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Criminal Law-Felony-Murder Results from the Shooting of One Bystander by Another

Holly D. McCoy

trial courts much help in evaluating the constitutionality of any potential replacement legislation in terms of the right of access to the courts. It never has been clear in Missouri what the substance of that right is, nor how far its extends. *Gaertner* clarifies those questions only to the extent that the specific terms of chapter 538 are now known to be unacceptable. The decision does, however, put the draftsmen of any future legislation on notice that the Missouri Supreme Court considers access to the courts to be a very substantial right. Any forthcoming attempt to legislatively abate the medical malpractice crisis must reflect that consideration.

MARTIN M. LORING

CRIMINAL LAW–FELONY-MURDER RESULTS FROM THE SHOOTING OF ONE BYSTANDER BY ANOTHER

State v. Moore[1]

Brian Keith Moore, a would-be robber, was convicted of first degree murder when a bystander shot another bystander. On July 28, 1975, Moore, accompanied by two others, entered a tavern in St. Louis. Moore displayd his shotgun and announced a holdup. When a customer in the tavern, Albert Williams, drew his pistol, one of Moore's accomplices fired at Williams. In the ensuing gunfight, two other customers were wounded. It was later discovered that the wounds suffered by one of the customers, Lawrence Meadows, were fatal. Meadows had been shot twice in the head, the fatal bullet coming from the pistol of Williams, the customer who had tried to thwart the robbery.

Two days later Moore was arrested in connection with the attempted robbery and the homicide. He was eventually convicted of first degree murder and attempted robbery. After affirming the robbery conviction, the Court of Appeals, St. Louis District, transferred the case to the Missouri Supreme Court for consideration of the first degree murder conviction.[2]

On appeal Moore contended that Missouri's first degree murder

1. 580 S.W.2d 747 (Mo. En Banc 1979).

2. In his appeal Moore made three allegations of trial error other than the one based on felony-murder. He alleged that the trial court erred (1) in failing to discharge him because his warrantless arrest was without probable cause, (2) in failing to suppress certain evidence and identification testimony allegedly procured by illegal means, and (3) in failing to instruct the jury on second degree murder and manslaughter. These allegations were dismissed by the court

statute, Mo. Rev. Stat. section 559.010,[3] did not cover the situation where the act of homicide was not that of the accused.[4] The statute provided that:

> Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing and every homicide which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or mayhem, shall be deemed murder in the first degree.[5]

Clearly then, under the Missouri statute, when a murder is committed during one of the enumerated felonies, the felon can be convicted of first degree murder. Such a conviction is generally termed "felony-murder."

In deciding the case, the court addressed the question of whether "the felony-murder rule [first degree murder] applies to the circumstances . . . where the evidence clearly indicates that the fatal shot was not fired by the appellant or an accomplice but by a bystander attempting to thwart the robbery."[6] In a unanimous opinion the court held that the rule did apply in this case and affirmed the first degree murder conviction. The most important factor considered in deciding this issue was "whether the death was the *natural and proximate result* of the acts of the appellant or of an accomplice."[7] The court relaxed its position somewhat by stating that "an independent intervening cause might relieve appellant of criminal responsibility for the killing."[8] No intervening cause was attendant, however, since Williams' act of drawing his pistol was provoked by the attempted robbery, and the shot fired by one of the felons provoked Williams' return fire which caused the death of Meadows.

By imposing liability on Moore for the acts of a bystander, the court expressly overruled two of its earlier decisions: *State v. Glenn*[9] and *State v. Majors.*[10] The facts in *Majors* were almost indistinguishable from those in *Moore.* In *Majors,* the felons were would-be robbers who entered a room in which the occupants were gambling. A bystander pulled his gun, and the ensuing gunfight resulted in the death of one of the gamblers. The evidence was not clear as to who fired the fatal bullet. In reversing Majors' conviction for the murder of this bystander, the court stated that

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of appeals and the Missouri Supreme Court adopted verbatim the court of appeals' opinion on these issues. The case was transferred by the court of appeals, under Mo. R. CRIM. P. 83.02, for the supreme court to consider Moore's fourth allegation of error, the felony-murder issue.

3. In 1975, RSMo § 559.010 (1969) was repealed and replaced with § 559.007 which defined felony-murder as first degree murder. In 1977, § 559.007 was substantially revised and now appears as RSMo § 565.003 (1978). The current statute, which was not in force and therefore not applied in the *Moore* case, is set out in full in note 81 *infra.*

4. 580 S.W.2d at 751.

5. RSMo § 559.010 (1969).

6. 580 S.W.2d at 751

7. *Id.* at 752 (emphasis added).

8. *Id.*

9. 429 S.W.2d 225 (Mo. En Banc 1968).

10. 237 S.W. 486 (Mo. 1922).

the instructions requested by the defendant had been a true statement of the law and that it was error for the trial court to reject them. Those instructions stated: "The court instructs the jury that if you find and believe from the evidence that the shot that killed [the victim] was not fired by the defendant, or by someone with whom he was acting in concert, if any, then you must find the defendant not guilty."[11]

In a 1968 Missouri Supreme Court decision, *State v. Glenn,*[12] the court again indicated that it required the fatal act to be that of the felons rather than that of an innocent person. In that case a police officer was killed while attempting to apprehend the defendant following a robbery. There were no witnesses to the actual shooting of the policeman, and the defendant alleged that the fatal bullet could have come from either the victim's own gun or that of another police officer. On appeal Glenn complained that one of the instructions to the jury "did not require the jury to find that defendant fired the fatal shot but only that the homicide occurred during the attempt to complete the robbery."[13] In affirming the defendant's conviction for first degree murder (felony-murder), the court emphasized that although the instruction complained of did not expressly require a finding that the defendant fired the fatal shot and that such an express requirement would have been preferable, the instructions taken as a whole did convey this requirement.

In support of its decision to overrule *Majors* and *Glenn,* the supreme court in *Moore* stated, "In neither *Majors* nor *Glenn* do we find a statement of the rationale for the requirement that the fatal act be performed by defendant or someone acting in concert with him."[14] In addition, the court emphasized that there has never been a requirement in Missouri that the defendant himself commit the fatal act before liability could lie under the felony-murder rule because "any person involved in the underlying felony may be held accountable for every homicide committed in the perpetration of the felony even though the fatal act was committed by a co-felon."[15]

In *Moore* the court chose to follow the proximate cause theory of felony-murder, a relatively recent approach in the historical development of the doctrine. The English common law notion of felony-murder was that if, while perpetrating or attempting to perpetrate a felony, the felon killed someone, a conviction for murder could be sustained. Of course, the additional conviction for murder made no difference with regard to the degree of punishment because all felonies were capitally punished.[16]

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11. *Id.* at 486.
12. 429 S.W.2d 225 (Mo. En Banc 1968).
13. *Id.* at 236.
14. 580 S.W.2d at 751.
15. *Id. See also* State v. Paxton, 453 S.W.2d 923 (Mo. 1970); State v. Messino, 325 Mo. 743, 30 S.W.2d 750 (1930); State v. Nasello, 325 Mo. 442, 30 S.W.2d 132 (1930); State v. Hart, 292 Mo. 74, 237 S.W. 473 (1922).
16. Ludwig, *Foreseeable Death in Felony Murder,* 18 U. PITT. L. REV. 51, 52 (1956).

The effect of the doctrine was generally "the imputation of a certain state of mind, the *mens rea* regarded as essential to liability for murder, to one who may or may not in fact have had that intention."[17] It was used as a means of establishing the mens rea, not the actus reus of the homicide.[18] Since the genesis of the felony-murder rule, two theories have developed with respect to whether the rule should be applicable to cases where the lethal act was not that of a felon but that of a nonparticipant in an attempt to thwart the felony. The first of these two rules, accepted today in a majority of jurisdictions, is the agency theory. Under this theory the homicidal act must be committed by the felon or a co-felon in furtherance of the felony and not by someone resisting the felony. This theory was first espoused in an early Massachusetts case, *Commonwealth v. Campbell.*[19] Campbell was a participant in a riot during which a nonparticipant was killed either by one of the rioters or by a soldier attempting to disperse the crowd. In holding that the defendant could not be guilty under felony-murder unless the shot was fired by him or another participant in the riot, the court stated, "No person can be held guilty of homicide unless the act is either actually or constructively his, and it cannot be his act in either sense unless committed by his own hand or by someone acting in concert with him or in furtherance of a common object or purpose."[20] Until approximately 1922, *Campbell* was consistently relied on[21] in other jurisdictions as a basis for denying liability where the lethal act was not that of a co-felon.[22]

In the 1920s and 1930s, a new theory concerning possible liability developed in some jurisdictions. It applied the tort theory of proximate cause to the criminal concept of felony-murder. Stated broadly, the theory stands for the following proposition: Where the felon reasonably could or should have foreseen that the commission or attempt to commit the

17. Morris, *The Felon's Responsibility for the Lethal Acts of Others,* 105 U. PA. L. REV. 50, 59 (1956).

18. *Id. See also* Commonwealth v. Balliro, 349 Mass. 505, 209 N.E.2d 308 (1965); 1 WHARTON'S CRIMINAL LAW AND PROCEDURE 539 (1957); Note, 7 LOY. CHI. L.J. 529 (1979).

19. 89 Mass. (7 Allen) 541 (1863).

20. *Id.* at 544.

21. Morris, *supra* note 17, at 57.

22. In Butler v. People, 125 Ill. 641, 18 N.E. 338 (1888), the Illinois court denied liability under felony-murder where a marshal killed a bystander while attempting to prevent the commission of a felony. The court again denied criminal liability in People v. Garippo, 292 Ill. 293, 127 N.E. 75 (1920), when there was not sufficient proof to show whether the robbery victim was killed by a co-felon or by some third person. The Kentucky Supreme Court cited *Campbell* in a case where the victim of a robbery and assault killed a bystander. The court reasoned that "to hold [the felons] responsible criminally for the accidental death of a bystander, growing out of [the victim's] bad aim, would be carrying the rule of criminal responsibility for the acts of others beyond all reason." Commonwealth v. Moore, 121 Ky. 97, 100, 88 S.W. 1085, 1086 (1905). This same principle was applied in State v. Oxendine, 187 N.C. 658, 122 S.E. 568 (1924), in which felony-murder was held not to apply when an assault victim killed a bystander.

contemplated felony would be likely to cause a situation in which another would be exposed to danger at the hands of a nonparticipant, this creation of the situation is considered the proximate cause of that injury.[23] This theory was developed in an Illinois case, *People v. Payne*,[24] where the evidence showed that a robbery victim was killed either by one of the co-felons or by another victim. That court reasoned that it should have been anticipated that the robbery would meet with resistance "during which the victim might be shot either by himself or someone else in attempting to prevent the robbery."[25] The proximate cause theory also was used to find liability in *Commonwealth v. Moyer*[26] in which a filling station attendant was killed during an attempted robbery when caught in the cross fire between the robbers and the owner. The evidence was not clear who fired the fatal bullet. That court stated:

> It is equally consistent with reason and sound public policy to hold that when a felon's attempt to commit robbery or burglary sets in motion a chain of events which were or should have been within his contemplation when the motion was initiated, he should be held responsible for any death which by direct or almost inevitable sequence results from the initial criminal act.[27]

Subsequent cases in other jurisdictions have been split, some following the traditional agency theory and some the proximate cause theory. The trend, though, has been toward limiting the applicability of felony-murder while the proximate cause theory is generally in disfavor.[28] In fact, although Pennsylvania expanded felony-murder under the proximate cause theory in *Commonweatlh v. Almedia*,[29] the court later limited *Almedia* in *Commonwealth v. Redline*.[30] Finally, the supreme court overruled *Almedia* and retained felony-murder within its traditional boundaries, the agency theory, in *Commonwealth ex rel. Smith v. Myers*.[31] Many states which now follow the proximate cause theory still rely on *Almedia* despite its demise. Those states, other than Missouri, which have addressed the question and have decided in favor of expanding the felony-murder rule to include the lethal acts of non-felons presently include Florida,[32] Illinois,[33]

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23. *See generally* Annot., 12 A.L.R.2d 210 (1950).
24. 359 Ill. 246, 194 N.E. 539 (1935).
25. *Id.* at 255, 194 N.E. at 543.
26. 357 Pa. 181, 53 A.2d 736 (1947).
27. *Id.* at 190-91, 53 A.2d at 741.
28. R. PERKINS, CRIMINAL LAW 721 (2d ed. 1969); Note, 52 CHI.-KENT L. REV. 184 (1975).
29. 362 Pa. 596, 68 A.2d 595 (1949).
30. 391 Pa. 486, 137 A.2d 472 (1958).
31. 438 Pa. 218, 261 A.2d 550 (1970).
32. Hornbeck v. State, 77 So. 2d 876 (Fla. 1955) (adopted *Almedia* before it was overturned).
33. People v. Hickman, 59 Ill. 2d 89, 319 N.E.2d 511 (1974), *cert. denied*, 421 U.S. 913 (1975); People v. Allen, 56 Ill. 2d 536, 309 N.E.2d 544, *cert. denied*, 419 U.S. 865 (1974); People v. Payne, 359 Ill. 246, 194 N.E. 539 (1935).

Michigan,[34] Oklahoma[35] (in a limited manner), Texas,[36] and possibly Alabama[37] and New Mexico.[38] On the other hand, a definite majority of the states which have considered the question have clearly restricted felony-murder to cases in which the act of killing was that of either the felon or a co-felon in the furtherance of the felony. These states include Arkansas,[39] California,[40]

34. People v. Podolski, 332 Mich. 580, 52 N.W.2d 201 (1952), relied on the now-overruled Pennsylvania case Commonwealth v. Almedia, 362 Pa. 596, 68 A.2d 595 (1949), to find a felon guilty of felony-murder when a policeman killed another policeman. The court noted that Michigan's statute was based on Pennsylvania's and that *Almedia* and Commonwealth v. Moyer, 357 Pa. 181, 53 A.2d 736 (1947), were an interpretation of that similar statute. This expansion of felony-murder was reaffirmed in People v. Austin, 370 Mich. 12, 120 N.W.2d 766 (1963). *But see* People v. Smith, 56 Mich. App. 560, 224 N.W.2d 676 (1974), in which the appellate court reluctantly followed the supreme court's *Podolski* decision, pointing out that *Podolski* was based on Pennsylvania cases (*Almedia* and *Moyer*) which had subsequently been overturned.

35. In Johnson v. State, 386 P.2d 336 (Okla. Crim. App. 1963), a police officer was killed by another policeman but, in this case, the defendant had announced his intention to kill the police officer. In the ensuing gunfire, the police officer was shot once by the defendant and once by a fellow policeman. Medical testimony showed that the fatal bullet was from the policeman's gun. The holding was limited to the facts in that case, the court stressing that actual malice was displayed by the defendant's announced intention and that his goal was achieved.

36. In Miers v. State, 157 Tex. Crim. 572, 251 S.W.2d 404 (1952), the victim was killed in a struggle with the defendant over a gun. The court held that the defendant was criminally liable even if the victim had accidently killed himself. The court stated, "The whole question here is one of causal connection. If the appellant here set in motion the cause which occasioned the death of deceased, we hold it to be a sound doctrine that he would be as culpable as if he had done the deed with his own hands." 251 S.W.2d at 408.

37. Johnson v. State, 142 Ala. 70, 38 So. 182 (1905), may be implying that it would expand felony-murder. This, however, was an unusual case because the defendants were the sons of the man who fired the shot which killed the policeman. The father was insane, and it was argued that the sons incited the father to shoot.

38. State v. Harison, 90 N.M. 439, 564 P.2d 1321 (1977). Although this case involved a traditional case of felony-murder in which one of the felons accidentally killed the kidnap victim, the court stated in dicta, "[A] policeman who shoots at an escaping robber but misses and kills an innocent bystander would be considered a dependent, intervening force, and the robber would be criminally liable for felony murder under this test." *Id.* at 442 n.1, 564 P.2d at 1324 n.1. These dicta were limited two years later when the court held felony-murder did not apply to a situation "where the victim of the crime kills a perpetrator." Jackson v. State, 92 N.M. 461, ___, 589 P.2d 1052, 1053 (1979).

39. In Wilson v. State, 188 Ark. 846, 68 S.W.2d 100 (1934), bank robbers were held responsible for the death of a teller killed by a police officer. This, however, was a case in which the felons held an innocent person before them as a shield when escaping. These shield cases have been a traditional exception, even in agency theory jurisdictions, because courts hold that using the person as a shield demonstrates actual malice. The *Wilson* court specifically said that it agreed with the principles of *Campbell* and Commonwealth v. Moore, 121 Ky. 97, 88 S.W. 1085 (1905).

40. Taylor v. Superior Court, 3 Cal. 3d 578, 477 P.2d 131, 91 Cal. Rptr. 275 (1970), *overruled on other grounds sub nom.* People v. Antick, 15 Cal. 3d 79, 539 P.2d 43, 123 Cal. Rptr. 475 (1975); People v. Gilbert, 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1965), *vacated,* 388 U.S. 263 (1967); People v. Washington, 62

Colorado,[41] Kentucky,[42] Louisiana,[43] Massachusetts,[44] Nevada,[45] New Jersey,[46] New York,[47] North Carolina,[48] and Pennsylvania.[49]

The Missouri court, in deciding *Moore,* opted to follow the proximate cause theory and, in fact, seemed to ignore the majority rule completely. No mention was made of the agency theory of felony-murder. Instead, the court relied on the Illinois line of cases, including a relatively recent case, *People v. Hickman.*[50] The facts in *Hickman* seem even less conducive to a holding of liability than do those in *Moore.* In *Hickman,* a police officer was killed by another police officer who shot believing that the figure he saw was an escaping burglar. Although one of the co-felons had a gun in his possession when he was arrested, none of the felons ever fired a shot, and there was no evidence that the defendant or any of the other co-felons had a gun at the time. This case has been criticized as an unreasonable extension of the felony-murder rule.[51]

In *Moore,* the court also relied on two Michigan cases, *People v. Podolski*[52] and *People v. Smith.*[53] *Podolski* relied on the now overruled Pennsylvania case of *Commonwealth v. Almedia. Smith* was an appellate decision which indicated a desire to change the existing case law on the

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Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965). California does not extend felony-murder to cover the non-participant homicides, but the act may be murder under another theory. *See* notes 63-67 and accompanying text *infra.*

41. Alvarez v. District Court, 186 Colo. 37, 525 P.2d 1131 (1974).

42. Commonwealth v. Moore, 121 Ky. 97, 88 S.W. 1085 (1905).

43. State v. Garner, 238 La. 563, 115 So. 2d 855 (1959). This court relied on determinations of the question in other jurisdictions and an interpretation of its own statute. The statute used the term "offender," and the court stated:

> No mention is made therein that the "offender" is responsible for the result of a self defensive act committed by the person attacked. No intimation is made that the "offender" stands in the shoes of the person protecting his person and property with arms. We believe . . . that the legislative intent in employing the word "offender" contemplated the actual killer.

Id. at 586, 115 So. 2d at 864. The court also emphasized that doubt concerning a statute is to be resolved in favor of the defendant.

44. The principles of Commonwealth v. Campbell, 89 Mass. (7 Allen) 541 (1863) were reaffirmed in Commonwealth v. Balliro, 349 Mass. 505, 209 N.E.2d 308 (1965).

45. Sheriff v. Hicks, 89 Nev. 78, 506 P.2d 766 (1973).

46. State v. Canola, 73 N.J. 206, 374 A.2d 20 (1977). After discussing the pros and cons of the expansion of the felony-murder rule to include cases in which the lethal act was not committed by one of the felons, the court chose to follow the majority view. It stated, "[M]ost modern progressive thought in criminal jurisprudence favors restriction rather than expansion of the felony murder rule." *Id.* at 217, 374 A.2d at 29.

47. People v. Wood, 8 N.Y.2d 48, 167 N.E.2d 736, 201 N.Y.S.2d 328 (1960).

48. State v. Oxendine, 187 N.C. 658, 122 S.E. 568 (1924), is one of the leading cases in the area and has been cited by numerous other courts in support of the agency theory.

49. Commonwealth *ex rel.* Smith v. Myers, 438 Pa. 218, 261 A.2d 550 (1970).

50. 59 Ill. 2d 89, 319 N.E.2d 511 (1974), *cert. denied,* 421 U.S. 913 (1975).

51. Note, 52 CHI-KENT L. REV. 184 (1975); Note, 7 LOY. U.L.J. 529 (1976).

52. 332 Mich. 580, 52 N.W.2d 201 (1952).

53. 56 Mich. App. 560, 224 N.W.2d 676 (1974).

subject but considered itself bound by the earlier supreme court decision in that state.[54]

Additional reliance was placed on one Texas[55] and one Oklahoma case; both decisions followed the proximate cause theory. The Oklahoma case, *Johnson v. State,*[56] while purporting to limit the application of the doctrine, applied it even though the felon did not fire the fatal shot himself since he had stated that he intended to kill the police officer; his intent to murder was thereby expressed and not merely implied by the felony.

The *Moore* court did not enumerate any policy reasons for adopting the proximate cause theory instead of the agency theory. At least one court, however, has stated the policy justification that the felony-murder rule would deter the commission of felonies.[57] This argument has not gone unscathed:

> It seems that the protection of society may be as effectively served by increasing the penalty for the felony itself as by making application of the state's most severe penalty depend on such fortuitous circumstances as the amount and nature of the resistance encountered in the perpetration of a felony.[58]

Besides merely increasing the penalty for the felony, another possible alternative to the felony-murder rule which probably would be a more effective deterrent would be to raise the penalty whenever a felony is accomplished by means of a deadly weapon. This would more appropriately increase the penalty because the felon chose to use a deadly weapon and not merely because someone happened to resist with deadly force. For example, using a deadly weapon in the commission of a robbery raises it from second to first degree robbery in Missouri.[59]

In choosing the foreseeability approach to felony-murder, the Missouri Supreme Court went against most modern progressive thought which favors restriction of the felony-murder rule.[60] As one court stated, "Tort concepts of foreseeability and proximate cause have shallow relevance to culpability for murder in the first degree. Gradations of criminal liability

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54. *See* note 34 *supra.*

55. Miers v. State, 157 Tex. Crim. 572, 251 S.W.2d 404 (1952). For a discussion of *Miers,* see note 36 *supra.*

56. 386 P.2d 336 (Okla. Crim. App. 1963). For a discussion of *Johnson,* see note 35 *supra.*

57. Commonwealth v. Almedia, 362 Pa. 596, 68 A.2d 595 (1949).

58. Note, 71 HARV. L. REV. 1565, 1566 (1958) (discussing Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958)).

59. Under the Missouri statutes, a robbery accomplished by use or threatened use of a dangerous instrument against any person or while armed with a deadly weapon is robbery in the first degree. RSMo § 569.020 (1978). Robberies accomplished without the use of these weapons and/or the threatened use of a dangerous instrument are only second degree robbery. RSMo § 569.030 (1978).

60. State v. Canola, 73 N.J. 206, 224, 374 A.2d 20, 29 (1977); R. PERKINS, CRIMINAL LAW 721, 722 (2d ed. 1969); Ludwig, *Foreseeable Death in Felony Murder,* 18 U. PITT. L. REV. 51, 52 (1956); Mueller, *Criminal Law and Administration,* 34 N.Y.U.L. REV. 83, 97, 98 (1959); Note, 52 CHI-KENT L. REV. 184 (1975); Note, 9 J. MAR. J. PRAC. & PROC. 517, 518 (1975).

should accord with degree of moral culpability for the actor's conduct."[61] Even as early as 1905, courts were pointing out the unfairness of any expansion of the rule.[62]

If the court were determined to hold Moore responsible for the death of the bystander, it could have done so without resorting to the felony-murder doctrine. Instead, it could have followed the unique approach taken by California courts. California courts have adopted the agency theory of felony-murder and have expressly rejected the proximate cause theory, stating:

> When a killing is not committed by a robber or by his accomplice but by his victim, malice aforethought is not attributable to the robber, for the killing is not committed by him in the perpetration or attempt to perpetrate a robbery. *It is not enough that the killing was a risk reasonably to be foreseen and that the robbery might therefore be regarded as a proximate cause of the killing.*[63]

The court specifically found that felony-murder did not apply in these cases, but allowed for the possibility of liability under a different theory:

> Defendants who initiate gun battles may also be found guilty of murder if their victims resist and kill. Under such circumstances, the defendant for a base, anti-social motive and with wanton disregard for human life, does an act that involves a high degree of probability that it will result in death.[64]

This exact situation occurred in *People v. Gilbert*[65] when one of the co-felons was killed by a police officer. The felon who had initiated the gun battle was held liable for the death of a co-felon. The conviction was affirmed not under the felony-murder doctrine, but under the theory that the defendant's actual malice was displayed in his conscious disregard for life. Of course, this theory too can be abused and liability extended illogically.[66] This theory has also been criticized as only another way of stating the felony-murder doctrine.[67]

In addition to these moral and policy questions, there also may be a

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61. State v. Canola, 73 N.J. 206, 226, 374 A.2d 20, 30 (1977).

62. For cases discussing this point, see note 22 *supra*.

63. People v. Washington, 62 Cal. 2d 777, 781, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965) (emphasis added).

64. *Id.* at 782, 402 P.2d at 134, 44 Cal. Rptr. at 446.

65. 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1965).

66. In Taylor v. Superior Court, 3 Cal. 3d 578, 477 P.2d 131, 91 Cal. Rptr. 275 (1970), the defendant was waiting in the getaway car while his co-felons attempted to rob a store. The victim of the robbery shot and killed one of the co-felons and the defendant was convicted for the murder. Although the felons did not fire the first shot, the court held that the threats and nervous activity of the two felons were sufficient provocation to be considered initiation of the gun battle and would thereby qualify under the exception stated in People v. Washington, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965), and People v. Gilbert, 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1965).

67. Sheriff v. Hicks, 89 Nev. 78, 82, 506 P.2d 766, 768 (1973).

constitutional question involved in applying felony-murder to Moore; it might violate the prohibition against *ex post facto* laws. Although the United States Supreme Court has never granted certiorari to address the question specifically applied to felony-murder,[68] it has addressed similar questions. Even though the *ex post facto* clause is traditionally viewed as only applying to legislative and not judicial actions, the Supreme Court stated in *Bouie v. City of Columbia,* "If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same results by judicial construction."[69] This reasoning was used in *Bouie* to strike down a conviction for trespassing. In that case the statute, precise and narrow on its face, defined trespassing as entering another's property after being told not to enter. The state courts then expanded the statute to include the defendants' action of remaining on property, a restaurant, after being told to leave. The Supreme Court reversed and stated:

> [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely as an *ex post facto* law, such as Article I, § 10, of the Constitution forbids. An *ex post facto* law has been defined by this Court as one "that makes an action done before the passing of the law, which was *innocent* when done, criminal; and punishes such action," or "that *aggravates* a *crime,* or makes it *greater* than it was, when committed."[70]

An argument of this type was made by the appellant in *United States ex rel. Almedia v. Rundle.*[71] In denying habeas corpus the court noted that this was not a case in which the courts, by interpreting the felony-murder statute to include the defendant's acts, had reversed a prior decision. It emphasized that at the time of Almedia's trial the Pennsylvania Supreme Court had never addressed the question and that it was the function of the court to interpret exactly what was covered by a statute.[72]

In *Moore,* however, there was a prior Missouri Supreme Court decision defining the limits of the statute.[73] It has been said:

> Perhaps the easiest case [in which the courts have violated the prohibition against *ex post facto* laws] is that in which a judicial

68. Certiorari has been denied consistently by the Supreme Court in cases concerning nonparticipant felony-murder. *See, e.g.,* People v. Hickman, 59 Ill. 2d 89, 319 N.E.2d 511 (1974), *cert. denied,* 421 U.S. 913 (1975). Although certiorari was granted in People v. Gilbert, 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1965), review was limited to other questions on appeal. 384 U.S. 985 (1966).

69. Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1964).

70. *Id.* at 353 (emphasis in original).

71. 255 F. Supp. 936 (E.D. Pa. 1966), *aff'd,* 383 F.2d 421 (3d Cir. 1967), *cert. denied,* 393 U.S. 863 (1968).

72. *Id.* at 944.

73. State v. Majors, 237 S.W. 486 (Mo. 1922). *See also* State v. Glenn, 429 S.W.2d 225 (Mo. En Banc 1968). *Majors* and *Glenn* are discussed in text accompanying notes 9-13 *supra.*

> decision subsequent to the defendant's conduct operates to his detriment by overruling a prior decision which, if applied to the defendant's case, would result in his acquittal. For example, the later decision may . . . interpret a criminal statute as covering conduct previously held to be outside the statute.[74]

If the court in *Moore* had followed the lead of *Glenn* and *Majors,* the defendant could not have been convicted of murder because the lethal act was not in furtherance of the crime. In so construing the statute to the defendant's detriment, the Missouri Supreme Court has violated a tradition in Missouri case law. The cases have consistently held that, when dealing with penal or criminal statutes, the statutes are "always strictly construed, and can have no broader application than is warranted by its plain and unambiguous terms."[75] Interpreting the statute to include homicides committed in an attempt to thwart, not perpetrate, the felony, clearly is not "warranted by its plain and unambiguous terms." Doubts in criminal cases concerning the interpretation of statutes have been traditionally resolved in favor of the defendant.[76] Missouri should follow the approach used by Louisiana when it was recently confronted with a similar problem. Basing its decision on prior Louisiana cases that required strict construction of criminal statutes,[77] the Louisiana Supreme Court refused to expand judicially its felony-murder statute to include nonparticipant lethal acts. The court stated:

> Reason dictates and justice demands that the public safety, peace, and good order of the community should be insured at all times. Normal people should be aware of the probable and natural consequences of their acts. The instant situation is deplorable; it is, however, a matter which addresses itself to the lawmakers. If we were to adhere to the theory advanced and contended for by the State, we would be *amending* and *enlarging* the scope of the statute involved rather than giving it a proper interpretation and application.[78]

In light of the general trend to restrict liability under the felony-murder doctrine and perhaps to abolish the rule completely,[79] the Missouri Supreme Court should reexamine its expansion of the rule to include the acts of nonparticipants.[80] In passing the new Criminal Code, the

74. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 94-95 (1972).
75. City of Charleston v. McCutcheon, 360 Mo. 157, 164, 227 S.W.2d 736, 738 (En Banc 1950).
76. Anthony v. Kaiser, 350 Mo. 748, 750, 169 S.W.2d 47, 48 (En Banc 1943).
77. State v. Garner, 238 La. 563, 586, 115 So. 2d 855, 864 (1959).
78. *Id.* at 586-87, 115 So. 2d at 864 (emphasis added).
79. Felony-murder was abolished 20 years ago in England, the country from which the United States adopted the concept. 5 & 6 ELIZ. 2, ch. 11 (1957). For statements concerning the movement in favor of limiting or abolishing felony-murder, see authorities cited in note 60 *supra.*
80. It is interesting to note that five months before the supreme court decided *Moore,* the Missouri Court of Appeals, Southern District, had examined the general trends and had, in a similar case, held differently than the supreme court