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## STATE v. JACKSON: A SOLUTION TO THE FELONY-MURDER RULE DILEMMA

In October, 1978, the New Mexico Court of Appeals, in *State v. Jackson*,<sup>1</sup> for the first time addressed the question of whether a felon can be held responsible for the murder of a co-felon where the killing is committed by one resisting the felony. In accordance with the minority view, the court of appeals in *Jackson* held that the defendants were guilty of felony-murder.<sup>2</sup> The defendants in *Jackson* appealed the issue to the New Mexico Supreme Court. In an opinion based primarily on the court's interpretation of its intended holding in a previous felony-murder case, *State v. Harrison*,<sup>3</sup> the supreme court reversed the court of appeals, thus adopting the majority view on felony-murder.<sup>4</sup> This note will explore the two *Jackson* opinions and propose an alternative analysis based upon case law, statutory authority and public policy.

In *State v. Jackson*, three people entered a pharmacy in Bernalillo County intending to commit a robbery. All three were armed. While resisting the armed robbery, the pharmacist shot and killed one of the robbers. The surviving co-felons were charged with armed robbery, conspiracy and felony-murder. The sole issue before the court of appeals and the New Mexico Supreme Court was whether the surviving co-felons were criminally liable for the death of their partner caused by one resisting the act.

The New Mexico Court of Appeals reversed the dismissal of the felony-murder charges and held the co-felons liable. Although the court noted that an opposite resolution of the issue would clearly be the majority view,<sup>5</sup> the court rested its reasoning on New Mexico's common law and an interpretation of the reasoning of the New Mexico Supreme Court in *State v. Harrison*.<sup>6</sup> The New Mexico Supreme Court reversed the court of appeals and affirmed the trial court's dismissal of the felony-murder charges on the strength of the

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1. *State v. Jackson*, 17 N.M. St. B. Bull. 2885 (Nov. 9, 1978).

2. *Id.* at 2888.

3. *State v. Harrison*, 90 N.M. 439, 564 P.2d 1321 (1977).

4. *Jackson v. State*, 92 N.M. 461, 589 P.2d 1052 (1979).

5. *State v. Jackson*, 17 N.M. St. B. Bull. 2885-86 (Nov. 9, 1978).

6. *State v. Harrison*, 90 N.M. 439, 564 P.2d 1321 (1977).

public policy announced in *State v. Harrison*.<sup>7</sup> In so doing, the supreme court reinstated the majority view of the felony-murder doctrine in New Mexico.

### HISTORY OF THE LAW

The basis of the felony-murder rule is simple. "Homicide is murder if the death results from the perpetration or attempted perpetration of an inherently dangerous felony."<sup>8</sup> Felonies most frequently regarded in this country as inherently dangerous are arson, rape, burglary and robbery.<sup>9</sup> Some state statutes, such as that in New Mexico, have broadened the scope of the felony-murder rule to read:

Murder is the unlawful killing of one human being by another with malice aforethought, either express or implied, by any of the means with which death may be caused.

A. Murder in the first degree consists of all murder perpetrated:

...

3) in the commission of or attempt to commit *any* felony. . . .<sup>10</sup>

An example of the generally accepted application of the felony-murder rule occurs when

[t]he robber who kills the one he is attempting to rob is guilty of murder whether he intended any personal harm or not. If he holds up the victim at the point of a gun and the weapon goes off, causing death, it makes no difference that the discharge was quite accidental. It is no element of mitigation that he was "shaking and nervous and pulled the trigger" unintentionally, or that the weapon was seized and went off by accident during a struggle for its possession.<sup>11</sup>

The felony-murder rule sometimes has been applied also to the co-felons' culpability for the lethal acts of non-felons. One commentator on the felony-murder rule reports that until 1922, all courts faced with the precise issue presented in *Jackson* denied liability. From the reported cases between the years of 1922 and 1935, it seems the courts vacillated on the co-felons' liability; cases from 1935 to 1956 tended to support findings of co-felons' liability on the basis of the "proximate cause" theory.<sup>12</sup>

7. *Id.*

8. R. Perkins, Perkins on Criminal Law 44 (2d ed. 1969).

9. R. Moreland, Law of Homicide 48 (1952), cited by R. Perkins, Perkins on Criminal Law, 39 n. 73 (2d ed. 1969).

10. N.M. Stat. Ann. §30-2-1 (1978), formerly N.M. Stat. Ann. §40A-2-1 (Repl. 1972) (emphasis added).

11. R. Perkins, Perkins on Criminal Law 37 (2d ed. 1969) (footnotes omitted).

12. Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. Pa. L. Rev. 50, 57 n. 40 (1956).

## THE PROXIMATE CAUSE THEORY

The proximate cause theory under the felony-murder rule rests on the tort concept that the actor is made responsible for the proximate consequences of his actions.<sup>13</sup> When the defendant, therefore, knew or should have known that forceful resistance to the felony could be expected, and a death results during the perpetration of the felony, all the surviving defendants are charged with felony-murder.

The beginnings of the proximate cause theory are found in *Commonwealth v. Moyer*,<sup>14</sup> a 1947 Pennsylvania case where the court affirmed convictions for the murder of a gas station attendant who was killed during the commission of a robbery in which the defendants exchanged shots with the owner of the station. It made no difference, said the court in *Moyer*, whether or not the fatal bullet came from the owner's gun or the felons' guns.<sup>15</sup> The felons' attempt to commit a robbery set in motion a chain of events which might, and ultimately did, result in a fatality. The defendants, therefore, were charged and convicted of the felony-murder of the gas station attendant.

In 1949, the Pennsylvania court approved its *Moyer* ruling in *Commonwealth v. Almeida*,<sup>16</sup> a case similar to *Moyer*, in which a bystander was killed during an attempted robbery. The court upheld the felony-murder convictions of the defendants for the death of the bystander, again relying on the proximate cause theory of felony-murder.

Finally, in 1955, the proximate cause theory espoused by the Pennsylvania courts was put to the test in *Commonwealth v. Thomas*,<sup>17</sup> a case with facts analogous to those in *Jackson*. The court in *Thomas* affirmed a conviction of felony-murder where the owner of a grocery store killed the defendant's accomplice as the defendant and the accomplice were fleeing the store after committing a robbery. The rationale the *Thomas* court gave in affirming the conviction for felony-murder was exactly that given previously in *Moyer* and *Almeida*: if the defendant sets a felony in motion, he is responsible for *any* death which by direct and almost inevitable consequence results from the initial criminal act.

## THE AGENCY THEORY

The *Almeida* and *Thomas* cases caused a furor.<sup>18</sup> Finally, in *Com-*

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13. See Annot., 56 A.L.R.3d 242 (1974).

14. *Commonwealth v. Moyer*, 357 Pa. 181, 53 A.2d 736 (1947).

15. *Id.* at \_\_\_\_\_, 53 A.2d at 741-42.

16. *Commonwealth v. Almeida*, 362 Pa. 596, 68 A.2d 595 (1949).

17. *Commonwealth v. Thomas*, 382 Pa. 639, 117 A.2d 204 (1955).

18. See Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. Pa. L. Rev. 50 (1956).

*monwealth v. Redline*,<sup>19</sup> utilization of the proximate cause theory came to a halt. In its place, the court adopted an "agency" theory in felony-murder, largely in response to the extreme criticism caused by the *Thomas* ruling.<sup>20</sup> In *Redline*, the court reversed a murder conviction based upon the death of the defendant's co-felon at the hands of a policeman who was chasing the two immediately after an armed robbery. In an erudite opinion, the court first exonerated the policeman's actions on the obvious grounds of justifiable homicide. A "justifiable homicide," said the court, "is such as is committed either by command or, at least, with the permission of the law, e.g., execution of a convicted criminal, *apprehension of an escaping felon*, etc.; . . ."<sup>21</sup>

The *Redline* court further argued:

In the present instance, the victim of the homicide was one of the robbers who, while resisting apprehension in his effort to escape, was shot and killed by a policeman in the performance of his duty. Thus, the homicide was justifiable and, obviously, could not be availed of, on any rational legal theory, to support a charge of murder. How can anyone, no matter how much of an outlaw he may be, have a criminal charge lodged against him for the consequences of the *lawful* conduct of another person? The mere statement of the question carries with it its own answer.<sup>22</sup>

The *Redline* court explicitly overruled *Thomas*,<sup>23</sup> stating that killing of the co-felon was excusable homicide and, therefore, lawful.<sup>24</sup> Excusable homicide, said the court, "is such as is committed either *per infortunium* (i.e., accidentally) or *se defendendo* (i.e., in self-defense); . . ."<sup>25</sup>

*Almeida* was later overruled in 1970 in *Commonwealth ex rel. Smith v. Myers*.<sup>26</sup> The *Myers* court stated that, based solely on the *Redline* rationale and decision on felony-murder, it was giving the *Almeida* case a burial, "taking it out of its limbo, and plunging it downward into the bowels of the earth."<sup>27</sup>

California cases, dating from 1965, have supported the agency

19. *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472 (1958).

20. 391 Pa. 486, \_\_\_\_\_ n.1, 137 A.2d 472, 473 n. 1 (1958).

21. *Id.* at 475.

22. *Id.* at 483.

23. *Id.* at 482.

24. *Id.* at 483.

25. *Id.* at 475.

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

27. 261 A.2d 550, 559-60 (1970).

theory espoused by the Pennsylvania court in *Redline*.<sup>28</sup> The California case most often cited in support of the agency theory is *People v. Washington*,<sup>29</sup> which was decided in 1965. As in *Jackson*, a victim of an attempted robbery shot and killed one of the felons. The surviving felon was charged with felony-murder under a statute almost identical to New Mexico's statute.<sup>30</sup> In overturning the conviction, the *Washington* court relied almost entirely on the explicit language of the California statute. The court reasoned:

"Murder is the unlawful killing of a human being, with malice aforethought." (Pen. Code, § 187) . . . The felony murder doctrine ascribes malice aforethought to the felon who kills in the perpetration of an inherently dangerous felony. . . . That doctrine is incorporated in section 189 of the Penal Code, which provides in part: "All murder \*\*\* committed in the perpetration or attempt to perpetrate \*\*\* robbery \*\*\* is murder of the first degree." . . . 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 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. 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. Indeed, in the present case the killing was committed to *thwart* a felony. To include such killings within section 189 would expand the meaning of the words "murder \*\*\* which is committed in the perpetration \*\*\* [of] robbery \*\*\*" beyond common understanding.<sup>31</sup>

The *Washington* court's analysis is clear. Under a felony-murder statute, materially the same as New Mexico's, the words "malice aforethought" and "perpetration" must be considered in determining the liability of a defendant for the death of his accomplice at the hands of a victim of a felony. Thus, the *Washington* case suggests an alternative analysis to *Redline* of the felony-murder rule. Both *Wash-*

28. *People v. Johnson*, 28 Cal. App. 3d 653, 104 Cal. Rptr. 807 (1972) (recognizing rule); *People v. Gilbert*, 63 Cal.2d 690, 408 P.2d 365, 47 Cal. Rptr. 909, *vacated on other grounds*, 388 U.S. 263 (1965).

29. *People v. Washington*, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1963).

30. N.M. Stat. Ann. §30-2-1 (1978), formerly N.M. Stat. Ann. §40A-2-1 (Repl. 1972). The California statute used by the court in *People v. Washington* is cited as Cal. Penal Code § 189 and reads in relevant part:

All murder . . . committed in the perpetration or attempt to perpetrate . . . robbery . . . is murder of the first degree. . . .

31. *People v. Washington*, 62 Cal. 2d 777, 780, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965).

*ington* and *Redline*, however, reached the same result in denying the liability of defendants in the position of the defendants in *Jackson*.

#### JACKSON: THE RATIONALE

From the foregoing, it is clear that the New Mexico Court of Appeals espoused what is now considered the minority view, the proximate cause theory, in deciding the *Jackson* case. It reached the conclusion that the defendants were guilty of felony-murder because they were directly involved in the commission of a felony, even though the deceased accomplice was killed by the victim of the felony. In reaching this conclusion, the court of appeals relied on the New Mexico common law rule, noting that New Mexico common law on the subject of felony-murder was embraced by Section 30-2-1 of the New Mexico Statutes.<sup>32</sup> By summarily accepting the traditional proximate cause theory, the court of appeals dismissed the possible issue of the defendants' contention that the killing was justifiable homicide, and therefore not an "unlawful killing" in terms of the felony-murder statute. The court of appeals said:

In our opinion, concepts such as the "agency" theory and limited attribution of malice aforethought, together with lawful killing arguments, are devices used to restrict application of the felony-murder rule. These devices are used to restrict the rule because of the view that the rule should be restricted. . . . The "better reasoned view," ultimately, depends upon one's view as to the appropriate policy.<sup>33</sup>

In determining the outcome of the case, the court of appeals in *Jackson* also relied upon *State v. Harrison* as precedent.<sup>34</sup> In *Harrison*, the defendants accidentally shot and killed the victim of the felony during the commission of the felony of false imprisonment. One of the defendants was charged with false imprisonment and felony-murder. The *Harrison* court set aside the defendant's conviction of felony-murder and ordered a new trial to determine whether or not false imprisonment was an inherently dangerous crime which would warrant a felony-murder conviction. The *Jackson* opinion of the court of appeals noted that the inference might be drawn from *Harrison* that there must be a causal relationship between the felony and the homicide in order to support a conviction for felony-murder.<sup>35</sup> Since, in *Jackson*, the court of appeals said, there was a direct causal relationship between the murder of the co-felon and the fel-

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32. *State v. Jackson*, 17 N.M. St. B. Bull. 2885-86 (Nov. 9, 1978).

33. *Id.* at 2887.

34. *Id.* at 2887-88. See *State v. Harrison*, 90 N.M. 439, 564 P.2d 1321 (1977).

35. *State v. Jackson*, 17 N.M. St. B. Bull. 2885, 2887-88 (Nov. 9, 1978).

ony itself, *Harrison* dictated that the circumstances of the *Jackson* case support a felony-murder conviction.<sup>36</sup>

The New Mexico Supreme Court, however, did not agree. The supreme court said:

In *Harrison* . . . this Court intended to *limit* the application of the felony-murder doctrine and to keep responsibility under this doctrine in line with the evolving concepts of criminal law. Thus, any expansion of the felony-murder doctrine would fly directly against the progressive direction taken by this Court in *Harrison*.<sup>37</sup>

In a succinct opinion, the Supreme Court of New Mexico clarified the policy announced in *Harrison*,<sup>38</sup> applied the same policy to *Jackson*, and, in so doing, adopted "the majority and best-reasoned view; namely, [that] the felony-murder doctrine should not be expanded to cover the situation where the victim of the crime kills a perpetrator."<sup>39</sup> On this basis, the New Mexico Supreme Court reversed the court of appeals in *State v. Jackson*.

#### AN ALTERNATIVE ANALYSIS

By the supreme court's own admission, public policy considerations played a large role in determining the outcome in *Jackson v. State*.<sup>40</sup> As one commentator has noted:

One principal (sic) incentive for imposing limitations on the broad scope of the felony-murder rule was that parallel developments in the criminal law had resulted in basic changes in the theory of punishment. At the time the felony-murder rule was first formulated, one of the major functions of the criminal law was retribution against the offender, a thesis generally disfavored today. While the retribution theory demanded that the punishment be proportionate to the injury, the more modern justifications for criminal sanctions attempt to relate the punishment to the culpability and dangerousness of the individual defendant. Although the felony-murder rule has obvious advantages in a retributive system, its relevance to a modern criminal justice system more concerned with the deterrence of criminal activity and the rehabilitation of offenders is questionable.<sup>41</sup>

Thus, in a state that follows the more modern deterrence theory

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36. *Id.* at 2887.

37. *Jackson v. State*, 92 N.M. 461, 589 P.2d 1052 (1979).

38. *Id.*

39. *Id.*

40. *Id.*

41. Comment, 24 Rutgers L. Rev. 591, 594 (1970).

of punishment, the scope of the felony-murder rule would be interpreted strictly by statute. In a state more concerned with a retributive theory of punishment, the scope of the felony-murder rule would be broadened to include cases such as *Jackson*. Justice Bell, in his dissenting opinion in *Redline*, expressed the thought behind the retributive theory of punishment by stating: "The brutal crime wave which is sweeping and appalling our Country can be halted only if the Courts stop coddling, and stop freeing murders, communists and criminals on technicalities made of straw."<sup>42</sup>

Obviously, the purpose of the felony-murder rule is to deter felons from negligently or accidentally killing other human beings. This deterrence is accomplished by holding the felons strictly responsible for killings they commit. This purpose would not be served by punishing them for the lawful killings committed by their victims. The New Mexico Supreme Court recognized this principle by announcing its public policy in *Jackson v. State* and, in so doing, it adopted the agency theory of felony-murder in New Mexico.<sup>43</sup>

In addition to its reliance on public policy, the New Mexico Supreme Court could have used a statutory analysis similar to that found in *People v. Washington*.<sup>44</sup> Under a statute almost identical to New Mexico's, the *Washington* court analyzed in detail the same legal words that appear in Section 30-2-1 of the New Mexico Statutes: "malice aforethought" and "perpetration." The legal fiction and dubious logic of the quasi-tort, quasi-criminal "proximate cause" theory was abolished by the *Washington* court; the statute was read to mean what it was written to reflect.

The facts in *People v. Washington*<sup>45</sup> and *Jackson v. State* are essentially identical. That is, a victim of a felony shoots a felon, and the co-felons are charged with their accomplice's murder, by use of the felony-murder rule. In considering "malice aforethought" no logic could attribute the requisite mens rea to the surviving defendants. The *victim* of the felony, after all, committed the justifiable homicide. As the court in *Commonwealth v. Redline* asked: how can the surviving defendants be charged with a criminal act for the *lawful*, justifiable conduct of the victim?<sup>46</sup>

The murder in *Jackson*, as in *Washington*,<sup>47</sup> was committed during the commission of a felony, namely, armed robbery. Section

42. *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472, 483 (1958).

43. *Jackson v. State*, 92 N.M. 461, 589 P.2d 1052 (1979).

44. *People v. Washington*, 62 Cal.2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).

45. *Id.*

46. *Commonwealth v. Redline*, 391 Pa. 486, \_\_\_\_\_, 137 A.2d 472, 483 (1958).

47. *People v. Washington*, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).

30-2-1 of the New Mexico Statutes on felony-murder requires that for a defendant to be charged with felony-murder, the murder must be "perpetrated . . . in the commission of or attempt to commit any felony[.]"<sup>48</sup> The word "perpetrated" carries with it a legal definition: "Generally, . . . (perpetrator) denotes the person who actually commits a crime or delict, or by whose immediate agency it occurs."<sup>49</sup> To say that the surviving defendants in *Jackson* "perpetrated" the murder of their co-felon at the hands of the victim of the felony would indeed expand the meaning of the word "beyond common understanding."<sup>50</sup> The victim of the felony in *Jackson* was not "perpetrating" any crime; he was, instead, "thwarting"<sup>51</sup> the commission of the felony, in itself a meritorious effort. Using a simple statutory analysis, therefore, it would appear outside logical comprehension to charge any surviving co-felons for the lawful homicide of their accomplice.

#### CONCLUSION

The clear weight of nation-wide authority supports the decision of the New Mexico Supreme Court in *Jackson v. State*.<sup>52</sup> It is a decision consonant with established New Mexico public policy and sound reason. The Supreme Court of New Mexico in *Jackson v. State* might have pursued a strict interpretation of the New Mexico felony-murder statute, however, and so provided sturdier precedent for future felony-murder cases. New Mexico trial courts and legal practitioners will look for such an analysis in the future as an aid in applying the laws of New Mexico.

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48. N.M. Stat. Ann. §30-2-1 (1978), formerly N.M. Stat. Ann. §40A-2-1 (Repl. 1972).

49. Black's Law Dictionary 1298 (4th ed. 1968).

50. *People v. Washington*, 62 Cal. 2d 777, 780, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965).

51. *Id.*

52. See *People v. Washington*, 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965); *Alvarez v. District Court of Denver*, 186 Colo. 37, 525 P.2d 1131 (1974); *Commonwealth v. Moore*, 121 Ky. 97, 88 S.W. 1085 (Ct. App. 1905); *State v. Garner*, 238 La. 563, 115 So.2d 855 (1959); *Commonwealth v. Balliro*, 349 Mass. 505, 209 N.E.2d 308 (1965); *People v. Warren*, 44 Mich. App. 567, 205 N.W.2d 599 (1973); *State v. Majors*, 237 S.W. 486 (Mo. 1922); *Sheriff of Clark County v. Hicks*, 89 Nev. 78, 506 P.2d 766 (1973); *State v. Canola*, 72 N.J. 206, 374 A.2d 20 (1977); *People v. Wood*, 8 N.Y.2d 48, 167 N.E.2d 736, 201 N.Y.S.2d 328 (1960); *State v. Oxendine*, 187 N.C. 658, 122 S.E. 568 (1924); *Commonwealth v. Myers*, 438 Pa. 218, 261 A.2d 550 (1970).