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# Case Note: Criminal Law—Dangerous, Not Deadly: Possession of a Firearm Distinguished from Use Under the Felony-Murder Rule—State v. Anderson

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**CASE NOTE: CRIMINAL LAW—DANGEROUS, NOT  
DEADLY: POSSESSION OF A FIREARM DISTINGUISHED  
FROM USE UNDER THE FELONY-MURDER RULE—  
STATE V. ANDERSON**

Michael C. Gregerson<sup>†</sup>

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I. INTRODUCTION

The felony-murder<sup>1</sup> rule challenges traditional notions of culpability by allowing courts to find a homicide where there is no corresponding homicidal intent.<sup>2</sup> At early common law, the rule

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1. “Felony murder” is a “[m]urder that occurs during the commission of a felony (esp. a serious one).” BLACK’S LAW DICTIONARY 1038 (7th ed. 1999).

2. See *State v. Branson*, 487 N.W.2d 880, 881 (Minn. 1992) (citing 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 7.5 (1986)) (describing the felony murder rule’s function as “imputing malice where there was no specific intent to kill”); 40 AM. JUR. 2D *Homicide* § 64 (2003) (explaining that the effect of a felony-murder statute is to impute malice). Traditionally, culpability has required intent. *Morissette v. United States*, 342 U.S. 246, 250 (1952).

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and

broadly held that a death resulting from the commission of a felony is murder.<sup>3</sup> The criminal intent applicable to the underlying felony is said to transfer to the homicide; thus, an accidental death becomes a murder.<sup>4</sup>

The doctrine has long been controversial.<sup>5</sup> The public, of course, has little tolerance for those who would intentionally commit a felony, and an unwarranted death without question deserves punishment.<sup>6</sup> But the conclusion that any death caused while attempting or committing a felony rises to murder is a brutal and illogical violation of what has been described as perhaps the most basic principle of criminal law: “criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result.”<sup>7</sup> Courts tend to avoid

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persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

*Id.*

3. State v. Anderson, 666 N.W.2d 696, 698 (Minn. 2003) (citing Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L.J. 763, 765 (1999) (quoting SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 947 (George Chase ed., 4th ed. 1938)).

4. 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 147 (15th ed. 1993) (“In the typical case of felony murder, there is no malice in ‘fact’ with respect to the homicide; the malice is supplied by the ‘law.’”); *cf.* Note, *Felony Murder: A Tort Law Reconceptualization*, 99 HARV. L. REV. 1918, 1919 (1986) [hereinafter *Reconceptualization*] (pointing out that within the concept of homicide, with the exception of manslaughter, only felony murder requires no specific mental element). The Minnesota Criminal Code, for example, classifies five types of homicide. *See* MINN. STAT. §§ 609.185-205 (2002). Each type describes a particular mental requirement. *See, e.g.,* MINN. STAT. § 609.185(a)(1) (2002) (requiring premeditation and intent); MINN. STAT. § 609.19, subd. 1(1) (2002) (requiring intent without premeditation).

5. *See* People v. Aaron, 299 N.W.2d 304, 307 (Mich. 1980) (“Felony murder has never been a static, well-defined rule at common law, but throughout its history has been characterized by judicial reinterpretation to limit the harshness of the application of the rule.”).

6. The standard definition of a felony offense as a crime punishable by a year or more in prison testifies to the public will as expressed through the legislature. *See, e.g.,* MINN. STAT. § 609.02, subd. 2 (2002) (“[S]entence of imprisonment for more than one year may be imposed.”). *See generally* David Crump & Susan Waite Crump, *Articles in Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL’Y 359 nn.18-19 (1985) (describing the BUREAU OF JUSTICE STATISTICS OF THE UNITED STATES DEPARTMENT OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA 4-5 (1983), where the public was asked to rank the severity of crimes). The author notes that some felony murders including rape- or robbery-homicides ranked higher than other intentional family killings. *Id.* at 364.

7. *Aaron*, 299 N.W.2d at 316 (quoting Bernard E. Gegan, *Criminal Homicide in the Revised New York Penal Law*, 12 N.Y.L. FORUM 565, 586 (1966)). The court

applying the rule where circumstances permit,<sup>8</sup> and the variety of judicial and legislative limitations testify to a growing discomfort with the harshness of the rule.<sup>9</sup>

Minnesota is among the states that have decided to limit the application of the felony-murder rule.<sup>10</sup> The Minnesota Supreme Court has, through its power of common law interpretation, wisely enunciated a rule that limits the reach of the doctrine to felonies that are inherently dangerous to life.<sup>11</sup> The result is a rule that is not entirely consistent with the broader demands of the statute. After settling into a consistent course of rulings, the court was once again called upon to grapple with the controversial doctrine.<sup>12</sup>

Although on its face the Minnesota statute applies to all but a few felonies,<sup>13</sup> the Minnesota Supreme Court recognizes only predicate felonies that involve a “special danger to human life.”<sup>14</sup> In Minnesota, determining whether a felony involves a “special danger to human life” is critical; only those felonies that involve such a danger can support a felony-murder charge.<sup>15</sup>

Determining whether a felony involves a special danger to human life requires consideration of two factors: (1) the nature of

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further reasoned, “[w]hile it is understandable that little compassion may be felt for the criminal whose innocent victim dies, this does not justify ignoring principles underlying our system of criminal law.” *Id.* at 318.

8. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 70 (3d ed. 1982).

9. *Aaron*, 299 N.W.2d at 316.

10. Most jurisdictions have limited the application of the rule either by statute or common law. *See generally* MODEL PENAL CODE AND COMMENTARIES § 210.2 cmt. 6 (1980) (summarizing major limitations); TORCIA, *supra* note 4, § 149 (describing a variety of limitations).

11. While Minnesota Statutes section 609.19 applies to all felonies (excepting specific crimes for treatment as murder in the first degree under Minnesota Statutes section 609.185 (2002)), the Minnesota Supreme Court only gives effect to the rule where the felony is inherently dangerous. *See State v. Nunn*, 297 N.W.2d 752, 754 (Minn. 1980).

12. Since *Nunn*, the court has applied the same standard for determining which felonies involve some special danger to human life. *See State v. Meyers*, 627 N.W.2d 58, 63 (Minn. 2001) (finding danger to life in the circumstances surrounding obstruction of justice); *State v. Branson*, 487 N.W.2d 880, 885 (Minn. 1992) (reiterating abstract and circumstances as the proper test); *Matter of Welfare of M.D.S.*, 345 N.W.2d 723, 729-30 (Minn. 1984) (finding danger to life in damage to property by shooting a rifle into a dwelling).

13. MINN. STAT. § 609.19, subd. 2 (2002). The Minnesota rule applies to all felonies except particular instances of criminal sexual conduct with force or violence, drive-by shootings, and certain crimes committed in violation of an order for protection. *Id.*

14. *Nunn*, 297 N.W.2d at 753.

15. *Id.* at 754.

the felony in the abstract (considering only the elements of the offense with a view to their inherent dangerousness), and (2) the manner in which the felony was committed (taking account of the particular facts and circumstances of the offense).<sup>16</sup>

Until recently, the courts focused largely on the facts and circumstances of the felony under consideration, an approach that tended to favor application of the felony-murder rule.<sup>17</sup> In 2003, the Minnesota Supreme Court revisited the doctrine in *State v. Anderson*, a case that involved *felon in possession*<sup>18</sup> and *possession of a stolen firearm*.<sup>19</sup> In *Anderson*, the court focused its analysis exclusively on the felonies in the abstract, ignoring the more dangerous circumstances in which the felonies were committed.<sup>20</sup> The court made this transition without explanation and without providing guidance for apportioning weight between the two considerations.<sup>21</sup>

This Note first briefly examines the history of the felony-murder doctrine both generally and in Minnesota.<sup>22</sup> Second, this Note describes the decision and analysis in *State v. Anderson*, the latest case in Minnesota to deal with the felony-murder doctrine.<sup>23</sup>

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16. See *id.* (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 547 (West Pub. Co. 1972)).

17. By including more activity within the scope of the analysis, the potential for finding danger increases. The opposite is also true. Viewing a felony only in the abstract tends to limit application of the felony-murder rule. Compare *People v. Patterson*, 778 P.2d 549 (Cal. 1989) (holding that furnishing cocaine is not inherently dangerous when viewed in the abstract) with *State v. Randolph*, 676 S.W.2d 943 (Tenn. 1984) (upholding heroin distribution as a proper predicate when viewed as committed).

18. MINN. STAT. § 624.713, subd. 1(b) (2002) (prohibiting those adjudicated delinquent of a crime of violence from possessing a firearm).

19. MINN. STAT. § 609.53, subd. 1 (2002) (describing felony possession of a stolen firearm); MINN. STAT. § 609.52, subd. 3(1) (2002) (prescribing punishment).

20. See *State v. Anderson*, 666 N.W.2d 696 (Minn. 2003). The court did not discuss its reasons for viewing the felony only in the abstract. See *id.* One possible explanation is that the court narrowly construed the scope of the felony. By limiting the time that the felony is considered to be occurring, the court can claim to have taken account of the entire felony. Compare *State v. Aarsvold*, 376 N.W.2d 518, 523 (Minn. Ct. App. 1985) (finding that the sale of cocaine ended at the point of transaction so death occurred outside of the felony) with *State v. Murphy*, 380 N.W.2d 766, 771 (Minn. 1986) (finding that a killing which took place after a rape was within the "same continuous criminal act"). See generally Erwin S. Barbre, Annotation, *What Constitutes Termination of Felony for Purpose of Felony-Murder Rule*, 58 A.L.R.3d 851 (1974).

21. *Anderson*, 666 N.W.2d at 701.

22. See *infra* Part II.

23. See *infra* Part III.

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Third, this Note concludes that in an effort to reach the right result, the court misapplied its previous precedent and left the lower courts with no clear standard for guidance in the future.<sup>24</sup> Finally, this Note suggests that a workable standard might be found in limiting the application of the rule to deaths that occur in furtherance of the felony.<sup>25</sup>

## II. GENERAL HISTORY

The original formulation of the felony-murder rule stated, without limitation, that a death caused while perpetrating or attempting a felony is murder.<sup>26</sup> The doctrine was mechanical and made no concessions for deaths that were caused by accident.<sup>27</sup> Death did not even have to be a foreseeable consequence of the crime.<sup>28</sup> One commentator framed the operation of the rule most starkly: “[A] felony + a killing = a murder.”<sup>29</sup> The unique and controversial aspect of this rule is that it regards the commission of a felony as conclusive evidence of homicidal malice.<sup>30</sup>

Legal historians agree that the rule appeared first in commentaries rather than judicial decisions,<sup>31</sup> but the precise origins of the doctrine are unclear.<sup>32</sup> Commentators often trace the first manifestation of the felony-murder rule to Lord Dacres case in 1535.<sup>33</sup> Lord Dacres and his hunting party agreed to trespass in a park to hunt and to kill anyone who opposed them.<sup>34</sup>

24. See *infra* Part IV.A-C.

25. See *infra* Part IV.D.

26. See M. Susan Doyle, Note, *People v. Patterson: California's Second Degree Felony-Murder Rule at "The Brink of Logical Absurdity,"* 24 LOY. L.A. L. REV. 195, 199 (1990) (citing 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 7.5 (1986)).

27. George P. Fletcher, *Reflections on Felony-Murder*, 12 SW. U. L. REV. 413, 413 (1980-81).

28. PERKINS & BOYCE, *supra* note 8, at 67-68.

29. See James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1430 (1994).

30. See Fletcher, *supra* note 27, at 415-16; *People v. Satchell*, 489 P.2d 1361, 1366 n.15 (Cal. 1971) (“The thing done having proceeded from a corrupt mind, is to be viewed the same, whether the corruption is of one particular form or another.”) (citing *People v. Doyell*, 48 Cal. 85 (1874)).

31. Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L.J. 763, 764 (1999).

32. *Id.*

33. *People v. Aaron*, 299 N.W.2d 304, 307 (Mich. 1980).

34. *Id.*

One of the Lord's party killed a gamekeeper who confronted him.<sup>35</sup> Although not physically present at the site of the killing, Lord Dacres was also held liable for the killing.<sup>36</sup> Even though this case has been presented as one involving the felony-murder rule,<sup>37</sup> its holding was based on the theory of "constructive presence," not on the felony-murder rule.<sup>38</sup> Because the hunting party had expressly agreed to kill anyone who opposed them, there was no need for the imputation of malice.<sup>39</sup>

Whatever the original source of the rule, "the doctrine gained prominence with Sir Edward Coke's statement of the rule in 1797."<sup>40</sup>

If the act be unlawful it is murder. As if A. meaning to steale a deere in the park of B., shooteth at the deere, and by the glance of the arrow killeth a boy that is hidden in a bush: this is murder, for that the act was unlawful, although A. had no intent to hurt the boy, nor knew not of him.<sup>41</sup>

This rule operates in direct opposition to the fundamental principle of criminal law that liability ought to reflect culpability.<sup>42</sup> A crime is typically composed of a particularized type of criminal intent coupled with an act.<sup>43</sup> When the felony-murder doctrine was first being applied, the idea of matching a specific mindset to a particular crime was not nearly as developed as it is today.<sup>44</sup> Judges focused more attention on the result of the felony than on the intent of the actor who produced the result.<sup>45</sup> The felony-murder

35. *Id.* at 308.

36. *Id.* at 307-08.

37. *Id.* at 308-09.

38. *Id.* at 308.

39. *Id.*

40. See Michael J. Roman, "Once More Unto the Breach, Dear Friends, Once More": A Call to Reevaluate the Felony-Murder Doctrine in Wisconsin in the Wake of *State v. Oimen* and *State v. Rivera*, 77 MARQ. L. REV. 785, 828 n.15 (1994).

41. *Aaron*, 299 N.W.2d at 309 (quoting SIR EDWARD COKE, THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 56 (1797) and noting that Coke's statements have been criticized as lacking authority).

42. Doyle, *supra* note 26, at 195; *State v. Branson*, 487 N.W.2d 880, 885 (Minn. 1992) (levels of criminal responsibility are based on the actor's intent).

43. PHILLIP E. JOHNSON, CRIMINAL LAW CASES, MATERIALS AND TEXT 1 (5th ed. 1995).

44. See Tomkovicz, *supra* note 29, at 1435. The early conception of mens rea necessarily was "vague and imprecise; any badness or wrongfulness qualified." *Id.*

45. See e.g., Gerber, *supra* note 31, at 765 (describing theory of "tainting," whereby "if one person caused the death of another, then the killing upset the

doctrine reflected the idea that “the defendant, because he is committing a felony, is by hypothesis, a bad person, so that we should not worry too much about the difference between the bad results he intends and the bad results he brings about.”<sup>46</sup>

Modern criminal codes distinguish among several degrees of criminal intent. The Model Penal Code for instance, recognizes four types of mental states associated with liability: purpose, knowledge, recklessness, and negligence.<sup>47</sup> As criminal law has evolved, “courts and commentators have come to recognize that the intent to commit a felony is not equivalent to the other mental states associated with murder.”<sup>48</sup> The doctrine has attracted vast amounts of scholarly criticism, and many courts have concluded that “the felony murder doctrine expresses a highly artificial concept that deserves no extension beyond its required application.”<sup>49</sup>

Where courts feel compelled to justify use of the rule, it is most often explained as a deterrent against the commission of felonies<sup>50</sup> or against killing negligently or accidentally while engaged in a felony.<sup>51</sup> The value of the rule as a deterrent has also been hotly contested.<sup>52</sup> Commentators point out that accidental killings, by their very nature, are neither planned nor susceptible to avoidance.<sup>53</sup> Opponents of the rule further contend that the

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moral order [and] [s]ome legal response was necessary to . . . expunge the taint”).

46. John S. Huster, *The California Courts Stray From the Felony in Felony Murder: What is “in Perpetration” of the Crime?*, 28 U.S.F. L. REV. 739, 745 (1994) (quoting 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW § 7.5(e) (1986)); see also Fletcher, *supra* note 27, at 427 (“If there is a principle . . . it is that the wrongdoer must run the risk that things will turn out worse than she expects.”).

47. Tomkovicz, *supra* note 29, at 1480 n.24 (discussing Model Penal Code section 2.02).

48. Tamu Sudduth, *The Dillon Dilemma: Finding Proportionate Felony-Murder Punishments*, 72 CAL. L. REV. 1299, 1306 (1984).

49. See 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 14.5(h) (2d ed. 1986) (quoting *People v. Phillips*, 414 P.2d 353, 360 (Cal. 1966)).

50. Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 451 (1985).

51. See *id.* at 450; see, e.g., *State v. Branson*, 487 N.W.2d 880, 882-84 (Minn. 1992) (holding that certain felonious conduct risks death and warrants punishment).

52. See generally Tomkovicz, *supra* note 29, at 1448; Crump & Crump, *supra* note 6, at 369 (defending deterrence as a rationale for the rule).

53. T.B. Macaulay, A Penal Code Prepared by the Indian Law Commissioners, Note M, 64-65 (1837), excerpted in SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES CASES AND MATERIALS 472-73 (6th ed. 1995). To punish one who while committing a felony caused a death by pure accident gains



average felon is unlikely to know about what is basically a rule of evidence regarding a defendant's mindset during the commission of a crime.<sup>54</sup>

Historically, the harshness of the felony-murder doctrine was tempered by the limited number and extreme nature of the acts that were recognized as felonies.<sup>55</sup> The rule applied to the most serious crimes within the social context of the time: "homicide, mayhem, rape, arson, robbery, burglary, larceny, prison breach, and rescue of a felon."<sup>56</sup> Both felonies and murders were punishable by death.<sup>57</sup> At trial, with the same result pending, it made no difference under which theory one was prosecuted.<sup>58</sup>

The rule, then, was not justified as a means to increase the penalty for a felony. Instead, commentators hold that it was used to punish homicides that occurred in the course of an attempted felony.<sup>59</sup> Because an attempted felony was punishable only as a misdemeanor, "the felony murder rule allowed the court to punish a person who attempted a felony and failed, in the same manner as if he had succeeded."<sup>60</sup>

In England, the application of the rule was limited<sup>61</sup> until 1957 when it was eliminated completely.<sup>62</sup> As the number of recognized felonies in America has grown, the potential for creating murderers

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nothing for the protection of life. *Id.* at 472. If the punishment for the felony is too light, then the punishment should be increased. *Id.* at 473. Treating the felon who did the same thing, with the same intention with no more risk of causing death, taking no less care to avoid it, is capricious. *Id.*

54. Crump & Crump, *supra* note 6, at 370 ("Deterrence is the policy most often recognized in the cases. Scholars, however, tend to dismiss this rationale, using such arguments as the improbability that felons will know the law.").

55. See Gerber, *supra* note 3, at 764 ("Under early English law, felonies and murders were both punishable by death.").

56. *State v. Aarsvold*, 376 N.W.2d 518, 521 (Minn. Ct. App. 1985) (listing common law felonies).

57. *Id.*; Roth & Sundby, *supra* note 50, at 450.

58. See Huster, *supra* note 46, at 744.

59. See MODEL PENAL CODE AND COMMENTARIES, pt. II, vol. I, § 210.2 cmt. 6 n.74 (1980) ("The primary use of the felony-murder rule . . . was to deal with a homicide that occurred in furtherance of an attempted felony that failed.").

60. *Id.*; Roth & Sundby, *supra* note 50, at 450-51 (explaining the purpose for the rule is vague and deterrence justification is logically flawed).

61. English courts created two general limitations: death had to be the natural and probable consequence of the felony, and the felony charged had to be violent in nature. Richard Brooks Holcomb, *Predicate Offenses For First Degree Felony Murder in Virginia*, 57 WASH. & LEE L. REV. 561, 571 (2000).

62. PERKINS & BOYCE, *supra* note 8, at 64 n.38 (citing HOMICIDE ACT OF 1957, 5&6 Eliz. II, c. 11, sec. 1).

out of relatively minor offenders has caused courts to limit the effect of the doctrine in a variety of ways.<sup>63</sup>

A. *Limitations on the Application of the Felony-Murder Rule*

There is no uniformity among the states with respect to felony-murder. This is partially because legislatures have promulgated a variety of statutes, but also because the judiciary has imposed many common law limitations.<sup>64</sup> Comments to the Model Penal Code describe several of the methods that courts have used to limit the felonies to which the rule can be applied.<sup>65</sup> These restrictions include: requiring that the crime, abstractly considered, be inherently dangerous to human life;<sup>66</sup> that the defendant's conduct in committing the felony involve a foreseeable risk to life;<sup>67</sup> that the felony be independent of the homicide;<sup>68</sup> that the act of killing be in furtherance of the felony;<sup>69</sup> and giving a narrow construction to the period of time during which the felony is in the process of commission.<sup>70</sup> All of these restrictions are aimed at avoiding situations where applying the rule would lead to harsh results.

One of the earliest and most logical limitations to the felony-murder doctrine is the requirement that the felony be inherently dangerous to life.<sup>71</sup> In order to justify a murder conviction, a felon should at least have done something dangerous. The goal of deterrence can only be served where a felon can foresee danger in the commission of the felony and modify his actions in light of the

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63. See 40 C.J.S. *Homicide* § 45 (1991 & Supp. 2004) (citing *State v. Forsman*, 260 N.W.2d 160 (Minn. 1977)). See generally LAFAVE, *supra* note 49, § 14.5(b) (describing limitations on felony-murder rule).

64. Tomkovicz, *supra* note 29, at 1434 (“Most American jurisdictions have a restricted form of the rule that applies only when a felon acting in furtherance of one of a certain, limited group of felonies commits a lethal act that kills another human being.”).

65. See MODEL PENAL CODE AND COMMENTARIES § 210.2 cmt. 6 (1980) (summarizing major limitations).

66. See, e.g., *People v. Patterson*, 778 P.2d 549, 555 (Cal. 1989). For application of the felony-murder rule, most courts require that [a felony not specifically listed in the statute] be inherently dangerous. TORCIA, *supra* note 4, § 148.

67. See, e.g., *Commonwealth v. Matchett*, 436 N.E.2d 400, 410 (Mass. 1982).

68. See, e.g., *People v. Ireland*, 450 P.2d 580, 590 (Cal. 1969).

69. See, e.g., *Commonwealth v. Redline*, 137 A.2d 472, 495 (Pa. 1958).

70. See, e.g., *State v. Aarsvold*, 376 N.W.2d 518, 521 (Minn. Ct. App. 1985).

71. Most courts limit the felony-murder rule to inherently dangerous felonies. PERKINS & BOYCE, *supra* note 8, at 65.

impending risk to life.<sup>72</sup>

As early as 1887, in the case of *Regina v. Serné*, the rule was limited by judicial instruction to situations deemed inherently dangerous.<sup>73</sup> In that case, a man stood accused of arson for setting fire to his home and burning his wife and children to death in order to cheat an insurance company on the claim.<sup>74</sup> The presiding judge suggested to the jury that, “instead of [allowing all felonies to support felony murder] it would be reasonable to say that any act known to be dangerous to life and likely in itself to cause death . . . should be murder.”<sup>75</sup> Today, the majority of jurisdictions recognize inherent danger as a proper qualification for treatment under the rule.<sup>76</sup>

In determining which felonies involve a danger to human life, two competing views have evolved. The first view looks only to the elements of the felony in the abstract, and the dangerousness is determined by the nature of the crime.<sup>77</sup> A theft of property, for example, requires only that one take possession of something that does not belong to him with an intent to keep it.<sup>78</sup> When viewed in the abstract, a theft does not create an unacceptable risk of death to justify imposition of the rule.<sup>79</sup> The second view maintains that the facts and circumstances surrounding the commission should be included in the analysis.<sup>80</sup> If the theft involved returning stolen

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72. Sudduth, *supra* note 48, at 1305 n.31; *People v. Burroughs*, 678 P.2d 894, 897 (Cal. 1984) (“We formulated this standard because ‘if the felony is not inherently dangerous, it is highly improbable that the potential felon will be deterred; he will not anticipate that injury or death might arise solely from the fact that he will commit the felony.’”).

73. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES CASES AND MATERIALS* 468-70 (6th ed. 1995) (citing *Regina v. Serné*, 16 Cox Crim. Cas. 311 (1887)).

74. *Id.* at 468.

75. *Id.* at 470.

76. It is critical to note, however, that even when limited to predicate felonies that are inherently dangerous, the rule still operates to turn what is essentially negligent or reckless activity into an intentional crime. See MODEL PENAL CODE AND COMMENTARIES § 210.2 cmt. 6 (1980).

77. PERKINS & BOYCE, *supra* note 8, at 66. In *People v. Williams*, California’s highest court ruled that the determination of danger is to be drawn from the “elements of the felony in the abstract, not the particular ‘facts’ of the case.” 406 P.2d 647, 650 n.5 (Cal. 1965).

78. A theft can occur under a variety of circumstances. See MINN. STAT. § 609.52 (2002 & Supp. 2003).

79. See, e.g., *People v. Phillips*, 414 P.2d 353, 357 (Cal. 1966); LAFAVE, *supra* note 49, § 14.5 (theft felonies in abstract do not involve danger to life).

80. PERKINS & BOYCE, *supra* note 8, at 66.

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merchandise for cash, while the felon was armed with a loaded firearm and under the influence of multiple narcotics, the result would be different in a jurisdiction that takes into consideration the facts of the case.<sup>81</sup>

The method employed plays a major and often determinative role in the outcome of the test.<sup>82</sup> Proponents of the circumstances test argue that the standard provides a more accurate measurement of the danger as it actually existed.<sup>83</sup> Opponents insist that the existence of a victim makes objective determination of danger difficult.<sup>84</sup> Every felony that ends in death will naturally have been done in a dangerous manner.<sup>85</sup>

*B. Recent History in Minnesota*

On its face, the current Minnesota statute on second-degree unintentional murder applies to all but a few felonies. The statute states in pertinent part:

[W]hoever does either of the following is guilty of murder in the second degree . . . (1) causes the death of a human being, without intent to effect the death of any person, while committing or attempting to commit a felony offense other than [particular sexual offenses and drive-by

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81. *State v. Cole*, 542 N.W.2d 43, 53 (Minn. 1996).

82. Compare *People v. Satchell*, 489 P.2d 1361, 1369-70 (Cal. 1971) (holding that possession of a firearm is not inherently dangerous when viewed in the abstract) with *State v. Goodseal*, 553 P.2d 279, 285 (Kan. 1976) (holding that possession of a firearm is inherently dangerous under the circumstances of the commission).

83. “[I]f the purpose of the felony-murder doctrine is to hold felons accountable for unintended deaths caused by their dangerous conduct, then it would seem to make little difference whether the felony committed was dangerous by its very nature or merely dangerous as committed in the particular case.” LAFAVE, *supra* note 49, § 14.5(b).

84. Explaining the decision to view felonies in the abstract only, the California Supreme Court stated:

This form of analysis is compelled because there is a killing in every case where the rule might potentially be applied. If in such circumstances a court were to examine the particular facts of the case prior to establishing whether the underlying felony is inherently dangerous, the court might well be led to conclude the rule applicable despite any unfairness which might redound to the defendant by so broad an application: the existence of the dead victim might appear to lead inexorably to the conclusion that the underlying felony is exceptionally hazardous. We continue to resist such unjustifiable bootstrapping.

*People v. Burroughs*, 678 P.2d 894, 897-98 (Cal. 1984).

85. *See id.*

shootings].<sup>86</sup>

Before 1981, the statute had only been applicable to felonies committed or attempted “upon or affecting the person whose death was caused.”<sup>87</sup> A felony not committed directly upon “the person” would not qualify for felony-murder treatment.<sup>88</sup> The effect of the language was to eliminate pure property crimes from the domain of the statute.<sup>89</sup> Minnesota courts have interpreted that limiting language as a means of “isolat[ing] for special treatment those felonies that involve some special danger to human life.”<sup>90</sup> After 1981, when the language was removed, Minnesota retained the requirement that predicate felonies involve some “special danger to human life.”<sup>91</sup>

In 1980, Minnesota adopted its current framework for resolving whether a felony is inherently dangerous and thereby capable of supporting a murder conviction. In *State v. Nunn*, the court adopted the two-part *special danger* test that called for potential predicate felonies to be viewed *both* in the abstract *and* in the context of how they were committed.<sup>92</sup> Significantly, the court gave no explicit guidance on how much weight was to be accorded to either consideration.<sup>93</sup> Beginning with *Nunn*, however, the court has made a series of decisions that appear to indicate that lack of danger in the abstract can be overcome by dangerous circumstances in the commission of the offense.<sup>94</sup>

The *Nunn* decision involved three young men who unlawfully entered a home intending to steal property.<sup>95</sup> They were surprised by the resident of the home and beat him severely.<sup>96</sup> The “beating, while insufficient to cause death to a healthy person,” caused the

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86. MINN. STAT. § 609.19, subd. 2(1) (2002).

87. *State v. Anderson*, 654 N.W.2d 367, 369 (Minn. Ct. App. 2002), *rev'd*, 666 N.W.2d 696 (Minn. 2003) (quoting MINN. STAT. ANN. § 609.195(2) advisory committee’s cmt. (West 1987)).

88. *See id.*

89. *Id.* at 370.

90. *Anderson*, 666 N.W.2d at 699 (quoting *State v. Nunn*, 297 N.W.2d 752, 753 (Minn. 1980)).

91. *Id.*

92. 297 N.W.2d 752, 754 (Minn. 1980).

93. *See id.* (stating only that the approach adopted considers both elements and circumstances).

94. *See infra* notes 95-103 and accompanying text.

95. *Nunn*, 297 N.W.2d at 753.

96. *Id.*

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resident to die of a heart attack.<sup>97</sup> In *Nunn*, the court reasoned that burglary of a dwelling, although largely a crime against property, “always carries with it the possibility of violence and therefore some special risks to human life.”<sup>98</sup> Thus, although burglary may not have been dangerous in the abstract, the fact that the burglary was committed on a dwelling, with an accompanying assault, created a special danger to life.<sup>99</sup>

In the 1983 case *State v. Back*, random shots were fired upon cars, streetlights, and buildings using a high-powered rifle.<sup>100</sup> The felony-murder rule was applied and predicated upon felony damage to property, a crime that viewed in the abstract does not jeopardize lives in its commission.<sup>101</sup> In deciding *Back*, the court held the defendant’s conduct involved a “high degree of risk of bodily harm.”<sup>102</sup> Thus, even a true property crime committed under dangerous circumstances may involve a danger to life and support a felony-murder charge.<sup>103</sup>

Thirteen years later, in *State v. Cole*, the court reached a similar conclusion.<sup>104</sup> The defendant, under the influence of multiple drugs and carrying a loaded gun, entered a department store intending to return stolen merchandise for money.<sup>105</sup> The crime of theft, when exhibiting a danger to life as committed, was an appropriate predicate for felony-murder.<sup>106</sup>

In all three supreme court rulings, the dangerous circumstances of the predicate felony proved to be dispositive, and the rule was applied. In 2003, the *Anderson* court arrived at a different result.

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97. *Id.*

98. *Id.* at 754.

99. *See id.*

100. 341 N.W.2d 273, 274 (Minn. 1983).

101. *Id.* at 277.

102. *Id.* at 276 (quoting the district court).

103. *Id.* The court noted that this holding was particularly significant because despite a legislative amendment that effectively allowed the felony-murder rule to encompass property offenses, the previous limitation that a special danger to human life be present was not abandoned. *State v. Anderson*, 666 N.W.2d 696, 699 (Minn. 2003) (discussing 40 MINN. STAT. ANN. § 609.195 1963 advisory committee’s cmt. (West 2003)).

104. 542 N.W.2d 43 (Minn. 1996).

105. *Id.* at 46-47.

106. *Id.* at 53.

III. THE *ANDERSON* DECISIONA. *Facts and Procedural History*

In 1998, Jerret Lee Anderson was convicted of riot in the second degree.<sup>107</sup> Thereafter, possession of a firearm would be a felony offense for Anderson.<sup>108</sup> On February 26, 2002, Anderson visited Blake Rogers and a third party at Rogers's house in Minneapolis.<sup>109</sup> As the three were together in Rogers's bedroom, Anderson showed both men a twelve-gauge shotgun that he claimed he had stolen.<sup>110</sup> Next, Anderson passed the gun briefly to his two companions.<sup>111</sup> The gun was missing its stock, and all three men noted that the gun was loaded.<sup>112</sup> While Rogers bent to load compact discs into his stereo, Anderson pointed the gun at him.<sup>113</sup> The gun discharged, killing Rogers.<sup>114</sup> Following Rogers's death, the State charged Anderson with murder in the third-degree and second-degree felony-murder.<sup>115</sup>

The district court dismissed the felony-murder charge for lack of probable cause.<sup>116</sup> The district court erroneously compared the possession of a firearm in *Anderson* to the felony sale of cocaine in *State v. Aarsvold*,<sup>117</sup> an earlier appellate court decision.<sup>118</sup> In *Aarsvold*, the court considered the sale to be finished after the exchange of money and drugs, and the death that followed was not considered part of the felony.<sup>119</sup> Comparing *Anderson* to *Aarsvold*, the district court concluded that while both involved a dangerous situation, neither involved an inherent danger to life.<sup>120</sup> The district court

107. *Anderson*, 666 N.W.2d at 698 n.3. The adjudication was pursuant to MINN. STAT. § 624.712, subd. 5 (2002 & Supp. 2003). *Id.*

108. *Id.* (citing MINN. STAT. § 624.713, subs. 1(b), 2 (2002 & Supp. 2003)).

109. *Id.* at 697.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. The district court found that neither felony possession charge was a proper predicate offense for felony murder. *Id.* (describing the procedural history).

117. 376 N.W.2d 518 (Minn. Ct. App. 1985).

118. *State v. Anderson*, No. 02-2918, Dist. Ct. Order Granting Mot. to Dismiss at 5 (Minn. Dist. Ct. June 20, 2002).

119. *Aarsvold*, 376 N.W.2d at 523.

120. *State v. Anderson*, No. 02016378, Dist. Ct. Order and Mem. of Law at 6

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did not address the fact that while the felony distribution of drugs may have ended at the point of sale, the possession in *Anderson* was still “occurring” at the time of the homicide.<sup>121</sup>

The court of appeals reversed the district court decision.<sup>122</sup> The State noted what it viewed as the district court’s unwarranted hostility toward application of the rule and the court’s “fail[ure] to even mention that [Anderson] aimed the weapon at the decedent.”<sup>123</sup> The defense argued that Anderson’s conduct was merely reckless and deserved the district court’s lesser charge of third-degree murder.<sup>124</sup> The court of appeals looked at the totality of the circumstances and found that “where a stockless firearm is pointed at another and discharged,” either felony can be a predicate for felony-murder.<sup>125</sup> Anderson then petitioned the Minnesota Supreme Court for review.<sup>126</sup>

### B. *The Court’s Analysis*

The Minnesota Supreme Court reversed the court of appeals decision.<sup>127</sup> First, the court rejected the State’s argument that “the facts of the offense, as opposed to the abstract elements of the predicate crime,”<sup>128</sup> determine whether a felony involves a special danger to human life.<sup>129</sup> The court insisted that in addition to the circumstances test, it had also consistently viewed the elements of the felony in the abstract as a separate factor within its analysis.<sup>130</sup> A

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(Minn. Dist. Ct. June 20, 2002).

121. *See id.*

122. *State v. Anderson*, 654 N.W.2d 367, 372 (Minn. Ct. App. 2002), *rev’d*, 666 N.W.2d 696 (Minn. 2003).

123. Appellant’s Brief and App. at 7, *Anderson* (No. C9-02-1043).

124. Respondent’s Brief and App. at 6, *Anderson* (No. C9-02-1043).

125. *Anderson*, 654 N.W.2d at 372.

126. *State v. Anderson*, 666 N.W.2d 696 (Minn. 2003).

127. *Id.* at 702.

128. Appellant’s Brief and App. at 7, *Anderson* (No. C9-02-1043).

129. *Anderson*, 666 N.W.2d at 701 n.6 (rejecting the State’s argument); *see* Appellant’s Brief and App. at 4, *Anderson* (No. C9-02-1043) (argument in full). The State could have been correct. Depending upon how broadly the circumstances are defined, they could well encompass the idea of the felony in the abstract. In fact, the State argued that whether a felony is “dangerous in the abstract is irrelevant under the totality of the circumstances test.” *Anderson*, 654 N.W.2d at 370.

130. *Anderson*, 666 N.W.2d at 701. The court declined to consider *only* the circumstances of the felony. The court reasoned that every felony that ends with a death would necessarily have been committed in a particularly dangerous way. *Id.* at 701 n.6. This same argument has been presented in California as the



closer look at *Nunn*, *Back*, and *Cole*, the cases relied upon by the majority for this proposition, reveals how little weight the court had actually accorded the abstract test in the past.<sup>131</sup>

Second, having noted the existence of the abstract test, the court declared that there is “nothing about a felon’s possession of a firearm, or of a stolen firearm—in the abstract—that in and of itself involves a special danger to human life.”<sup>132</sup> The court acknowledged that felons with firearms create a “dangerous situation.”<sup>133</sup> But, the court continued, possession neither “require[s] an act of violence” nor is “death . . . the natural and probable consequence” of the offense.<sup>134</sup> Finally, the court concluded that “[b]ecause [a] felon in possession of a firearm and possession of a stolen firearm are not dangerous in the abstract, these predicate felonies fail the special danger to human life standard.”<sup>135</sup> Thus, the court dismissed the charge of felony-murder.<sup>136</sup>

Dissenting, Justice Gilbert called upon the majority to include the circumstances of Anderson’s possession within their analysis, stating that “[t]his is precisely the especially dangerous situation that the legislature [intended to cover under the statute.]”<sup>137</sup> The gun was stolen, loaded, illegally possessed, pointed at the victim’s head, and ultimately discharged.<sup>138</sup>

#### IV. ANALYSIS OF THE ANDERSON DECISION

As a matter of policy, the Minnesota Supreme Court ultimately came to the right result in holding that neither possession of a stolen firearm nor felony possession should support a charge of

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justification for foreclosing consideration of the circumstances surrounding the felony entirely. *See supra* text accompanying note 84.

131. *See* State v. Cole, 542 N.W.2d 43 (Minn. 1996) (involving circumstances of theft control); State v. Back, 341 N.W.2d 273 (Minn. 1983) (involving circumstances of damage to property control); State v. Nunn, 297 N.W.2d 752 (Minn. 1980) (involving circumstances of burglary control over elements in the abstract).

132. *Anderson*, 666 N.W.2d at 701. California courts have employed the same standard and reached similar conclusions. *See* People v. Satchell, 489 P.2d 1361 (Cal. 1971).

133. *Anderson*, 666 N.W.2d at 701.

134. *Id.*

135. *Id.* (emphasis added).

136. *Id.*

137. *Id.* at 702 (Gilbert, J., dissenting).

138. *See id.*

felony-murder. Current Minnesota law, however, required the opposite conclusion.<sup>139</sup> Instead of explicitly changing the law, the limited reasoning that the court provided in *Anderson* only served to obfuscate what had before been well-settled principles.<sup>140</sup>

A. *Propriety of Result*

In *Anderson*, the Minnesota Supreme Court wisely refused to include possession of a stolen firearm and felony possession in the list of offenses that can be punished as felony-murder.<sup>141</sup> First, the court made a critical and just distinction between the use of a firearm and the possession of a firearm.<sup>142</sup> As the appellant's brief to the court aptly noted, possession of the stolen firearm "did not become a special danger to human life until the firearm was pointed at Blake Rogers."<sup>143</sup> It required a separate act that cannot be fairly characterized as the manner in which the firearm was possessed.

Second, there is a measurable difference between the quality of mens rea<sup>144</sup> required for second-degree murder (outside of the felony-murder context) and that required for the possession offenses at issue in *Anderson*.<sup>145</sup> This discrepancy is particularly acute where the underlying felony is a "status crime," based directly on a defendant's commission of a previous crime.<sup>146</sup> This

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139. See *infra* Part IV.B.

140. See *infra* Part IV.C.

141. *Anderson*, 666 N.W.2d at 701.

142. *Id.* at 700.

143. Appellant's Brief and Appendix at 7, *Anderson* (No. C9-02-1043) ("It is the blending of these two concepts (possessing a stolen firearm and placing the firearm close to the decedent's head) . . . that permits the conclusion [that the felony was inherently dangerous to human life]."). The court did not specifically address the argument, but its agreement is implicit in the distinction the court drew between possession of a firearm and its use. See *Anderson*, 666 N.W.2d at 701.

144. BLACK'S, *supra* note 1, at 999 (defining "mens rea" as "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime; criminal intent or recklessness").

145. In Minnesota, second-degree murder requires "intent." See MINN. STAT. § 609.19, subd. 1 (2002). Intent "means that the actor either has a purpose to do the thing or cause the result specified or believes the act, if successful, will cause that result." MINN. STAT. § 609.02, subd. 9(4) (2002). Possession, in contrast, requires no particular mental state. See MINN. STAT. § 624.713, subd. 1(b) (2002) (not requiring a specific mens rea).

146. A status crime "consists not in proscribed action or inaction, but in the accused's having a certain personal condition or being a person of a specified character." U.S. v. Leviner, 31 F. Supp. 2d 23, 26 (D. Mass. 1998) (quoting

discrepancy militates against application of the felony-murder rule.<sup>147</sup> The California Supreme Court argued similarly that it is illogical to maintain “that the presence or absence of a felony conviction on a person’s past record [could be] the controlling factor as to whether a homicide was committed with malice.”<sup>148</sup>

Third, the homicide in *Anderson* was not caused by an act that was in furtherance of the felony. The discharge of the gun did not make the gun more stolen or Anderson’s possession less lawful. Although Minnesota law has not explicitly articulated such a requirement, the application of the felony-murder rule in this case would “eliminate[] the proximate cause requirement and allow[] the state virtually unlimited discretion to invoke the felony-murder rule.”<sup>149</sup> Anderson’s use of the gun did nothing to advance his unlawful possession.<sup>150</sup>

Finally, simply removing *possession* from the domain of the felony-murder rule does not diminish the protections provided against *use* of a firearm.<sup>151</sup> Anderson, like other felons who misuse firearms, will still be called upon to answer for his actions.<sup>152</sup> This decision only removes the unwarranted conclusion that Anderson intentionally killed Rogers and places that decision back in the hands of the jury.<sup>153</sup>

Strangely, these substantive arguments were largely ignored when the court explained its reasoning.<sup>154</sup> In their place, the court substituted the conclusion that because the felonies “are not dangerous in the abstract” they cannot support a felony-murder

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BLACK’S LAW DICTIONARY 1410 (6th ed. 1990).

147. *Cf. Reconceptualization, supra* note 4, at 1920 (identifying mens rea as a traditional focus of the debate on felony murder).

148. *People v. Satchell*, 489 P.2d 1361, 1369 (Cal. 1971) (quoting *People v. Lovato*, 65 Cal. Rptr. 638, 640 (Cal. Ct. App. 1968)). The court further explained that allowing such an illogical conclusion would “constitute an affront to the judiciary which through the years has constantly striven to find compelling reasons rather than arbitrary distinctions before making rules which result in differing treatment of people.” *Id.* Although California employs the abstract test for dangerousness, the charge still arises out of defendant’s status as a felon.

149. *State v. Anderson*, 654 N.W.2d 367, 375 (Minn. Ct. App. 2002) (Hudson, J., dissenting), *rev’d*, 666 N.W.2d 696 (Minn. 2003).

150. *See infra* Part IV.D.

151. Referring to the remaining third-degree murder charges, the appellate court noted, “[O]ur criminal code adequately encompasses the conduct at issue here.” *Anderson*, 654 N.W.2d at 375 (Hudson, J., dissenting).

152. *Id.*

153. *See supra* text accompanying note 2.

154. *See State v. Anderson*, 666 N.W.2d 696, 701 (Minn. 2003).

conviction.<sup>155</sup> The court failed to recognize that absence of a special danger in the abstract was not fatal under the *Nunn* standard.<sup>156</sup> Moreover, in the three cases the court cited in support of its conclusion, the lack of danger in the abstract was not determinative.<sup>157</sup> Instead, the dangerous circumstances under which the felonies were committed were acknowledged, and the felony-murder rule was applied.<sup>158</sup>

*B. The Court Misapplied the Law*

Had the court strictly applied the *Nunn* standard as it had previously, the appellate court ruling and the felony-murder charge would have been affirmed. Under the *Nunn* standard, all of Anderson's actions while possessing the gun can be properly considered as part of the underlying felony.<sup>159</sup> The *Nunn* standard called for the court to consider "not just the elements of the felony in the abstract but the facts of the particular case and the circumstances under which the felony was committed."<sup>160</sup> Anderson was in possession of the gun at the time it was fired. While possession of a gun by a felon in the abstract may not be dangerous, it certainly became so when Anderson placed it inches from the victim's head.<sup>161</sup>

Applying the same standard that the Minnesota Supreme Court purported to apply, the Georgia Supreme Court found possession of a firearm by an ex-felon to be inherently dangerous.<sup>162</sup> The Georgia court ruled on similar facts to those involved in *Anderson*, and their decision demonstrates the proper analysis

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155. *Id.*

156. *State v. Nunn*, 297 N.W.2d 752, 754 (Minn. 1980) (describing the standard as having dual considerations).

157. *State v. Cole*, 542 N.W.2d 43 (Minn. 1996) (applying the felony-murder doctrine despite a lack of danger in the abstract); *State v. Back*, 341 N.W.2d 273 (Minn. 1983) (applying the felony-murder doctrine despite questionable danger in the abstract); *Nunn*, 297 N.W.2d 752 (Minn. 1980) (felony-murder doctrine applied despite questionable danger in the abstract).

158. *Cole*, 542 N.W.2d at 53; *Back*, 341 N.W.2d at 277; *Nunn*, 297 N.W.2d at 754.

159. Possession is by nature a "continuing crime." *See, e.g., People v. Ford*, 388 P.2d 892, 908 (Cal. 1964), *overruled by People v. Satchell*, 489 P.2d 1361 (Cal. 1971) (determining that possession of a firearm was not dangerous in the abstract).

160. The court seems to be implying that the lack of a formula for combining *both* tests leaves open the option to consider *either*.

161. *See State v. Anderson*, 666 N.W.2d 696, 702 (Minn. 2003) (Gilbert, J., dissenting).

162. *Metts v. State*, 511 S.E.2d 508 (Ga. 1999).

under the standard. A felony-murder charge will be upheld in Georgia where the underlying felony is “dangerous per se or . . . create[s] a foreseeable risk of death when the attendant circumstances [are] taken into account.”<sup>163</sup> In *Metts v. State*, the defendant, a felon in possession of a firearm, shot the victim through a second-story window after twice demanding that the person in the window leave.<sup>164</sup> The evidence showed that the defendant had pointed a cocked and loaded gun at a window knowing there was someone on the other side, and thus defendant’s possession of a firearm was deemed dangerous and life threatening.<sup>165</sup> In light of the circumstances, the felony supported a felony-murder charge.<sup>166</sup>

### C. Lack of Guidance

The *Nunn* standard calls for two considerations.<sup>167</sup> The Minnesota Supreme Court utilized only one.<sup>168</sup> Either the court changed the standard by which it rules upon proper predicate felonies, or it failed to explain a major omission within its current scheme. The *Anderson* court never claimed to be changing the *Nunn* standard. In fact, the court was extremely clear in its insistence that this decision was to follow prior precedent.<sup>169</sup> The court cited the *Nunn* standard no less than six times, each time maintaining that the standard called for consideration of the felony both in the abstract and in the context of its commission.<sup>170</sup>

The court specifically stated, “Contrary to the implications set forth in the dissent, we are not writing on a clean slate. We cannot, and should not, ignore our precedent interpreting Minnesota’s felony-murder statute in order to render an opinion reaching a different result.”<sup>171</sup> Ironically, the court proceeded to do just that.

After taking pains to reinvigorate the dual nature of its analysis, the court went on to focus singularly upon the unlawful

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163. *Id.* at 510.

164. *Id.*

165. *Id.*

166. *Id.*

167. *See* *State v. Nunn*, 297 N.W.2d 752, 754 (Minn. 1980) (describing the abstract and circumstances tests).

168. *See* *State v. Anderson*, 666 N.W.2d 696 (Minn. 2003).

169. *See* *Anderson*, 666 N.W.2d at 701 (stating that the court is applying the “statute as previously interpreted” to the facts of this case).

170. *Id.* at 699-701.

171. *Id.* at 701 n.7.

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possession in the abstract. “Applying the statute as previously interpreted,” the court held that “[b]ecause felon in possession of a firearm and possession of a stolen firearm are not dangerous in the abstract, these predicate felonies fail the special danger to human life standard.”<sup>172</sup> The omission was particularly glaring in light of the appellate court’s reliance upon the circumstances as the basis for its holding<sup>173</sup> and Justice Gilbert’s strong dissent emphasizing the same.<sup>174</sup>

#### D. *Alternative Reasoning*

The court should have taken the opportunity presented by the facts in *Anderson* to change its existing law. Had the court desired to create a standard to further limit the felony-murder rule in a substantive way, the court should have expressly required that the homicide be committed in “furtherance of the felony.”<sup>175</sup> The change would have properly enabled the court to avoid charging *Anderson* with felony-murder and would have provided a clear and sustainable guide for future decisions.

The recognition of such a limitation would require a tighter causal nexus between the felony and the homicide.<sup>176</sup> The resulting death must be “a consequence [of an] action which was directly intended to further the [predicate] felony.”<sup>177</sup> While the requirement has most often been used in situations involving deaths caused by a third party,<sup>178</sup> it has also been applied to deaths caused by acts that were not “part of the criminal enterprise.”<sup>179</sup>

172. *Id.* at 701.

173. *See* *State v. Anderson*, 654 N.W.2d 367 (Minn. Ct. App. 2002), *rev’d*, 666 N.W.2d 696 (Minn. 2003).

174. *See Anderson*, 666 N.W.2d at 702 (Gilbert, J., dissenting).

175. *See, e.g., State v. Jones*, 937 P.2d 310, 319 (Ariz. 1997) (“A death is in furtherance of an underlying felony,” for purposes of felony murder, “if the death resulted from an action taken to facilitate accomplishment of the felony.”).

176. *See* 40 AM. JUR. 2D *Homicide* § 70 (2004) (“The death need not be in furtherance of the felony, but the act that caused the death should be in furtherance of the felony.”).

177. *King v. Commonwealth*, 368 S.E.2d 704, 708 (Va. Ct. App. 1988). “In short, whether there is a sufficient causal connection between the felony and the homicide depends on whether the defendant’s felony dictated his conduct which led to the homicide.” *Griffin v. Commonwealth*, 533 S.E.2d 653, 658 (Va. 2000) (citing WAYNE R. LAFAVE, CRIMINAL LAW § 7.5 (1998)).

178. *See, e.g., State v. Canola*, 374 A.2d 20 (N.J. 1977).

179. *King*, 368 S.E.2d at 706. *King* provides a clear illustration of this principle. Two men flew a plane containing over 500 pounds of marijuana. *Id.* at 705. Due to heavy fog, the pilot had his companion take control of the airplane while he

It would be difficult to argue that the discharge of the firearm in *Anderson* was “integral to the felony, or in direct furtherance of or necessitated by the felony.”<sup>180</sup> This argument constituted much of the appellate court dissent in *Anderson*.<sup>181</sup> Judge Hudson objected to the appellate court ruling, arguing that “the discharge of the gun, the act causing Rogers’ death, was not committed in furtherance of the underlying felony of unlawful possession.”<sup>182</sup> The appellate majority recognized that “[Anderson] did not commit the murder to further any of the underlying felonies,” but did not find the consideration to be determinative.<sup>183</sup>

The requirement would have proceeded naturally from recent Minnesota decisions working with the felony-murder rule.<sup>184</sup> In *Nunn*, the homicide was caused by a physical beating that was administered in an attempt to complete a burglary.<sup>185</sup> In *Back*, the same firearm shots that caused the felony damage to property also caused the homicide.<sup>186</sup> The defendant in *Cole* intentionally shot a police officer to avoid arrest for his felony theft.<sup>187</sup> *Anderson* did not use the firearm to further his unlawful possession. Finally, comparing the unlawful possession in *Anderson* to the dangerous theft in *Cole*, the dissenting judge pointed out that “Cole purposely shot the police officer to evade arrest; here [Anderson] accidentally shot the victim.”<sup>188</sup>

Instead of attacking the problem directly and requiring a tighter causal nexus between the felony and the resulting death, the *Anderson* court simply ignored the dangerous circumstances portion of its analysis and evaluated the possession in the abstract

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attempted to navigate. *Id.* The plane hit a mountain, and the companion died. *Id.* As a result, defendant was charged with felony murder based on possession of marijuana with intent to distribute. *Id.* The Virginia Court of Appeals ruled that the crash was not a foreseeable result of the felony nor made more likely by the fact that the plane cargo was illegal. *Id.* at 708.

180. *Id.* at 708.

181. See *State v. Anderson*, 654 N.W.2d 367, 372-75 (Minn. Ct. App. 2002) (Hudson, J., dissenting), *rev'd*, 666 N.W.2d 696 (Minn. 2003).

182. *Id.* at 374.

183. *Id.* at 371.

184. *Id.* at 374 (suggesting that the “in furtherance” requirement was adhered to in *Cole* and *Back*).

185. *State v. Nunn*, 297 N.W.2d 752, 752 (Minn. 1980).

186. *State v. Back*, 341 N.W.2d 273, 274 (Minn. 1983).

187. *Anderson*, 654 N.W.2d at 374 (discussing *State v. Cole*, 542 N.W.2d 43 (Minn. 1996)).

188. *Id.* at 375.

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alone.<sup>189</sup>

## V. CONCLUSION

In recognizing the abstract test as capable of standing alone and according it determinative weight, the court effectively added a new tool to its capacity to control which felonies may be utilized for conviction under the felony-murder doctrine.<sup>190</sup> Having recognized both the abstract and the circumstances test, without constraining itself with a standard for reconciling them, the court had only to choose between them to determine the outcome.<sup>191</sup> By focusing singularly on the abstract test in *Anderson*, the court made its judgment that neither felony is a proper predicate for felony-murder, but left the lower courts with very little guidance on how and when to duplicate its reasoning.<sup>192</sup>

The Minnesota Supreme Court did come to the correct result in *Anderson* by declining to allow a charge of second-degree felony-murder. Rather than changing the law in Minnesota, the court simply reinterpreted its prior precedent, leaving several issues unaddressed.<sup>193</sup> Foremost among them is the scope of the court's holding. Although the court has limited the immediate scope of its holding to *felon in possession of a firearm* and *possession of a stolen firearm*, the court offered little explanation for what it had done.<sup>194</sup> Because the court has yet to prescribe a rule for the interaction of the abstract and the circumstances tests, lower courts will temporarily find themselves with greater decision-making power and less guidance for using it.

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189. See *State v. Anderson*, 666 N.W.2d 696 (Minn. 2003).

190. *Id.*

191. Had the majority taken the dissent's broader view of the felony, the court could easily have found the requisite danger. In particular, the dissent faults the majority for overlooking the "realities of the situation" and declared that "[t]his case involves exactly the inherently dangerous situation the legislature envisioned." *Id.* at 702 (Gilbert, J., dissenting).

192. See *id.*

193. See *supra* Part IV.B.

194. See *Anderson*, 666 N.W.2d 696 (Minn. 2003).