the felony murder rule is desired to prevent killings during the perpetration of a robbery, should not the penalty for armed robbery be increased? Under the present law a killing during the commission of a felony ordinarily results in a charge of first degree murder. Clearly this result does not prevent robberies or other felonies. At least one commentator agrees:

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[40] People v. Wood, 8 N.Y.2d 48, 51, 201 N.Y.S.2d 328, 331-332, 167 N.E.2d 736, 738. However the New York Statute (§ 1044 of the PENAL LAW, CONSOL. LAW c. 40.) states: "The killing of a human being unless it is excusable or justifiable, is murder in the first degree when committed:

"2. Without a design to effect death by a person engaged in the commission of . . . a felony. . . ." The court said that it was obviously the intent of the legislature that the only person charged be the one who did the killing."

[41] See, *e.g.*, Commonwealth v. Almeida, *supra* note 17; People v. Harrison, *supra* note 12.

[42] See, *e.g.*, People v. Wood, *supra* note 40.

[43] See, *e.g.*, Commonwealth v. Redline, *supra* note 24.

[44] See, *e.g.*, Commonwealth v. Redline, *supra* note 34; People v. Garripo, 292 Ill. 293, 127 N.E. 75 (1920), where there was no evidence as to who had actually killed the co-felon. The court ruled that in order for the co-felons to be guilty, it would have to be proved that the killing was done in furtherance of the conspiracy.

[45] See, *e.g.*, People v. Bolish, *supra* note 20.

[46] See, *e.g.*, People v. Ferlin, *supra* note 8.

> As a general proposition it is submitted that the statutorily authorized and judicially implemented application of substantially heavier punishments on all felons carrying a gun at the time of their felony (or taking part in a felony where a co-felon used a gun in furtherance of the felony) would better serve the purpose of deterring the type of conduct in *Almeida* and *Thomas* than do the decisions in those cases. Some jurisdictions have provided for such higher penalties, but there would appear to be a reluctance on the part of the courts to impose wholeheartedly these heavier penalties. In England and other countries of the British Commonwealth, particularly where the police are unarmed, such a policy is deliberately followed by the courts. The general opinion in these countries is that there is wisdom in this course. The essential harm is that the felon carries or uses a gun—let us fasten upon that with the utmost severity.[47]

This is not to say that the felon should go unpunished for a resultant death, but if it is necessary for the protection of society that the felon be punished then possibly the felon should be charged with manslaughter. This would more accurately reflect the harm done and do less violence to established doctrine.

Since the agency rule of felony murder appears to be the better view, then the felony murder rule is merely an alternative theory on which to try the defendant.[48] If the killing is required to be the result of the defendant's act, then it would seem that the felon should be charged with murder since he had the express intent to kill. There is no need to imply the malice from the fact that he was engaged in a felony. As far as the co-felons are concerned, if one felon was guilty of murder then the others would also be guilty under the normal rules applied to parties to a crime.

Accordingly, the California felony murder rule should be modified.[49] It is submitted that the California Supreme Court should reverse the conviction in the *Washington* case and thus reverse the trend in California law for two reasons.

First, California should follow the more logical agency rule espoused in *Redline* and hold that the killing, in order to come under the felony murder rule, should have to be done in furtherance of the felony. As was said in one law review note:

> A closer causal connection between the felony and the killing

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[47] Morris, *supra* note 22, n.77.

[48] See, *e.g.*, People v. Chavez, 37 Cal. 2d 656, 234 P.2d 632 (1951), where the court said that the jurors need not agree on which theory to base defendant's conviction. It is sufficient if each juror is convinced of guilt beyond a reasonable doubt. In *Chavez* there was enough evidence to convict without the felony murder rule.

[49] Packer, *The Model Code and Beyond*, 63 COLUM. L. REV. 594, 598-599 (1963); Prevezer, *The English Homicide Act*, 57 COLUM. L. REV. 624, 633-636 (1957); Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50 (1956); *Moreland, Law of Homicide*, pp. 50-53 (1952).

> than the proximate cause theory normally applicable to tort cases should be required because of the extreme penalty attached to a conviction for felony murder and the difference between the underlying rationales of criminal and tort law.[50]

The Supreme Court of Pennsylvania in the *Redline* case admitted that both the *Almeida* and *Thomas* decisions were judicial extensions of the felony murder rule through the application of the proximate cause concept. It is felt by the writer that the better view is the agency rule of *Redline* under which a felon is not responsible for the death of his co-felon when someone else kills him.

Secondly, the California statute defining felony murder is not broad enough to include a case such as *Washington*. Penal Code section 189 states:

> All *murder* which is perpetrated by means of poison, . . . or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, . . . is murder of the first degree; all other kinds are murders of the second degree.

All killing is not murder. If the legislature intended a person to be guilty for all deaths, they would have inserted the word homicide in the statute rather than murder. Therefore, a result such as arrived at in the *Washington* case should logically proceed from a statute which would cover all homicides.

Enlightened jurisdictions have met the problem with a logical compromise. Realizing the difficulty of a statute such as California's which uses *murder*, yet realizing the harshness of the felony murder rule they have included all killings in this statute but limited the punishment.[51] England, the birthplace of the felony murder rule, has for all practical effect abolished it. In England in order for a killing committed during a felony to constitute murder it must be done with the same malice aforethought as would normally be required for murder.[52]

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[50] 71 HARV. L. REV. 1565, 1566 (1957-58).

[51] WIS. STAT. § 940.03 calls it third degree murder and states: "Whoever in the course of committing or attempting to commit a felony causes the death of another human being as a natural and probable consequence of the commission of or attempt to commit the felony, may be imprisoned not more than 15 years in excess of the maximum penalty provided by law for the felony."

MINN. STAT. § 609.195(2) calls it third degree murder and provides for a 25 year penalty. Minnesota, however, retains the felony murder rule for rape and sodomy (§ 609.185).

[52] 5 & 6 ELIZ. 2, C. 11, Part 1, 1 (1) which states, "Where a person kills another in the course of furtherance of some other offense, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course of furtherance of another offense."

Part 1, 1 (2) says that there is malice when resisting arrest.

The court in *Redline* stated:

> If predominant present-day thinking should deem it necessary to the public's safety and security that felons be made chargeable with murder for *all* deaths occurring in and about the perpetration of their felonies—regardless of how or by whom such fatalities came—the legislature should be looked to for competent exercise of the State's sovereign police power to that end which has never yet been legislatively ordained.[53]

California's statute limits the felony murder rule to murder. This requires a certain *mens rea*. Extension of the statute to those killings not requiring this specific intent, is a legislative, not a judicial function.

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[53] Commonwealth v. Redline, 391 Pa. 486, —, 137 A.2d 472, 474 (1958).