VIRGINIA'S FELONY - MURDER DOCTRINE: FROM *HASKELL* TO *KING* AND THE PROBLEMS IN-BETWEEN

INTRODUCTION

English common law extended the punishment for murder to cases where a murder occurs during the commission of a felony. The common law classified this as secondary to the murder, but today it has been codified into what is known as the felony-murder doctrine.[1] The doctrine allows an accomplice to a felony to be convicted of murder if one of the principals of the felony kills someone while perpetrating the felony. What follows is an analysis of the elements of the felony-murder doctrine, and of some of the problems that the Virginia court system has faced in defining these elements.

DISCUSSION

Elements of the Underlying Felony (Felony Requirements)

In order to apply the doctrine, the principals in the first and second degree must be in the process of committing a felony, one element of which is an actus reus (voluntary act) by each party. The key act by the accomplice is a voluntary action of aiding and abetting, keeping watch or lookout, encouraging, or inciting the "principal in the first degree" while the felony is either being planned[2] or is in progress.[3]

---

[1]. People v. Goldvarg, 346 Ill. 398, 178 N.E. 892 (1931). *See also* Wooden v. Commonwealth, 222 Va. 758, 284 S.E.2d 811 (1981).

Brief History of Felony-Murder

The felony-murder rule developed as a natural part of common law murder. Its consequences were of no real concern when the rule was originally applied because the punishment for all felonies was death. The underlying felony had the same punishment as the killing that took place as a corollary to the felony. It is only in modern times when the punishment for felonies changed to include penalties other than death that the felony-murder rule came under attack for its harshness.

The contention by many jurists, who oppose the doctrine, is either that felony-murder is unnecessary because it is subsumed under statutory murder or that felony-murder is unfair because it punishes without proving culpability. For these reasons, many states have either abolished felony-murder (Kentucky, Hawaii and Michigan) or have restrained its use (Arkansas, Delaware and New Hampshire). *People v. Aaron*, 409 Mich. 672, 299 N.W.2d 304 (1980).

However, the state of Virginia has codified felony-murder in two statutes that give it wide applicability to criminal proceedings in the state. Va. Code Ann. Secs. 18.32-33 (1988).

[2]. Horton v. Commonwealth, 99 Va. 848, 38 S.E. 184 (1901).

[3]. Moerhing v. Commonwealth, 223 Va. 564, 290 S.E.2d 891 (1982). See also Ramsey v. Commonwealth, 2 Va. App. 265, 343 S.E.2d 465 (1986); Brown v. Commonwealth, 180 Va. 733, 107 S.E. 809 (1921); Jones v. Commonwealth, 208 Va.

The second element of a felony is *mens rea* (intent to commit a felony).[4] The accomplice must act with purpose, and must consciously engage in felonious conduct. Shared criminal intent with "principal in the first degree".[5] This element can be fulfilled by inference if *actus reus* is met. However, if this type of purposeful conduct is lacking, one may use the "willful blindness" rule set forth in *United States v. Jewell*.[6]

In that case, the defendant was paid one hundred dollars to drive a car across the United States/Mexican border. The defendant did not know that one hundred and ten pounds of marijuana was in the trunk of the car. The defendant contended that he was not an accomplice because he lacked the criminal intent necessary for the illegal transportation of the drugs. The court held that he should have inquired further from the "principal in the first degree" as to why he was being paid to drive across the border. The court termed the defendant's conduct "willful blindness" and ruled that intent may be proven by a showing that the accomplice should have been aware that the conduct he was participating in was probably felonious.[7] A reasonable man standard, similar to that used to demonstrate negligence, should be used to prove "willful blindness".[8]

370, 157 S.E.2d 907 (1967); and Va. Code Sec. 18.2-18 (1982 and Supp. 1986, 1987).

The full text of the Virginia statute Sec. 18.2-18 reads:

How principals in second degree and accessories before the fact punished.--
In the case of every felony, every principal in the second degree and every accessory before the fact may be indicted, tried, convicted and punished in all respects as if a principal in the first degree; provided, however, that except in the case of a killing for hire under the provisions of Section 18.2-31 (b) an accessory before the fact or principal in the second degree to a capital murder shall be indicted, tried, convicted and punished as though the offense were murder in the first degree.

4. Horton v. Commonwealth, 99 Va. 848, 38 S.E. 184 (1901).

5. Hall v. Commonwealth, 225 Va 533, 303 S.E.2d 903 (1983). *See also* Augustine v. Commonwealth, 226 Va. 120, 306 S.E.2d 886 (1983).

6. United States v. Jewell, 532 F.2d 697 (9th Cir. 1976).

7. *Id.*

8. *Id.* The language used by the court in *Jewell* is consistent with a negligence standard of reasonable care.

Actus Reus (First Element of Felony-Murder)

Aside from the felonious act, felony-murder requires a necessary sequence of events leading up to the murder.[9] The intent to commit the felony must precede the intent to kill. If not, the murder is independent of the felony and the accomplice is not liable under a felony-murder theory.[10] Thus, a felon (principal in the first degree) cannot kill his victim and then decide to rob him.

The murder must occur during the felony as defined by the *actus reus*. Generally, this question is answered in part by the satisfaction of the proximate cause requirement. The determination of the length of time encompassed by the felony is critical to the application of the doctrine.[11] In *Haskell*, the defendant helped to rob a sailor in the city of Norfolk by offering the sailor a ride and then stopping at a predetermined location for his counterparts to rob him. After the robbery had ended, the sailor would not allow the felons to escape. Finally, one co-felon shot the sailor in the chest to ensure their escape.

The court in Haskell overruled *Mason v. Commonwealth*, where felony-murder was not applied to an escaping felon.[12] The court in *Haskell* ruled that "the felony-murder doctrine applies where the initial felony and homicide were parts of one continuous transaction and were closely related in point of time, place, and causal connection, as where the killing was done in flight from the scene of the crime to prevent detection or promote escape."[13] The court in *Haskell*, citing *People v. Salas*, stated "... robbery is not terminated until the robber has won his way to a place of temporary safety".[14]

The classic fact scenario is *People v. Gladman.* The felons were termed to still be in the process of committing the felony even though they were in a parking lot a half mile from the murder-robbery site. The court held that the felons, who were fleeing a delicatessen, were in the process of robbing the store

---

9. This section refers not to the existence of the underlying felony, but to additional elements that must co-exist with the underlying felony to establish felony-murder *actus reus.*

10. LaFave and Scott, *Criminal Law*, 637 (2d ed. 1986).

11. Haskell v. Commonwealth, 218 Va. 1033, 243 S.E.2d 477 (1978).

12. Mason v. Commonwealth, 200 Va. 253, 105 S.E.2d 149 (1958).

13. Haskell v. Commonwealth, 218 Va. at 1041, 243 S.E.2d at 482.

14. *Id.*, citing People v. Salas, 7 Cal.3d 812, 500 P.2d 7, 103 Cal. Rptr. 431, 58 A.L.R.3d 832 (1972), cert. denied, 410 U.S. 939 (1973).

until they had traveled to a safe and secure place, and until their "booty", if there was any, was safe.[15]

Stipulated Felonies (Part of the Felony-Murder *Actus Reus*)

There are two classes of felonies to which the felony-murder doctrine applies, and varying punishments that accompany these two classes. The first class is statutory and is listed in the Va. Code Ann. Sec. 18.2-32.[16] This class includes arson, rape, forcible sodomy, inanimate object sexual penetration, robbery, burglary, and abduction. The accomplice to any of these felonies is charged with first degree murder if a killing occurs. The punishment is that for a Class 2 felony.[17] The second class of felony is stipulated in the Va. Code Ann. Sec. 18.2-33.[18] If an accidental murder occurs as a result of any other felony not listed in Sec. 18.2-32, the felony-murder doctrine can apply.[19] However, the

---

[15]. People v. Gladman, 41 N.Y.2d 123, 359 N.E.2d 420 (1976).

[16]. Va. Code Ann. Sec. 18.2-32 (1982 and Supp. 1986, 1987).

The full text of the statute reads:

First and second degree murder defined; punishment.--
Murder, other than capital murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate object sexual penetration, robbery, burglary or abduction, except as provided in Section 18.2-31, is murder of the first degree, punishable as a Class 2 felony.
All murder other than capital murder and murder in the first degree is murder of the second degree and is punishable as a Class 3 felony.

[17]. *See* Wooden v. Commonwealth, 222 Va. 758, 284 S.E.2d 811 (1981).

[18]. Va. Code Ann. Sec. 18.2-33 (1982 and Supp. 1986, 87).

The full text of the statute reads:

Felony homicide defined; punishment.--
The killing of one accidentally, contrary to the intention of the parties, while in the prosecution of some felonious act other than those specified in Sections 18.2-31 and 18.2-32, is murder of the second degree and is punishable as a Class 3 felony.

[19]. In *Aaron*, the Michigan Supreme Court contended that the inherent unfairness in the felony-murder doctrine stems from holding felons guilty of accidental deaths that should be categorized as manslaughter, not murder, because there is no malice. *People v. Aaron*, 409 Mich. 672, 299 N.W.2d 304 (1980).
However, in the actual usage of the doctrine this flaw is corrected through the use of proximate cause "foreseeability" and "furtherance of the felony" rules. If a death is foreseeable then there is an inherent danger in the underlying felony. This danger connotes reckless behavior and malice by a felon who

accomplice can only be convicted of second degree murder and is punished for a Class 3 felony.[20]

In addition to these two accepted classes, a new class is developing beyond the felonies in the statutory listing of the Va. Code Ann. Sec. 18.2-32. Under *Heacock v. Commonwealth* any "inherently dangerous" felony that can cause death or serious injury regardless of whether the death is accidental can be used to apply the doctrine.[21] In that case, a drug dealer distributed cocaine to some friends at a party. One friend went into convulsions and died after ingesting the coke. The court in *Heacock* deemed the killing nonaccidental, but applied the felony-murder doctrine, although drug possession is not one of the felonies listed under the Va. Code Ann. Sec. 18.2-32.

The court held that the felony was in the possession and ingestion of the coke and that the defendant aided and abetted the perpetrator by distributing the cocaine to him in the first place. The court further stated that cocaine is "inherently dangerous" to human life and its ingestion is not accidental. Thus the court concluded that "inherently dangerous felonies" are a new category of felony-murder punishable as a second degree murder offense. The defendant contended that felony-murder could not apply because the victim was a co-felon. However, the court ruled that a co-felon can be a victim for purposes of felony-murder.[22]

Although the court applied Va. Code Ann. Sec. 18.2-33 as to the punishment of the offense (second degree murder), the court, like other courts, seemed to be hinting that an "inherently dangerous felony" could constitute first degree murder.[23] The judicial trend in the future of Virginia seems to be toward

---

proceeds without regard to the danger. Additionally, the "furtherance of the felony" rule shows that the killing was not accidental, but contributed to the success of the underlying felony. The unfairness must not be in the killing and the nonuse of manslaughter, but in holding the accomplice liable for the murder when he had no intent to commit it. For a discussion of transferred malice *see* footnotes 41 and 50.

[20]. *See* Whiteford v. Commonwealth, 27 Va. 721 (1828).

[21]. Heacock v. Commonwealth, 228 Va. 397, 323 S.E.2d 90 (1984).

[22]. *Id.*

[23]. The Virginia Supreme Court used language more consistent with Va. Code Ann. Sec. 18.2-32 than with Va. Code Ann. Sec. 18.2-33. However, it found the murder to be second, not first, degree as Va. Code Ann. Sec. 18.2-32 specifies. *Id.*

expanding Va. Code Ann. Sec. 18.2-32 to include "inherently dangerous felonies", but with the advent of a more restrictive Virginia Court of Appeals which now hears all criminal appeals, this expansion seems unlikely. Thus, four years after the supreme court's opinion in *Heacock* there are still no Virginia cases that expressly hold that Va. Code Ann. Sec. 18.2-32 should be expanded.[24]

Virginia's Accomplice Doctrine (Validating Felony-Murder)

According to *Briley v. Commonwealth*, a "principal in the second degree" is as culpable as the "principal in the first degree" if the accomplice has met the *actus reus* and the *mens rea* requirements of the felony. Hence, the felony-murder

---

[24]. *Felony-Murder and the Death Penalty*

Although an accomplice cannot usually be convicted even under Va. Code Ann. Sec. 18.32 of capital murder, the United States Supreme Court made an exception in its recent decision in *Tison v. Arizona*, 107 S.Ct. 1676 (1987), reh'n denied, 107 S.Ct. 3201 (1987). In that case two brothers broke their father out of prison. While escaping, their car broke down in the desert. To obtain another vehicle, the father stopped a car on the highway and killed the family in the car. The brothers did not participate in the killing, but sat idly by while their father brutally killed the family. The Supreme Court held that the initial felony was the escape ant that the killing occurred while the escape was still in progress. The felony-murder rule was therefore applicable to the killing. Although this would normally result in the brothers' conviction for first degree murder, the fact that the brothers showed reckless indifference to human life by watching their father kill the family without attempting to stop him warranted the death penalty for both brothers. Thus the death penalty can apply to special cases of felony-murder.

Does this explanation of felony-murder and the death penalty demonstrate the continued reasoning as set out by the common law in regard to felony-murder and deterrence? Francis B. Sayre, *Cases on Criminal Law*, 527-531 (1930), quoting *Regina v. Serne and another*, 16 Cox C.C. 311 (1887) and *People v. Washington*, 62 Cal.2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965). The answer to this is embodied in the difference in the degree of culpability between an accomplice who has no knowledge of the approaching murder until after the fact and an accomplice who is a witness to the entire incident and has the opportunity to stop the murder. The difficulty is in how foreseeable the murder must be to the accomplice at the scene of the crime. Surely if the principal pulls out a gun and shoots the storekeeper spontaneously, the accomplice has no time to stop the murder. The court determines the reasonableness of the opportunity. As to the degree of culpability and its application to the common law policy behind felony-murder, it seems that as the culpable conduct of the accomplice rises, so does the ability that the accomplice possesses to deter the murder. Under the robbery scenario, the ability to deter the principal is less than in *Tison* where the two brothers just stood by and watched. Since the common law policy of deterrence is at the heart of the doctrine, it is only logical that the punishment should increase with the need to deter. Seen in this light, one may better understand how the United States Supreme Court in the majority opinion written by Sandra Day O'Connor reached its conclusion in *Tison*.

doctrine holds the accomplice liable for the murder committed by the "principal in the first degree."[25]

Corpus Delicti (Second Element of Felony-Murder)

The second general requirement that must be satisfied is that someone must be killed.[26] However, death does not need to occur during the actual felony, but must be a proximate result of injuries received during the commission of the felony.[27] If a body is not found, this requirement may still be satisfied by showing circumstantial evidence of the death.[28]

Proximate Cause (Third Element of Felony-Murder)

The third requirement is that the felony must be the proximate cause of the murder.[29] This requirement is composed of a two-pronged test. First, the murder must satisfy the traditional "but for" prong. "But for" the commission of this particular felony by the principals in the first and second degree, the murder would not have taken place.[30] Generally, if one proves the felony and the corpus delicti, one also passes the "but for" prong.[31]

---

[25]. Briley v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980).

[26]. Smith v. Commonwealth, 62 Va. 809 (1871). *See also* Va. Code Ann. Sec. 18.2-32.

[27]. State v. Shortridge, 54 N.D. 779, 211 N.W. 336 (1926).

[28]. Epperly v. Commonwealth, 224 Va. 214, 294 S.E.2d 882 (1982).

[29]. Wooden v. Commonwealth, 222 Va. 758, 284 S.E.2d. 811 (1981). *See also* Va. Code Ann. Sec. 18.2-32.

[30]. *See* Doane v. Commonwealth, 218 Va. 500, 237 S.E.2d 797 (1977).

[31]. *The "Year and a Day" Rule Re-Explored*

The "but for" analysis includes the traditional "year and a day" rule. Although the rule is still used in murder cases today, the rule is treated as a rebuttable presumption, not as a concrete stipulation. The rule evolved due to the absence of medical practices that could adequately determine the causes of death. Thus, the rule supplied the State with a means of ascertaining proximate cause. If the defendant's act was over a year from the victim's death, than proximate cause could not be established and the defendant would be set free. In today's world of high tech medicine, the determination of cause is much easier than when the traditional rule was established. For example, in a case of poisoning, where the traditional rule would fail to establish proximate cause if the

The second prong of the test is much more stringent than the initial "but for" prong. Because the murder is classified under the "but for" prong as dependent on the felony, the second prong narrows this link by adding the requirement of foreseeability to the picture. The murder must not only be dependent, but it must also be foreseeable.[32] In *Haskell*, the foreseeability issue is satisfied by Va. Code Ann. Sec. 18.2-32, as a murder in connection with any of the listed felonies is foreseeable *per se*.[33]

According to *People v. Kessler*, this second prong is deemed the "accomplice theory".[34] In *Commonwealth v. Redline* this "Accomplice Theory" was refined from mere nexus or foreseeability to furtherance of the felony.[35] A co-felon or accomplice is only liable for the actions of the "principal in the first degree" if the murder was in the furtherance of the felony; that is, the murder must be the natural and probable consequence of the felony.[36] *Haskell* reemphasizes this prong by defining "furtherance" in the Virginia court system as "closely related in point of time, place, and causal connection".[37]

Thus in a case where felons are robbing a store and the store manager fights back, the use by one felon of deadly force to kill the manager is foreseeable.[38] Additionally, the felon furthered the success of the robbery by killing one who

---

poison had been administered over a long period of time, medical science today can trace the cause of death directly to the poison and establish proximate cause. As a result, medical science has availed the State a method in which the traditional rule can be rebutted.
See generally, Rollin M. Perkins, *Perkins on Criminal Law*, 690-96 (2d ed. 1969).

[32]. *Id.*

[33]. Haskell v. Commonwealth, 218 Va. 1033, 243 S.E.2d 477 (1978).

[34]. People v. Kessler, 315 N.E.2d 29 (Ill. 1974).

[35]. Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958). *See also* Wooden v. Commonwealth, 222 Va. 758, 284 S.E.2d 811 (1981).

[36]. *Id.*

[37]. Haskell v. Commonwealth, 218 Va. at 1041, 243 S.E.2d at 483.

[38]. It is within contemplation that people may be hurt in a robbery, as stipulated in Va. Code Ann.18.2-32. The legislative intent was to deem certain crimes dangerous by their very nature and thus limit judicial mercy by stipulating the punishment as a class 2 felony (first degree murder). Va. Code Ann. 18.2-32 (1982 and Supp. 1986, 1987).

had the potential to apprehend him. In this situation the second prong would be satisfied because a tighter link between the robbery and the murder would be established.

The harder case is an accidental murder. For example, suppose an embezzler steals from his employer. While escaping from the premises with the money, he inadvertently pushes an innocent bystander into the street where the bystander is killed by an oncoming car, or kills someone while operating the getaway car. Is the death of the bystander a foreseeable consequence of his felony? Perhaps the better question is whether this killing furthers the felonies just committed so as to be causally connected to them. Ultimately, the satisfaction of the second prong is not as automatic as it may seem.[39]

---

[39]. *See* King v. Commonwealth, 6 Va. App. 351 (1988), as an example of the difficulty in determining "furtherance" and proximate cause.

Note: *Confusion over Proximate Cause (The Evolution of Proximate Cause in the Virginia Court System)*

There is confusion among *Doane, Haskell, Heacock, King* (an Appeals Court case), *Wooden*, which cites *Redline*, as to how they fit into the overall picture of proximate cause. "In *Doane v. Commonwealth* we reserved the question whether the application of the rule requires a showing of causal relationship or whether a showing of mere *nexus* will suffice. We do not decide that question here because it is foreclosed by the evidence which we consider conclusive." *Heacock v. Commonwealth*, 228 Va. 397, 404, 323 S.E.2d 90, 94 (1984) (citing *Doane v. Commonwealth*, 218 Va. 500, 237 S.E.2d 797 (1977)). The Virginia Appeals Court used this quote in *Heacock* to decide for itself that proximate cause was not mere *nexus*, but causal connection. *King v. Commonwealth*, 6 Va. App. 351 (1988). Thus, in the court's opinion it decided an issue that the Virginia Supreme Court would not. However, the Virginia Supreme Court in *Heacock* (1984) overlooked its decision in *Haskell* (1978), which occurred a year after *Doane* (1977). *Heacock v. Commonwealth*, 228 Va. at 397, 323 S.E.2d at 90.

In *Haskell* the court defined its position on proximate cause not as "mere *nexus*", but as causal connection. The "felony-murder statute applies where the killing is so closely related to the felony in time, place and causal connection as to make it a part of the same criminal enterprise." *Haskell v. Commonwealth*, 218 Va. at 1044, 243 S.E.2d at 483. The *Wooden* case in 1981 adds to the confusion by citing proximate cause through the *Redline* definition, but made no attempt to define what "furtherance of the felony" as stipulated in *Redline* meant as applied to Virginia law. *Wooden v. Commonwealth*, 222 Va. 758, 284 S.E.2d 811 (1981). Thus, in order to clear the confusion, one must continue to rely upon *Haskell* in truly understanding what "furtherance" or proximate cause in regards to felony-murder connotes in Virginia. *Haskell v. Commonwealth*, 218 Va. at 1944, 243 S.E.2d at 483. The key is in the causal relationship between the felony and the murder. Therefore, the grand conclusion of the Virginia Court of Appeals in *King* had already been decided by the Virginia Supreme Court ten years earlier in *Haskell.*

Malice Aforethought (Fourth Element of Felony-Murder)

The last requirement of the felony-murder doctrine is *mens rea.*[40] The intention to commit the actual murder, as well as to commit the felony, is required. According to *Wooden*, all of the requirements of common law murder must be satisfied by the accomplice (principal in the second degree) in order to apply the felony-murder doctrine.[41] The *actus reus* is satisfied by the accomplices' participation in the initial felony, the *corpus delicti* and proximate cause requirements are satisfied as described in the previous two sections and the *mens rea* requirement is satisfied by the application of a rule stipulated in *Heacock.*[42]

---

[40]. *Discussion of Mens Rea*

There are generally four levels of intent: purpose (specific intent), knowing (general intent), reckless (unjustifiable risk or gross negligence), and negligence (lack of reasonable care).

The *mens rea* or intent required by felony-murder shifts in accordance with the underlying felony. This is due to the implied malice inherent in the doctrine. Thus, robbery which connotes a specific intent carries over to the murder. This is a logical progression of intent, as Va. Code Ann. Sec. 18.32 would apply the felony-murder rule to the charge of first degree murder. First degree murder, like robbery, is a specific intent crime. Larceny is also a specific intent crime, but does not come under the Va. Code Ann. Sec. 18.32 in its application of the felony-murder rule. The defendant in a larceny case is convicted under the Va. Code Ann. Sec. 18.33 felony-murder rule of second degree murder, yet the larceny defendant had the same type of intent as the robber in the first scenario. Can it then be presumed that Felony-Murder is a specific intent crime applying to Va. Code Ann. Sec.Sec. 18.32 and 18.33 equally? The answer is no. An example is found in nonfeasance crimes, as when a truck driver fails to comply with a safety regulation that is required under federal law. The crime is not a specific intent crime, but one of general intent. The intent distinction is due to a circumstance in which the driver may be aware of the way a chemical is being transported without being aware of the regulations that govern that transportation. The result is termed "strict liability". If someone is killed due to the lack of compliance with the safety regulation, the driver could be found guilty of second degree murder under the Va. Code Ann. Sec. 18.33 felony-murder rule because the failure to meet the safety regulations is a felony. Thus, a general intent crime can impute the malice necessary to establish second degree murder. This proposition defeats any notion of logical order between the underlying felony and the murder as it would pertain to Va. Code Ann. Sec. 18.33 *mens rea.*

Therefore, one may conclude that all specific and general intent underlying felonies apply to Va. Code Ann. Sec. 18.33, while only specific intent crimes pertain to Va. Code Ann. Sec. 18.32. All crimes stipulated under the latter statute are specific intent crimes.

Recklessness and negligence have no application to the rule.

[41]. Wooden v. Commonwealth, 222 Va. 758, 284 S.E.2d 811 (1981).

[42]. Heacock v. Commonwealth, 228 Va. 397, 323 S.E.2d 90 (1984).

According to the *Heacock* rule, the act of committing a felony gives rise to imputed (implied and constructive) malice.[43] This malice satisfies the intent requirement for *mens rea* or "malice aforethought".[44] Malice is imputed because the felons who committed the murder had the original *mens rea* necessary to commit the original felony. Hence the felony *mens rea* is transferred to the murder and satisfies by judicial interpretation the malice requirement. Therefore, as a matter of law, if the accomplice meets the intent requirement for committing the felony, he also meets the intent requirement for the murder. As a result, the accomplice may be liable for the murder of an innocent victim by the principal felon through transference.

However, there are certain exceptions to the *Heacock* rule that tend to limit its application in regard to the imputation of malice in the felony-murder doctrine. There is no transference where the victim is killed by anyone other than one of the felons.[45] To do otherwise would impute malice where none had existed previously. The malice of the "principal in the first degree" is imputed to his accomplice in the felony only. This distinction is very important as a policeman or victim who shoots a co-felon cannot be used as a "principal in the first degree" to convict one of the other co-felons for the murder of a confederate.[46]

---

[43]. *Id.*

[44]. *See* Commonwealth v. Gibson, 4 Va. 70 (1817).

[45]. *Where does Felony-Murder malice originate?*

There have been many theories as to how the malice is actually transferred. Some jurists have argued that the malice comes from the "principal in the first degree", *Wooden v. Commonwealth*, 222 Va. at 758, 284 S.E.2d at 811. Others have specified that it is the inherent nature of the original felony that gives rise to the malice, *Heacock v. Commonwealth*, 228 Va. at 397, 323 S.E.2d at 90. However, the best reasoning behind the imputation of malice comes from the common law. Francis B. Sayre, *Cases on Criminal Law*, 527-531 (1930), quoting the common law from *Regina v. Serne and another*, 16 Cox C.C. 311 (1887) and *People v. Washington*, 62 Cal.2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).

Because the common law purpose is to punish accomplices who could have prevented the murder by not participating in the original crime, the *mens rea* for the initial felony passes to the murder regardless of the nature of the underlying felony and regardless of the intent of the "principal in the first degree". For this reason it is entirely possible for a robber to accidentally kill a victim without malice. If the robber dropped his weapon, thereby setting off the trigger and killing a bystander, his malice would be constructively transferred to the accomplice. For a discussion of the problems that come with the court's view of malice in *Wooden* and *Heacock* see footnote 50.

[46]. Wooden v. Commonwealth, 222 Va. at 758, 284 S.E.2d at 811.

An example of this scenario is found in *Wooden.* In that case, the felons broke into the victim's apartment at night and waited for him to return in order to rob him. When the victim arrived, he shot and killed one of the felons. The court held that the other felon, the defendant in the case, was not liable for the death of his co-felon as the victim's shooting was done without malice and was classified as a justifiable homicide.[47] The same rule applies to police officers who kill co-felons in a shootout.[48]

In *Heacock*, it was further held that a felon who aids and abets another felon (principal) in committing a felony and the principal felon dies either accidentally or due to the dangerous nature of the felony, malice is imputed to the accomplice felon.[49]

King v. Commonwealth (A Problem Case)

King v. Commonwealth raised questions about the scope of "furtherance" and the meaning of "inherently dangerous".[50] The defendant and victim were in the business of transporting and distributing illegal drugs for a drug smuggling operation. While flying over North Carolina and Virginia the victim, who was piloting the plane without a license, flew low in order to evade detection by law enforcement agencies. While flying at this dangerous altitude, the pilot lost

---

[47]. *Id.*

[48]. *See* Redline v. Commonwealth, 391 Pa. 486, 137 A.2d 472 (1958) (a policeman shot a felon and malice was not imputed.)

[49]. Heacock v. Commonwealth, 228 Va. 397, 323 S.E.2d 90 (1984).

Malicious Suicide?

The logic behind the imputed malice theory seems to break down in *Heacock.* The malice not only is imputed from the principal, but from the nature of the felony. The disturbing question presented is whether in a felony other than murder there can be imputed malice as a matter of law. Larceny, for example, has no malice element, yet under the required Felony-Murder conditions the court could deem its existence. Even if this notion of malice from the felony were rejected, the court would still be left to decide whether one can have malice towards oneself. For the principal's malice to be imputed to the accomplice, the malice is transferred from the principal's intent to the accomplice's. Thus the principal must direct his malice toward himself to transfer it to another. If this be true, than it begs the question, "Can suicide be malicious?" The answers to any of the questions that present themselves when a discussion of the imputed malice in *Heacock* is commenced will continue to be controversial and disturbing until the court explains how the malice element of Felony-Murder in this case is truly satisfied.

[50]. King v. Commonwealth, 6 Va. App. 351 (1988).

control of the plane and crashed into a mountainside. The other felon, the defendant in the case, who acted as navigator, was the only one who survived the crash. He was convicted under the felony-murder doctrine.[51]

The court in *King* incorrectly held that the act of distributing drugs was not "inherently dangerous", even though the Virginia Supreme Court held in *Heacock* that marijuana is of the class of drugs that is "inherently dangerous".[52] The court in *King* distinguished that case from *Heacock* in that *Heacock* involved cocaine, but here marijuana, a less harmful drug, was involved.[53] However, according to the supreme court's reasoning in *Heacock* concerning drugs that can kill, both cocaine and marijuana are "inherently dangerous".

The best argument against using marijuana under the felony-murder doctrine that the court in *King* should have mentioned is not that it is not "inherently dangerous", but that in most states possession below a certain amount is a misdemeanor and not a felony. Distribution, as stated in *Heacock*, makes the dealer an accomplice to the felony of possession. Thus, if the possession is not a felony, the first requirement of felony-murder is not met and there is no transference of malice to the accomplice.

The key to this case was not the blunder by the Court of Appeals in incorrectly defining "inherently dangerous", but in its misinterpretation of proximate cause. According to *Haskell* and *Wooden* the murder must "further" the felony in a causal connection.[54] However, that connection does not need to be as restricted as the court in *King* believed. The court in *King* found no

---

[51]. *Id.*

[52]. "Inherently dangerous" refers to drugs that have the propensity to kill and to be addictive. *See generally, Heacock v. Commonwealth*, 228 Va. at 404, 323 S.E.2d at 97. Unfortunately, in many states mere possession of various classes of "inherently dangerous" drugs is not a felony. An example of this classification in Virginia is marijuana. Va. Code Ann. Sec. 18.2-248 and Sec. 18.2-249 (1982 and Supp. 1986, 1987).

[53]. However, just as cocaine can kill, so marijuana can kill also. Although marijuana is cumulative in nature and not prone to an overdose as is cocaine, according to Helen Jones, a noted drug expert, marijuana can kill brain cells and cause cancer and heart disease. Jones, *On Marijuana Reconsidered*, Addictive Behavior: Drug and Alcohol Abuse, 109-113 (1985). *See also* R. Petersen, *Marijuana Overview*, Addictive Behavior: Drug and Alcohol Abuse 116-126 (1985). Additionally, marijuana is addictive like cocaine. "One of the most widely accepted misconceptions about marijuana is that a user will not develop physical or psychological dependence. Neither is true." *Id.* at 112.

[54]. Haskell v. Commonwealth, 218 Va. 1033, 1044, 243 S.E.2d 477, 483 (1978).

connection between the fog that caused the accident and the drug trade,[55] but failed to consider the reason why the plane was in the air or why it was flying low in mountainous terrain, which an experienced pilot, such as the defendant, would not do.[56] The court contended that the cause of the crash was the fog. The principal cause of the crash was in fact the low flying, not the fog, done to hide from law enforcement authorities so as not to be caught transporting a controlled substance.[57] The ring leader of the smuggling organization admitted that his employees were flying ridiculously low for ascertaining their location.[58] There was a "causal connection" between the crash and the felony.

The victim was furthering the felony by flying low to avoid detection. The defendant was aiding and abetting the victim by navigating the plane. Hence, proximate cause is easily established and the faulty reasoning of the court in *King*, which restricted "furtherance" and felony-murder, should be disregarded in favor of the Virginia Supreme Court's more expansive ruling in *Haskell* which gives the felony-murder doctrine a more expansive reading.

Possible Defenses to the Felony-Murder Doctrine

In order to fully understand the scope of the felony-murder doctrine, one must not only be acquainted with the elements necessitating the doctrine, but also with the defenses that may be used by the defendant. There are eight defenses to felony-murder that may be employed by the defendant at trial. Seven of these defenses are categorized as affirmative defenses and acknowledge that the prosecution has made out a *prima facie* case against the defendant for the crime charged. The burden rests with the defendant to prove his affirmative defenses.

1. Prosecution's Failure To Meet Its Burden

This is the most common of all the defenses that can be used and is the only nonaffirmative defense that can be employed by the defendant. Failure by the prosecution to prove beyond a reasonable doubt any of the aforementioned elements to felony-murder will constitute a valid defense. The major factor

---

[55]. King v. Commonwealth, 6 Va. App. 351 (1988).

[56]. The defendant contended that he flew low to avoid bad weather and to locate himself. Any logical inquiry into the facts would render this argument incredible. The better choice that an experienced pilot, like the defendant, would make would be to fly above the fog and radio the nearest airport for assistance.

[57]. *Id.* at 10-11.

[58]. *See* Appellee Brief at 10, King v. Commonwealth, 6 Va. App. 351 (1988) (No. 0998-86-3).

facilitating the successful use of this defense by the defendant is disproving the underlying felony. In all cases, the dismissal of the underlying felony amounts to a dismissal of felony-murder.

2. Withdrawal

The accomplice can contend that he had withdrawn from the felony and that the causal connection between the accomplice and the felony had been broken before the murder took place.[59] The accomplice cannot just use verbal language to withdraw but must be physically remove himself. The strongest case for the withdrawal defense is when the accomplice calls the police to stop the "principal in the first degree" from completing the felony.[60]

3. The New York Defense

This defense is presently unrecognized in Virginia, but is a persuasive theory that has been made part of the criminal code in New York. The requirements for this defense are as follows:

1. "Principal in the second degree" did not directly aid the "principal in the first degree" in the commission of the homicide.
2. "Principal in the second degree" was not armed.
3. "Principal in the second degree" did not think the "principal in the first degree" was armed.
4. "Principal in the second degree" had no reasonable grounds to believe that the co-felon intended to engage in conduct likely to result in death or serious physical injury.[61]

Although this is a minority view, it is a well-liked theory that may have success in the future in Virginia.[62]

---

[59]. State v. Thomas, 140 N.J. Super. 429, 356 A.2d 433 (1976).

[60]. *Id.* at 433.

[61]. N.Y. Penal Law Sec. 125.25(3) (1987).

[62]. LaFave and Scott, *supra*, at 10.

4. Self Defense

The defendant may attempt to show that the "principal in the first degree" acted out of necessity in fear for his own life in killing the victim.[63] The difficulty in sustaining the argument lies in the standard of the self defense doctrine. The standard states, in part, "a man shall not in any case justify the killing of another by a pretense of necessity, unless he were without fault in bringing that necessity upon himself."[64] In a case of felony-murder, the killing is only necessary because of the felon's culpable conduct. Hence, self defense is never a viable affirmative defense to felony-murder.

5. Intoxication

The defendant claims that he was intoxicated and did not possess the required intent to kill the victim or to commit the felony. The use of intoxication to negate an intent to kill is a generally accepted defense to premeditation in first degree murder. However, in felony-murder the malice is imputed so as to avoid an analysis of the specific intent to kill. Only the intent to commit the underlying felony must be proven. Thus the use of intoxication to void *mens rea* is valid only in regard to the underlying felony.

Voluntary intoxication has consistently been held not to be a bar to the question of intent,[65] but if shown acts only to mitigate premeditation in first degree murder.[66] Therefore, if an accomplice becomes voluntarily intoxicated before the felony in order to get up his nerve to participate in the crime, he may not use his lack of sobriety as an excuse. Only involuntary intoxication is a valid defense to felony-murder. Involuntary intoxication as it pertains to forming the prerequisite intent is not a presumption, but goes to the weight of the evidence in demonstrating whether the defendant was intoxicated enough so that his ability to form the necessary intent was impaired.[67]

---

[63]. Clark v. Commonwealth, 90 Va. 360, 18 S.E. 440 (1893).

[64]. Bausell v. Commonwealth, 165 Va. 669, 181 S.E. 453 (1935).

[65]. Gill v. Commonwealth, 141 Va. 445, 126 S.E. 51 (1925).

[66]. Jackson v. Virginia, 443 U.S. 307, 312, 313, reh'n denied, 444 U.S. 890 (1979).

[67]. *See generally* Giarrantano v. Commonwealth, 220 Va. 1064, 266 S.E.2d 94 (1980) (mere intoxication is not a *per se* defense to "intent").

6. Insanity Defense

In order to use this defense, the accomplice must be so out of touch with reality that he cannot comprehend the character and consequences of his actions. The defendant is classified as partially insane if he has periods of lucidity where he can understand his actions. Partial insanity cannot be used as a defense.[68]

7. Coercion

The defendant could contend under this defense that the "principal in the first degree" forced him to be a party to the felony, thus negating the defendant's volition. The defendant must establish a sufficient amount of evidence to substantiate his claim. Past actions of the "principal" in dealing with the defendant supply the key evidence in this regard.[69]

8. Cruel and Unusual Punishment (Eighth Amendment)

The criminal justice system's belief in fairness demands that the punishment be commensurate with the offense. Murder is the most serious of charges and provokes the most extreme retribution, which in some jurisdictions includes death.[70] Thus, the burden on the commonwealth to prove murder is a strong one, beyond a reasonable doubt. Through the "accomplice theory" as articulated in *Briley*, the accomplice is treated as a principal to the felony in which he participated.[71] It is unfair to extend felony-murder by the accomplice theory to a situation where an accomplice consciously participated in one felony, but is charged in the commission of another felony. The accomplice in that case is of course not as culpable as the "principal in the first degree". Even in murder cases where there is no underlying felony, the accomplice is convicted of a lesser offense, generally second degree murder. In felony-murder the need to prove culpability is deleted by Va. Code Ann. Sec. 18.32, which specifies a punishment

---

[68]. Dejarnette v. Commonwealth, 75 Va. 867, 876-7 (1881).

[69]. In order to determine a "reasonable reliance" by the defendant on the fact that the principal would injure or kill him unless he helped commit the felony, a prior history that shows a trend of abuse must be established by extrinsic evidence. Any prior court proceedings showing abuse of the defendant by the principal can be used toward the weight of the evidence demonstrating coercion.

[70]. *See generally* Va. Code Ann. Sec. 18.31 (1988).

[71]. Briley v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980).

of first degree murder.[72] Perhaps Chief Justice Traynor put it best when he stated that the felony-murder rule "erodes the relation between criminal liability and moral culpability."[73]

Additionally, there are problems in the transference of malice to the accomplice. It is awkward to convict an accomplice with a general intent to commit murder[74] of a specific intent offense such as first degree murder.[75] Malice and premeditation are imputed.[76] The result is a first degree murder conviction under felony-murder that meets none of the elements of murder.

The question of excessive punishment is strong under these circumstances, especially if the policy behind the punishment is general deterrence.[77] Is general deterrence a sufficiently strong policy to impose first degree murder on an accomplice who may not have satisfied all of the elements of murder? The

---

[72]. Va. Code Ann. Sec. 18.32 (1988) (stipulation of certain underlying felonies as raising the level of murder participated in by an accomplice to first degree murder).

[73]. J. Cook and P. Marcus, *Criminal Law* 505 (2d ed. 1988) quoting People v. Washington, 62 Cal.2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).

[74]. Va. Code Ann. Sec.18.32 imputes a presumption of knowledge for certain felonies, as mentioned above.

[75]. J. Cook and P. Marcus, *supra* note 73.

[76]. For a more complete discussion of malice and Felony-Murder *see supra* 40 and 49.

[77]. *See generally*, Francis Sayre, *Cases on Criminal Law*, 527, 527-31 (1930), quoting Regina v. Serne and another, 16 Cox C.C. 311 (1887). *Serne* discusses felony-murder in terms of the common law and implies the reasoning behind the harsh doctrine to be twofold: first, people intend the consequences of their actions and second, the law must discourage dangerous felonies. *See also* Washington, 62 Cal.2d at 777, 402 P.2d at 130, 44 Cal. Rptr. at 442.

Is the Felony-Murder Doctrine Fair?

There is a heated debate between jurists as to the fairness of the Felony-Murder rule. The opponents of the rule contend that an accomplice should not be forced into rescuing a crime victim. The general rule, whether in tort law or criminal law, is that there is no duty to rescue. Therefore the policy of promoting the rescue of victims either before or during the commission of the felony by deterring the accomplice is defective.

However, the rescuer doctrine does have some notable exceptions. One such exception is if the rescuer caused the conditions that warrant rescue. *See* Parrish v. Atlantic Coast Line R. Co., 221 N.C. 292, 20 S.E.2d 299 (1942) and Hardy v. Brooks, 103 Ga. App. 124, 118 S.E.2d 492 (1961). Because the accomplice's own actions in engaging in the underlying felony caused the condition, it is only fair that the accomplice be held liable to remedy it.

question may only be answered by individual legislatures that have the responsibility of weighing the pros and cons of such a contradiction. However, a court can impose its will on a case by case basis, and the defendant's attorney, using an Eighth Amendment argument, must exploit that role of the judiciary to overturn a first-degree felony-murder conviction.[78]

CONCLUSION

The felony-murder doctrine allows an accomplice to a felony to be convicted of first or second degree murder when a murder he did not commit occurs while the felony is in progress. In order to apply this doctrine, a number of elements must be met. When using this legal theory to convict an accomplice, jury instructions must contain each of the following requirements:

1. *Actus Reus* (committing the initial felony)
   a. The accomplice must be aiding and abetting, keeping watch or lookout, encouraging or inciting the "principal in the first degree" to commit the initial felony.
   b. The accomplice must act with purpose or knowingly while aiding and abetting the "principal in the first degree" to commit the initial felony.
   c. The murder must take place while the initial felony is in progress.
   d. The intent to commit the felony by the "principal in the first degree" must antedate the intent to commit the murder.
2. *Corpus Delicti* (crime committed by a criminal agent)
   a. There must be evidence to suggest beyond reasonable doubt that a human being has been killed.
3. Proximate Cause
   a. "But for" this particular felony, the murder would not have occurred, must be answered in the affirmative.
   b. The murder must be foreseeable.
   c. The murder must "further" the purpose of the felony by being closely related in point of time, place, and causal connection.
4. *Mens Rea* (intent)
   a. As long as the accomplice *acted* with *intent* to commit a felony (requirements 1.a. and 1.b. are satisfied), there is "implied malice" to commit the murder and *mens rea* is satisfied. However, this imputed malice does not apply where the "principal in the first degree" is the victim (non-felon) or a law enforcement official.

---

[78]. Although lack of Due Process is an additional constitutional defense that could be used to combat first degree Felony-Murder, it is nevertheless a defense that would fail because the Felony-Murder doctrine was codified and in common usage in most jurisdictions in the early nineteenth century.

As long as these elements are included in the jury instructions, the felony-murder rule may apply. The distinction in charges and penalties to the accomplice is based entirely on the type of felony. Any of the specifically listed felonies under Va. Code Ann. Sec. 18.2-32 carries a charge of first degree murder and is punishable as a Class 2 felony, while any non-listed felony coupled with accidental death or a non-listed "inherently dangerous felony" carries a charge of second degree murder and is punishable as a Class 3 felony.

In conclusion, it may be noted that this doctrine is not as well developed in Virginia as it is in many other states. As the quantity of case law expands, so will the applicability and requirements of the doctrine. Virginia is now beginning to use felony-murder more liberally as a viable theory in criminal law.

This trend began in the mid-1970s with the approval of the Virginia Supreme Court. However, with the new Virginia Court of Appeals, the use of the doctrine has been restricted. *King* may indicate that the court of appeals is trying to follow in the footsteps of the Michigan Supreme Court by abolishing felony-murder. The difference is that Michigan's felony-murder rule was never codified, as opposed to Virginia's. The legislative protection of felony-murder will keep the doctrine available to prosecutors in the future with the hope that judicial deference a goal of the law, deterring crime, will override the protection of criminals at the expense of the community. The doctrine may seem harsh to the criminal, but so are the effects on a family who loses their father to a robber's bullet.

Appendix: Recommended Virginia Jury Instructions

First Degree Felony Homicide

The defendant is charged with the crime of first degree murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

1. That (Name of Victim) was killed by (Name of "Principal in the First Degree") who was a party to the (Name of Felony).

2. That (Name of the Defendant) was a "principle in the second degree" to the (Name of Felony).

3. That the felony committed was either arson, rape, forcible sodomy, inanimate object sexual penetration, robbery, burglary or abduction.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty and fix his punishment at:

1. Imprisonment for life; or

2. A specific term of imprisonment, but not less than twenty (20) years.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the offense, then you shall find the defendant not guilty of felony homicide.[79]

---

[79]. *See Generally*, MICHIE'S JURISPRUDENCE, VIRGINIA MODEL JURY INSTRUCTIONS, CRIMINAL VOL. I 503 (1985 & Supp. 1987).

First Degree Felony-Murder is not addressed specifically in the Virginia Model Jury Instructions, but is instead mentioned as an afterthought in the instructions for First Degree Murder. The difficulty with the Virginia Model Jury Instruction's definition of First Degree Felony-Murder revolves around the inference that only the principal can be prosecuted for First Degree Murder. That assumption is incorrect. The purpose of the doctrine is to punish accomplices who participate in dangerous felonies equally with the "Principal in the First Degree". By punishing accomplices commensurate with the principal, the State hopes to deter dangerous crimes by encouraging accomplices to withdraw from assisting principal actors in the commission of dangerous felonies. *See Generally People v. Washington* 62 Cal.2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).

Second Degree Felony Homicide

The defendant is charged with the crime of felony homicide. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

1. That (Name of Victim) was killed by (Name of "Principal in the First Degree") who was a party to the (Name of Felony).

2. That (Name of the Defendant) was a "principle in the second degree" to the (Name of Felony).

3. That the killing in the (Name of Felony) was accidental and contrary to the intentions of the defendant.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty and fix his punishment at a specific term of imprisonment, but not less than five (5) years nor more than twenty (20) years.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the offense, then you shall find the defendant not guilty of felony homicide.[80]

---

[80]. *Id.*

For a basic guide on how Second Degree Felony-Murder instructions should be structured, the Virginia Model Jury Instructions are a good starting point. However, the instructions specifically detailing Second Degree Felony-Murder are incomplete and should not be used without further expansion.