St. Mary's Law Journal

Volume 3 | Number 1 Article 14

3-1-1971

A Felon Can Be Held Responsible for a Murder Committed by a Fear-Motivated Victim - Responsibility Is Based on a Theory of Vicarious Liability and Not Felony-Murder.

Remy J. Ferrario

screening of donors[39] would support an action based on negligence, or possibly a criminal offense.

One must admit that by the application of strict liability, those who contract post-transfusion hepatitis will be insured against such injury. However, the hospital will not bear the risk of such injury; but rather, those who seek medical service will bear the responsibility for the risk of loss. Liability insurance will surely rise and hospital costs will simultaneously increase. Those increases will be borne by the public, not by the hospital.

The simplistic solution of *Cunningham* will seem most appealing to other courts throughout the land. Nonetheless, the detrimental consequences to the medical world and the public which it serves will far outweigh the advantages bestowed on the inflicted patient.

Jerry G. DuTerroil

CRIMINAL LAW—FELONY MURDER—VICARIOUS LIABILITY—A FELON CAN BE HELD RESPONSIBLE FOR A MURDER COMMITTED BY A FEAR-MOTIVATED VICTIM—RESPONSIBILITY IS BASED ON A THEORY OF VICARIOUS LIABILITY AND NOT FELONY-MURDER. *Taylor v. Superior Court of Alameda County*, 91 Cal. Rptr. 275 (Cal. 1970).

On the evening of January 12, 1969, James Daniels and John Smith attempted to rob Jax Liquor Store. The store was operated by Mrs. Linda Lee West and her husband, Jack. During the robbery, "Daniels repeatedly referred to the fact that he and Smith were armed. According to Mrs. West, Daniels 'chattered insanely' during this time, telling Mr. West . . . 'put the money in the bag. Don't move or I'll blow your head off. He's got a gun. He's got a gun. Don't move or we'll have an execution right here. Get down on the floor, I said on your stomach, on your stomach.' Throughout this period, Smith's gun was pointed at Mr. West."[1]

While Daniels was forcing Mr. West to the floor, Mrs. West drew a pistol from under her clothing and fired at Smith, who was struck on the right side of the chest. Mrs. West fired four more shots in rapid succession with Smith returning the fire. During this period, Mr. West had seized a pistol and fired two shots at Smith. Mrs. West's last shot was fired at the fleeing Daniels. Smith died as a result of multiple gunshot wounds and Daniels was wounded.

Petitioner Taylor, driver of the get-away car, and his co-defendant,

[39] 14 AM. JUR. PROOF OF FACTS § 23 *Hepatitis* 149-50 (1964).

[1] Taylor v. Superior Court of Alameda County, 91 Cal. Rptr. 275, 276 (Cal. 1970)

Daniels, were charged by information with the murder of John H. Smith. The Superior Court denied petitioner's motion to set aside the information as to the murder count. The supreme court issued an alternative writ of prohibition. Held—*Alternative writ discharged, peremptory writ denied.* A felon can be held responsible for a murder committed by a fear-motivated victim. Responsibility is based on a theory of vicarious liability and not felony-murder.

Under the common law felony-murder rule, if a person killed another while committing or attempting to commit a felonious act, the killing was murder.[2] The malice necessary to make the killing murder is transferred from the underlying felony to the homicide.[3] A generally accepted explanation of the origin of the doctrine is that at early common law practically all felonies were punishable by death. Therefore it was considered immaterial whether the condemned was hanged for the initial felony or for the death accidentally resulting from the felony.[4] This is no longer true, for today, most felonies are not punishable by death. As a result of these penal reforms, all jurisdictions passed felony-murder statutes which in effect provide that a killing committed during the perpetration or attempted perpetration of robbery, arson, or other inherently dangerous felonies is murder.[5] The statutes were known as felony-murder statutes because the felony-murder rule was invoked to impute malice to a killing.

Originally the felony-murder rule was applied under the agency theory.

> No person can be held responsible for a homicide unless the act was either actually or constructively committed by him. And in order to be his act it must be committed by his hand, or by someone acting in concert with him, or in furtherance of a common design or purpose.[6]

The courts were reluctant to venture beyond limiting the application of the agency theory to homicides committed by a felon or his co-felon.[7]

---

2 Commonwealth v. Guida, 19 A.2d 98, 100 (Pa. 1941).

3 Commonwealth v. Redline, 137 A.2d 472, 475 (Pa. 1958).

4 *Id.* at 476.

5 *E.g.*, PENN. STATUTES ANN. Title 18, § 4701 (Purdon 1963). "All murder which . . . shall be committed in the perpetration of, or attempting to perpetrate any arson . . . robbery . . . , shall be murder in the first degree." TEX. PENAL CODE ANN. art. 42 (1952): "One intending to commit a felony and who in the act of preparing for or executing the same shall through mistake or accident do another act which if voluntarily done, would be a felony, shall receive the punishment affixed to the felony actually committed."

6 Butler v. People, 18 N.E. 338, 339 (Ill. 1888).

7 *See* Note, *Proximate Cause and the Extension of the Felony-Murder Rule*, 38 S. CAL. L. REV. 698, 700 n. 17, 18, 19, 22 (1965). *See also, Homicide—Liability of Robber for Death Caused by Shot of Third Person* [Arkansas], 25 J. CRIM. L.C. 283 (1934). The shield or alternate danger cases are a long recognized exception to the agency theory of liability and will not be discussed in this note. In such a case malice need not be implied or imputed. Malice is express.

The theory was followed throughout the United States until 1947[8] when the felony-murder rule was extended to impose criminal responsibility to a felon for a killing committed by a third party. In 1947, the Pennsylvania Supreme Court, in *Commonwealth v. Moyer*,[9] adopted a vastly expanded rule of responsibility. In *Moyer* a gas station owner was shot and killed during an attempted robbery. The issue arose whether the bullet was shot by one of the felons or by a station employee; the court concluded it was immaterial and the felons were convicted of first degree murder. The court adopted a second theory, proximate cause:

> Every robber or burglar knows that a likely later act in the chain of events he inaugurates will be the use of deadly force against him on the part of the selected victim. For whatever results follow from the natural and legal use of retaliatory force, the felon must be held responsible.[10]

The court reasoned that as long as the felon was committing an offense enumerated in the felony-murder statute, the malice necessary to make the killing murder was imputed to the felon regardless of who did the actual killing. While a majority of the states refused to accept this reasoning and hold fast to the agency theory, some leading jurisdictions, including California, did adopt the proximate cause theory.[11] A felon could now be held criminally responsible for a killing committed by his victim or by any nonparticipant to the felony where his "felonious act is the proximate cause of another's death."[12] Presently, the theory of proximate cause, "an unwarranted judicial extension of the felony-murder rule,"[13] has been repudiated in Pennsylvania,[14]

---

8 Note, *Criminal Law—Killing of Felon by Police Officer During Perpetration of Robbery Does Not Make Co-felon Criminally Responsible Under Pennsylvania Felony-Murder Rule*, 106 U. PA. L. REV. 1176, 1177 (1958).

9 53 A.2d 736 (Pa. 1947).

10 *Id.* at 742.

11 People v. Harrison, 1 Cal. Rptr. 414 (Cal. App. 1959); People v. Wilburn, 314 P.2d 590 (Cal. App. 1957); Hornbeck v. State, 77 So.2d 876 (Fla. 1955); People v. Podolski, 52 N.W.2d 201 (Mich. 1952). *See also*, Note, *Criminal Law—Under the Felony-Murder Doctrine, Felons Are Guilty of First Degree Murder of An Accomplice Who Is Killed By The Victim of The Felony*, 44 GEO. L.J. 529 (1956); Comment, *Homicide—Felony—Murder Doctrine—Shooting of Co-Felon by Victim of Armed Robbery*, 30 S. CAL. L. REV. 357 (1957); Morris, *The Felon's Responsibility For The Lethal Acts of Others*, 105 U. PA. L. REV. 50 (1956).

12 Commonwealth v. Almeida, 68 A.2d 595, 599 (Pa. 1949), 12 A.L.R.2d 183, 188 (1950). *See* Note, *Criminal Law—Murder—Felony—Murder Doctrine—Charge to Jury*, 1 CATH. U. L. REV. 46 (1950).

13 Commonwealth v. Redline, 137 A.2d 472, 482 (Pa. 1958).

14 Commonwealth Smith v. Myers, 261 A.2d 550, 561 (Pa. 1970). ". . . *none of the co-felons is guilty of murder—if the fatal shot was fired by the holdup victim or by a policeman* or other law enforcement officer, or by a person attempting to prevent the robbery or the robber's (or felon's) escape, *or by anyone except one of the robbers or a co-felon.*" (emphasis added). *See also* Commonwealth v. Redline, 137 A.2d 472 (Pa. 1958) and People v. Austin, 120 N.W.2d 766 (Mich. 1963).

New York,[15] and California.[16]

In *People v. Washington*, the California court rejected the theory of proximate cause. Washington's co-felon entered an office and pointed his gun at the station owner who was seated at his desk; the station owner drew a gun from the desk and shot and killed the co-felon. The court applied the agency theory and stated that before a felon can be guilty under the felony-murder rule the act must be committed by his own hands or by someone acting in concert with him; a felon is not guilty where the killing is committed by one not a participant in the felony.[17] Unsatisfied with this state of affairs, the court then adopted the theory of vicarious liability.[18]

In essence the theory consists of several elements applied together to formulate criminal responsibility. The theory propounds that, if during a felony, a felon or co-felon commits *acts which imply malice* and a third party (policeman, victim, *etc.*) kills in a reasonable response to those acts, the felon and his co-felon are criminally responsible and can be convicted of first degree murder. Responsibility for such a murder is applied under basic rules defining principals and criminal conspiracies.

> The general rule is well settled that, where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine.[19]

Under vicarious liability, malice is implied when a "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."[20] The theory transfers the implied malice from a felon's acts[21]

---

15 People v. Wood, 201 N.Y.S.2d 328, 332 (N.Y. 1960); "In order for a felon to be guilty of the homicide, the act (as in agency) must be '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.'" *See also* Note, *Criminal Law—The Felony-Murder Doctrine and Its Limits*, 19 ARK. L. REV. 180 (1965); Note, *Criminal Law—Construction of New York Felony—Murder Statute—Rejection of Proximate Cause Theory—People v. Wood (New York 1960)*, 25 ALB. L. REV. 153 (1961).

16 People v. Washington, 44 Cal. Rptr. 442, 446 (Cal. 1965): ". . . for a defendant to be guilty of murder under the felony-murder rule the act of killing must be committed by the defendant or by his accomplice acting in furtherance of their common design."

17 *Id.* at 446. *See* Commonwealth v. Almeida, 68 A.2d 595, 617 (Pa. 1949).

18 *Id.* at 445.

19 People v. Kauffman, 92 P. 861, 862 (Cal. 1907).

20 People v. Thomas, 261 P.2d 1, 7 (Cal. 1953).

21 Taylor v. Superior Court of Alameda County, 91 Cal. Rptr. 275, 280 n.1 (Cal. 1970). "It is significant that People v. Thomas (concurring opinion) cited in *Washington* as a case enunciating the implied malice doctrine . . . and the other cases enunciating this doctrine involved defendants who recklessly and with conscious disregard of human life had *fired a gun or struck a blow with a deadly weapon* directly at the victim or a group of which the victim was a member." (Citations omitted).

and holds him criminally responsible for the results of these acts under the rules defining principals and criminal conspiracies.[22] The central inquiry is "whether the conduct of a defendant or his accomplice was sufficiently provocative of lethal resistance to support a finding of implied malice."[23]

In *Washington* the court concluded that *merely pointing a gun* at a victim who then shoots and kills, without further provocation, is not sufficient to imply malice. In order to be convicted on a theory of vicarious liability, a robber must commit malicious acts, in addition to the acts constituting the underlying felony, which are sufficient to imply malice.[24] In *People v. Gilbert*, the supreme court held malice may be established where a defendant *initiates a gun battle* and that under such circumstances he may be convicted of murder for a killing committed by another.[25] In *People v. Reed*, a defendant resisted an officer's commands and *pointed his gun toward the police officers.* The court found "such aggressive actions required immediate reaction unless an officer is to be held to the unreasonable requirement that an armed robber be given the courtesy of the first shot."[26] In *Brooks v. Superior Court of the County of Los Angeles*, the court stated *reaching for and grasping the officer's shotgun* "was fraught with grave and inherent danger to human life" and sufficient to raise an inference of malice.[27]

In the instant case, *Taylor v. Superior Court of Alameda County*, the supreme court stated that the holding of the *proprietor at gunpoint, nervous apprehension* and *repeated threats of execution* is conduct "sufficiently provocative of lethal resistance to lead a man of ordinary caution and prudence to conclude that Daniels and Smith *'initiated'* the gun battle, or that such conduct was done with conscious disregard for life and with natural consequences dangerous to life."[28]

---

22 People v. Gilbert, 47 Cal. Rptr. 909, 918 (Cal. 1965): Once murder is established under Section 187 and 188 "Section 189 may be invoked to determine its degree." In summary the theory reasons:

(a) CAL. PENAL CODE ANN. § 187 (Deering Supp. 1971):
Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

(b) CAL. PENAL CODE ANN. § 188 (Deering 1960):
malice may be express or implied. . . . It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

(c) CAL. PENAL CODE ANN. § 189 (Deering 1960):
All murder . . . which is committed in the perpetration or attempt to perpetrate arson, rape, robbery . . . is murder of the first degree.

Criminal responsibility is placed upon the felons for a killing committed by a third party under the rules defining principals and criminal conspiracies.

23 Taylor v. Superior Court of Alameda County, 91 Cal. Rptr. 275, 278 (Cal. 1970).

24 People v. Washington, 44 Cal. Rptr. 442 (Cal. 1965).

25 47 Cal. Rptr. 909 (Cal. 1965).

26 75 Cal. Rptr. 430, 435 (Cal. App. 1969).

27 48 Cal. Rptr. 762, 763 (Cal. App. 1966).

28 91 Cal. Rptr. 275, 279 (Cal. 1970) (emphasis added).

The majority holds "apart from the felony-murder doctrine, petitioner could be found guilty of murder on a theory of vicarious liability."[29] In this 4-3 decision Justice Peters in his dissent stated:

> To convert such acts—i.e. to convert a first degree robbery—into murder solely because the victim killed one of the robbers is in effect to reinstate the felony-murder doctrine in such a situation contrary to the basic *Washington* holding that a defendant cannot be convicted of murder simply because he and his accomplice committed a felony in which a death resulted. . . . The majority have set forth a new wholly irrational, rule: if robbers point guns at their victims without articulating the obvious threat inherent in such action they cannot be convicted of murder for a killing committed by their victims, whereas if they articulate their threat they can be convinced [sic] of murder in the same situation . . . . The majority's purported distinction of *Washington* makes absolutely no sense.[30]

While the majority and dissent ponder the question of overt conduct sufficient to imply malice, both do agree with the theory of vicarious liability adopted in *People v. Washington*.[31] The entire court concludes the rules defining principals and criminal conspiracies can be invoked to hold a felon criminally responsible for a killing committed by a third party. This holding is an expansion of those rules designed and interpreted to impose liability on all conspirators *only where* the act of killing is committed by *one of the conspirators*. The law is well settled:

> [A] party associated with others for the purpose of engaging in a robbery, in which a homicide is committed by one of his associates, is as guilty of murder as if he had actually done the killing himself. . . .[32]

Generally these rules do not apply to killings committed by a third party in response to a felon's acts, no matter how provocative of lethal resistance these acts may be. Jurisdictions which followed the agency theory have refused to hold a felon responsible for killings committed by a third party; "the act (as in agency) must be 'either actually or constructively his, and 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.' "[33] The California

---

[29] *Id.* at 277.
[30] *Id.* at 283.
[31] 44 Cal. Rptr. 442 (Cal. 1965).
[32] People v. Lawrence, 76 P. 893, 897 (Cal. 1904). *Compare* Note, *Criminal Law: Conspiracy, Homicide committed by conspirator during escape after robbery. Liability of a co-conspirator—In State v. Terrell, Franklin, and Conner, 144 So. 488 (La. 1932)*, 18 CORNELL L. REV. 439 (1932).
[33] People v. Wood, 201 N.Y.S.2d 328, 332 (N.Y. 1960). *See* Commonwealth v. Campbell,

Supreme Court has traditionally applied the rules defining principals and criminal conspiracies to impose liability on all conspirators only where a felon or co-felon commits the act of killing.[34] In decisions discussing vicarious liability, the cases cited as precedent are not in point and fail to add any support to the court's interpretation of the rules defining principals and criminal conspiracies.[35] This basic rule of agency has been followed for over 100 years and *absent the proximate cause theory there is not the slightest suggestion of a different application of these rules.* Vicarious liability is unique to California. In 1959, the California court of appeals admitted "We have not been cited to, nor have we found a California case which deals squarely with the the question of criminal liability for a harm occurring in the commission, or attempt to commit, a felony where the fatal injury is inflicted by one not a participant in the felony."[36] The court failed to mention a theory of vicarious liability and was *content* with a murder conviction under the proximate cause theory.

California in a bold effort to impose criminal liability on the felon has extended their rules defining principals and criminal conspiracies beyond recognition. In addition, to make their new theory workable

89 Mass. 541 (1863); Butler v. People, 18 N.E. 338 (Ill. 1888); People v. Garippo, 127 N.E. 75 (Ill. 1920); Commonwealth v. Moore, 88 S.W. 1085 (Ky. 1905); State v. Oxendine, 122 S.E. 568 (N.C. 1924); People v. Austin, 120 N.W.2d 766 (Mich. 1963); Commonwealth v. Balliro, 209 N.E.2d 308 (Mass. 1965), 14 A.L.R.3d 640 (1967).

[34] People v. Olsen, 22 P. 125 (Cal. 1889); People v. Lawrence, 76 P. 893 (Cal. 1904); People v. Raber, 143 P. 317 (Cal. 1914); People v. Reid, 225 P. 859 (Cal. 1924); People v. Perry, 234 P. 890 (Cal. 1925); People v. Green, 17 P.2d 730 (Cal. 1932); People v. Ketchel, 30 Cal. Rptr. 538 (Cal. 1963). *But cf.* People v. Caballero, 87 P.2d 364, 368 (Cal. App. 1939). Suggests a felon is not responsible where the fatal shot is fired by a third person.

[35] *See:*

(a) In People v. Washington, 44 Cal. Rptr. 442, 445 (Cal. 1965) the court cited as precedent People v. Boss, 290 P. 881 (Cal. 1930) and People v. Kauffman, 92 P. 861 (Cal. 1907). Both are cases in which *the felon* committed the killing. The court also cited Wilson v. State, 68 S.W.2d 100 (Ark. 1934) and Taylor v. State, 41 Tex. Crim. 564, 55 S.W. 961 (1900). These are cases recognized as exceptions to the agency theory. In the so-called shield cases malice is express.

(b) In People v. Gilbert, 47 Cal. Rptr. 909, 918 (Cal. 1965) the court cited two additional cases: People v. Schader, 44 Cal. Rptr. 193 (Cal. 1965) in which the killing was committed by a felon and People v. Ferlin, 265 P. 230 (Cal. 1928). In *Ferlin* an arsonist accidentally burned himself to death and the court concluded this co-conspirator could not be convicted of his murder. To support its decision the court cited People v. Garippo, 127 N.E. 75 (Ill. 1920) a case which directly contradicts the court's present application of agency rules.

(c) In People v. Reed, 75 Cal. Rptr. 430, 435 (Cal. App. 1969); Brooks v. Superior Court of the County of Los Angeles, 48 Cal. Rptr. 762, 764 (Cal. 1966) and Taylor v. Superior Court of Alameda County, 91 Cal. Rptr. 275, 277 (Cal. 1970) no additional cases were cited as precedent.

In the effort to find precedent in support of its theory of liability for a killing committed by one not a participant to the felony, the court cited cases during a period in which there were *admittedly no California cases in point. See* People v. Wilburn, 314 P.2d 590, 593 (Cal. App. 1957) and People v. Harrison, 1 Cal. Rptr. 414, 416 (Cal. App. 1959). It is interesting that while the court refers to the rules defining principals and criminal conspiracies and bases the entire theory of vicarious liability on these rules, it fails to define these rules in either *Washington, Gilbert, Reed, Brooks,* or *Taylor.*

[36] People v. Harrison, 1 Cal. Rptr. 414, 416 (Cal. App. 1959).

the long recognized and intended meaning of Section 189 has been completely changed. "Section 189 requires that the felon or his accomplice commit the killing, for if he does not, the killing is not committed to perpetrate the felony."[37] In order to *justify a conviction* for first degree murder under the theory of vicarious liability, the court has taken two unprecedented steps. First the court, without *any* precedent, applies basic agency rules in a totally *unique manner* to impose criminal responsibility on a felon for a killing committed by a third party. Malice aforethought cannot be ascribed to a felon for a killing committed by a third party. A felon can be held responsible for a killing with malice aforethought only where a felon or co-felon kills, for "the thing which is imputed to a felon for a killing incidental to his felony is *malice* and *not the act of killing*."[38] Secondly, through judicial interpretation the court alters the meaning of a statute which clearly states "All murder . . . which is committed in the perpetration . . . of robbery . . . is murder of the first degree."[39] Section 189 was designed to impose criminal responsibility under the agency theory on all felons for a killing committed *by a felon* during a robbery. The statute was not designed to apply in a situation where a third party commits a killing to thwart a felony. The court interprets Section 189 as though it clearly states any killing which results during a robbery is first degree murder. The instant problem is one that can and must be solved by the legislature, not by unwarranted extensions and interpretations of rules and statutes by the judiciary.[40] "The only constitutional power competent to define crimes and prescribe punishment therefor is the legislature, and courts do well to leave the promulgation of police regulations to the people's chosen legislative representatives."[41]

---

37 People v. Washington, 44 Cal. Rptr. 442, 445 (Cal. 1965).

38 Commonwealth v. Redline, 137 A.2d 472, 476 (Pa. 1958). *Cf.* People v. Washington, 44 Cal. Rptr. 442 (Cal. 1965).

39 CAL. PENAL CODE ANN. § 189 (Deering 1960).

40 N.J. STAT. ANN. 2A: 113-1, N.J.S.A. "If any person, in committing or attempting to commit robbery . . . or any unlawful act against the peace of the state, of which the probable consequences may be bloodshed, kills another, *or if the death of anyone ensues from the committing or attempting to commit any such crime or act. . . .*" In State v. Kress, 253 A.2d 481, 487 (N.J. 1969) the italicized portion of the above statute was found sufficient to charge a felon with first degree murder where a police officer killed a bank teller in an effort to prevent an escape of felons. *See* TEXAS PENAL CODE, A Proposed Revision, art. 19.02 (1970):

> An individual or corporation commits murder if:
>
> . . . .
>
> (3) he commits or attempts to commit a felony . . . and in the course of and in the furtherance of the felony, or in immediate flight from the commission or attempt, *he commits or attempts to commit an act clearly dangerous to human life that causes the death of another* . . . . (emphasis added).

The italicized portion of this *proposed statute* would seem to be applicable and sufficient for a conviction in the instant case.

41 Commonwealth v. Redline, 137 A.2d 472, 473 (Pa. 1958). *See also* Note, *Criminal Law: Applicability of Felony-Murder Rule Where Bystander Killed By a Person Other*