

# Availability Of The Felony-murder Rule Today: Equitable And Just Or Unfair And Excessive?

2005

Traci Rose Francis  
*University of Central Florida*

Find similar works at: <https://stars.library.ucf.edu/etd>

University of Central Florida Libraries <http://library.ucf.edu>

 Part of the [Criminology and Criminal Justice Commons](#)

## STARS Citation

Francis, Traci Rose, "Availability Of The Felony-murder Rule Today: Equitable And Just Or Unfair And Excessive?" (2005). *Electronic Theses and Dissertations*. 444.

<https://stars.library.ucf.edu/etd/444>

This Masters Thesis (Open Access) is brought to you for free and open access by STARS. It has been accepted for inclusion in Electronic Theses and Dissertations by an authorized administrator of STARS. For more information, please contact [lee.dotson@ucf.edu](mailto:lee.dotson@ucf.edu).

AVAILABILITY OF THE FELONY-MURDER RULE TODAY:  
EQUITABLE AND JUST OR UNFAIR AND EXCESSIVE?

by

TRACI R. FRANCIS  
B.A. University of Florida, 2002

A thesis submitted in partial fulfillment of the requirements  
for the degree of Master of Science  
in the Department of Criminal Justice  
in the College of Health & Public Affairs  
at the University of Central Florida  
Orlando, Florida

Summer Term  
2005

© 2005 Traci R. Francis

## **ABSTRACT**

The current research provides an examination of felony murder to determine the similarities and differences among jurisdictions in the nation. It provides a current analysis of jurisprudence to update the literature as to practices in the United States pertaining to the availability of felony murder and the specific elements that make up the rule.

This research conducts a survey of the 50 states, the District of Columbia, and the Federal System. It provides an overview of the felony-murder rule and its availability, the degrees to which the doctrine is utilized, and the subsequent sentences allowable for defendants convicted under the theory. Current statutes are analyzed to establish what circumstances specifically constitute felony murder and the criteria required by each of the jurisdictions. Additionally, it determines to what degree jurisdictions subscribe to the felony-murder theory, which ones allow individuals to be eligible for life sentences or death sentences, and which jurisdictions allow the rule to be applied to non-triggerman offenders.

I am dedicating this work to my friends and family...  
Through much trepidation, they remained supportive and always willing to help me get  
through this project.

To my mother who is always in my corner cheering me on, and encouraging me to continue  
to believe in myself...

To my dear friend, Bill Van Poyck, whose enduring friendship over the years has meant  
more to me than I can express. If not for him, my passion for this issue would not be as  
profound. You are truly special for always being there for others and for me...

To my handsome boy, McCool, and beautiful Gracie Girl, who always sat ready and waiting  
and were forever there when I needed to smile, and to Bear and Alpha who were constantly  
around to keep me company.

Finally, to my loving and devoted husband, Nick, for all his patience and understanding in  
enduring my education journey over the past several years. I will remain forever grateful for  
your love and support during those times and throughout this project. How truly blessed I  
am to have you by my side...

Without all of you, this work would not have been possible...

## **ACKNOWLEDGEMENTS**

I wish to acknowledge Dr. Joseph Sanborn for his candid critique of this work. Thank you for your enthusiasm and genuine interest, along with your suggestions for a better product.

To Dr. Bernard McCarthy for his involvement in the evaluation of this thesis.

I also wish to deeply thank Dr. Mike Reynolds for his sage wisdom in offering research suggestions for this study. Additionally, his genuine kindness over the past several years during my time as a graduate student has not gone unnoticed. Thank you, Dr. Reynolds, for being such a great mentor and for always giving me a challenge...

## TABLE OF CONTENTS

LIST OF TABLES .....	viii
LIST OF FIGURES .....	ix
INTRODUCTION .....	1
FELONY MURDER DEFINED.....	3
A Brief History .....	6
Felony Murder Typology.....	8
A REVIEW OF THE LITERATURE.....	14
WHAT ESTABLISHES FELONY MURDER?.....	20
Criteria for Felony Murder.....	20
Intent to Kill: A Look at Culpability.....	33
A MATTER OF DEGREES: MURDER REVIEWED .....	41
First-Degree Murder .....	41
Second-Degree Murder .....	42
Manslaughter.....	43
Felony Murder .....	45
APPLICATION OF THE FELONY-MURDER RULE: A SNAPSHOT .....	48
Jurisdictions that Allow Conviction for a Non-Triggerman .....	48
The Death Penalty: An Option for Felony Murder .....	52
PROPORTIONALITY IN CRIME AND PUNISHMENT .....	56
Sentencing.....	56
Should Felony-Murder Defendants be Eligible for the Death Penalty? .....	58
Aggravators.....	61
Mitigators .....	65
The Courts Decide: The Death Penalty as it Applies to a Non-Triggerman .....	68

THE COURTS IN ACTION.....	74
California .....	74
Colorado.....	75
Illinois .....	76
Maryland .....	77
North Carolina .....	78
Washington .....	79
WHY DOES SOCIETY PUNISH PEOPLE?.....	80
CONCLUSIONS AND RECOMMENDATIONS .....	84
APPENDIX A: IDENTIFICATION OF FELONY MURDER.....	86
APPENDIX B: CRITERIA FOR FELONY MURDER.....	90
APPENDIX C: CULPABILITY SITUATIONS AND CIRCUMSTANCES .....	94
LIST OF REFERENCES .....	97



## LIST OF TABLES

Table 1: Felony Murder Elements and Percentages .....	22
Table 2: Additional, Atypical Qualifying Felonies.....	28
Table 3: Culpability Felonies and Situations .....	39
Table 4: Maximum Sentence in Death Penalty Jurisdictions.....	53
Table 5: Maximum Sentence in Non-Death Penalty Jurisdictions .....	60

## LIST OF FIGURES

Figure 1: Identification of Felony Murder in the U.S.....	13
Figure 2: Situational Circumstances.....	33
Figure 3: Degrees of Felony Murder .....	47
Figure 4: Accomplice Language Among Jurisdictions.....	50
Figure 5: Felony Murder and the Death Penalty .....	54

## **INTRODUCTION**

The current research conducts a survey of the states that utilize the felony-murder rule and to what degree. Although there have been several studies about the application of this controversial rule, it has been many years since the discussion has taken place. This study poses questions about equity and fairness in the availability of the of the felony-murder rule. The main purpose is to update the literature regarding what constitutes felony murder. Another goal is for this research to be thought provoking and assist the reader in answering moral and ethical questions about equality, fairness, and justice.

This work explains what defines felony murder, the required culpability of offenders charged under the theory, proportionality in sentencing, along with why the criminal justice system, and ultimately society, punishes people. In addition, a detailed analysis of state statutes explains what establishes felony murder by revealing the underlying felonies and the criteria for felony murder among the jurisdictions. The statutes further define degrees and sentences and provide a comparison with other varying degrees of murder. One of the research questions is that the felony-murder rule is available at the highest degree in most jurisdictions in the United States. This study also proposes that a death sentence is available for felony murder in a large majority of jurisdictions that utilize the death penalty. Additionally, A non-triggerman can be convicted of felony murder and eligible for a death sentence in jurisdictions that provide for the death penalty.

It is anticipated that this research will enable the reader to form opinions about the felony-murder rule and its availability; the degree to which it is used, along with the types of sentences that are proportionate and equitable for defendants convicted under the theory

compared to deliberate and purposeful killings. Questions posed are: Should defendants be responsible for results that are not their intention? And, how much more severe should a defendant's sentence for felony murder be compared to a defendant convicted of an unadulterated, premeditated killing?

## **FELONY MURDER DEFINED**

Felony murder is based on the theory that if a person commits a certain violent crime and an unintentional death is the result of that crime such person should be responsible for the death(s) that occur. The rule is based on the idea of transferred intent; where intent to commit a violent crime, often referred to as the underlying or qualifying felony, is transferred to actually intend that a killing take place. In its simplest form, the courts permit the intent to commit an underlying felony to become the intent to kill. The acknowledged intent to commit a predetermined, qualifying violent felony is essentially substituted for the absent intent to kill. Through a bootstrapping of inference, a non-intentional killing is transformed into a premeditated murder.

The felony-murder rule allows for a first-degree murder conviction when an individual commits a violent felony that directly results in the death of another person. The death of the victim can be completely accidental as long as the underlying felony was intentional (Tuite, 2003b). Logically it follows that there is no difference between the intent to commit robbery and the intent to kill.

Consider the following scenarios:

- Randy and Michael cross paths on a street corner and begin arguing with each other. Michael starts threatening Randy. In turn, Randy is in fear for his safety because Michael is a much larger guy and he has somewhat of a reputation around town. Randy begins to pull out a pistol from the waist belt of his pants. Randy's intent is to merely scare Michael off; however, seeing the pistol Michael grabs Randy's hand and they wrestle to the ground. The

gun discharges killing Michael. Under this scenario, Randy may or may not (depending on a jury's finding) be guilty of some degree of homicide. It may be manslaughter or third-degree murder if a jury determines that Randy is culpably negligent. It may even constitute second-degree murder if the jury finds that Randy's actions exhibited the requisite "imminently dangerous act evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual" (Fla Statutes § 782.04 (2)). Alternatively, the jury may acquit Randy; finding the homicide to be accidental or excusable under the theory of self-defense. What this scenario does not illustrate is first-degree murder because Randy never had a premeditated intent to kill, as defined in Florida Statutes, "the unlawful killing of another human being when perpetrated from a premeditated design to effect the death of the person killed or any human being" (§ 782.04 (1) (a) 1). Adding an underlying felony to this same scenario greatly changes the consequences.

- Randy and Michael cross paths on a street corner. Randy pulls out a pistol and robs Michael taking his wallet. Michael then grabs Randy's hand with the gun in it and a struggle ensues. The gun discharges killing Michael. In this scenario, Randy is now guilty of armed robbery, which is punishable by life imprisonment in many states, as well as first-degree felony murder; punishable by life imprisonment or death in most states that utilize the death penalty.

Under the second scenario, *the killing itself* is factually identical to the one in the first scenario—an accidental gun discharge during a scuffle. However, now Randy faces the death penalty (at least in the states that have the death penalty) because of the underlying felony. Although in the second scenario there is criminal intent due to the robbery, the question is the severity of punishment available in both situations.

Another scenario exists when there is a case involving multiple defendants. Many jurisdictions provide accomplice language in their felony murder statutes, which mainly state that *any* person committing the underlying felony is guilty of first-degree murder whenever *anyone* of the felons commits a killing.<sup>1</sup>

This is in keeping with the “law of principals” doctrine, which holds that during the course of a crime any and all defendants are legally and equally responsible for all the actions of their codefendants. For example, if Randy and Michael enter a store to rob it and Randy starts emptying the cash register while Michael holds the clerk at gunpoint and Michael shoots the clerk (whether intentionally or accidentally), Randy is just as guilty of murder as Michael and equally culpable under the law. Under this scenario, assuming for argument’s sake that the shooting by Michael was accidental, there is a situation where a non-triggerman is guilty of a non-premeditated murder and is, consequently, guilty of first-degree felony murder and in many states can legally be sentenced to death (William Van Poyck, personal phone conversation, February 10, 2005).

---

<sup>1</sup> See States that Allow Conviction for a Non-Triggerman section.

The main purpose of this antiquated ideology is to deter felonies that put human life at risk. A felony is considered inherently dangerous to human life when it cannot be committed without creating a substantial risk that someone will be killed (George, 2004). The central idea behind the felony-murder rule is that if a person participates in a dangerous act (mainly a felony in most cases) for which he does not intentionally take a life, but a life is lost as the result and the offender commits the act with “extreme indifference to the value of human life” he should be responsible for the death as if he intended the death to happen (Whitmire, 2003). Felony murder proponents believe that the underlying felony is the only unlawful act required. Whether the death that resulted is accidental or unintentional is of no significance.

Essentially, the rule focuses on the culpability in committing the felony itself. However, it contradicts the criminal law (Myers, 1997) in that people are independent actors who have the capacity to make choices and the knowledge and ability to do what is lawful and right. Although there has been a trend in the United States to restrict the felony-murder rule (Fortado, 2004), use of the rule has also broadened in scope and is being used more frequently in instances where second-degree murder or manslaughter may be more appropriate.

### A Brief History

English courts first utilized the felony-murder rule in 1536. Some years later when malice aforethought was the requisite for murder, and later when criminal homicide defined manslaughter, a wrongdoing was the premise to infer malice aforethought. During that time, a general malevolence was inherent in a voluntary wrongdoing. Some courts in the 1600s



retained the original definition, however, many of them incorporated premeditation and a specific mental culpability into the construct of malice aforethought (Gilbert, 1983).

At common law all felonies were punishable by death. In a felony-murder situation, it made little difference whether the individual was convicted of murder or of the underlying felony because the punishment was the same. The main purpose for the felony-murder rule at common law was to deal with a killing that occurred during a failed attempt at a felony. Because attempts were punished as misdemeanors, the use of the felony-murder rule allowed the courts to punish the offender in the same manner as if his attempt had succeeded. Consequently, a conviction for attempted robbery was a misdemeanor, but a homicide committed in the attempt was murder and punishable by death.<sup>2</sup> After much criticism from the courts in England due to harsh punishments, Parliament abolished the felony-murder rule in 1957 (Gilbert, 1983).

Drafters of the Model Penal Code in the United States believed that a specific guilty mental state was a necessary and essential requirement for murder under the principles of the criminal law and, therefore, would have abolished the felony-murder rule altogether. However, as a compromise and to appease conservative legislatures the language “under circumstances manifesting extreme indifference to the value of human life” while committing certain dangerous felonies was incorporated and allowable under the felony-murder rule. In the Model Penal Code, extreme indifference is sufficient to establish murder and the presumption exists with the commission of certain enumerated felonies.

---

<sup>2</sup> For a more detailed explanation, see *People v. Aaron*, 1980.

Most state jurisdictions have not adopted the Model Penal Code's version, as they only require that the offender commit one of the state's qualifying felonies (Adlerstein, 1976). However, a few come close by requiring a specific mental state in order to be convicted for the highest degree of murder.

Historians and commentators have concluded that the felony-murder rule is of questionable origin and that the reasons for the doctrine no longer exist, making it an anachronistic remnant for which there is no logical or practical basis in modern law. Felony murder has never been a static, well-defined doctrine at common law, but throughout its history it has been characterized by judicial reinterpretation to limit the harshness of its application (*People v. Aaron*, 1980).

### Felony Murder Typology

Following is a typology of the felony-murder rule among jurisdictions in the United States. It reveals how felony murder is currently identified and how it is defined in various statutes. All of the jurisdictions that subscribe to the theory statutorily define what degree felony murder can be applied. Among the jurisdictions, there are several categories in which the rule is identified (*See* Appendix A for a full breakdown).

A few jurisdictions have abolished the rule altogether, a few provide a separate felony murder statute to address the issue, and some of the jurisdictions exclusively define the rule in their second-degree murder or murder statutes. A majority, however, provide for felony murder in multiple statutes: capital or first-degree murder, second-degree murder, and third-degree murder or some form of manslaughter.

Currently there are three states that do not subscribe to the felony murder theory and have **abolished** the rule. Both Hawaii and Kentucky eradicated the practice by statute (Gilbert, 1983) and Michigan no longer uses the rule by abrogating it through case law (*See People v. Aaron*, 1980).

Three states contain **separate felony murder** statutes: Connecticut, Maine, and Wisconsin. Both Connecticut and Maine primarily provide the same statutory language:

A person is guilty of murder when, acting either alone or with one or more persons, he commits or attempts to commit [list of qualifying felonies], and in the course or in furtherance of such crime or of flight therefrom, he, or another participant, if any, causes the death of a person.

Conn Penal Code Chap 952 § 53a-54c

There are a few differences, however. For instance, Maine allows for an additional requirement in that the resulting death must be a *reasonably foreseeable consequence* of the crime (Crim Code Title 17-A Chap 9 §202, 1), while Connecticut adds that the person killed must be someone other than one of the participants (Penal Code § 53a-54c).

The state of Wisconsin approaches felony murder differently than all other jurisdictions by offering a determinant sentence of an additional fifteen years in excess of the maximum sentence for the felony committed or attempted (Crim Code § 940.03).<sup>3</sup>

Alaska, Missouri, and Pennsylvania exclusively allow for felony murder in their **second-degree murder** statutes. These states categorize felony murder with some

---

<sup>3</sup> See Appendix B for each jurisdiction's list of qualifying felonies.

differences, but with the same primary purpose of allowing for a lesser sentence for the crime of felony murder.

For example, both Alaska and Pennsylvania allow for a conviction if the defendant was “engaged as a principal or an accomplice in the perpetration of a felony.” Alaska and Missouri include that a defendant is eligible under the rule if he “commits or attempts to commit [an underlying felony]” or if the offender is in immediate flight from the crime. Nevertheless, the sentence allowable is specifically for murder in the second degree in all three states.<sup>4</sup>

Several states provide exclusively for **murder (or aggravated murder) without varying degrees**.<sup>5</sup> In such instances, the states provide for felony murder within their murder and/or manslaughter statutes.

If a jurisdiction defines felony murder in their **first-degree murder or capital murder** statute, it is very similar to Arizona’s first-degree murder language, which states in part:

A person commits first-degree murder if acting either alone or with one or more other persons the person commits or attempts to commit [qualifying felonies offered] and in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person.

ARS § 13-1105, A, 2

---

<sup>4</sup> AS § 11.41.110 (a) (3), Missouri Revised Statutes § 565.021(2), Penn Crime Codes § 2502 (b)

<sup>5</sup> See Alabama, Georgia, Indiana, New Jersey, North Dakota, Ohio, Oregon, South Carolina, Texas, and Utah. And, Montana approaches it a little differently by identifying felony murder as deliberate homicide.

There are a few substantive differences, however, among the states that provide for felony murder in the highest degree. The statutory language varies in three notable areas:

- 1) Accomplice language<sup>6</sup>
- 2) The qualifying felonies allowable for felony murder<sup>7</sup>
- 3) Situational circumstances of the offense<sup>8</sup>

Several states statutorily identify and provide for felony murder as capital or aggravated murder<sup>9</sup>; however, most of them provide for lesser degrees of felony murder as well.

In addition, it is worth noting that seven of the death penalty states that identify felony murder in their first-degree murder or capital murder statutes require a specific *mens rea*, or guilty mind, for a conviction under the theory of felony murder. However, all but one of the states in this category allow for a death sentence (*See* Table 4 and Appendix C).

Sentences for felony murder in most of the death penalty states allow defendants to be death eligible upon conviction absent any culpable mental state.<sup>10</sup>

Along with first-degree murder, many of the states identify felony murder in **multiple degrees**, including second-degree murder, third-degree murder, or manslaughter.

Other than the states that include first-degree murder as a lesser degree of felony murder, specifically capital murder states, the underlying crime is not enumerated in a majority of the lesser-degree statutes. As an example, several of the states that allow for

---

<sup>6</sup> *See* States that Allow Conviction for a Non-Triggerman section.

<sup>7</sup> *See* Appendix B, and Additional, Atypical Qualifying Felonies (Table 2).

<sup>8</sup> *See* Appendix C for a comprehensive breakdown by jurisdiction.

<sup>9</sup> *See* Arkansas, Mississippi, Ohio, Utah, and Virginia.

<sup>10</sup> *See* The Death Penalty: An Option for Felony Murder section.

lesser degrees of felony murder, including both second-degree murder and manslaughter, allow for a conviction if a person “unintentionally causes the death of another person during the commission of an unlawful act other than a forcible felony,”<sup>11</sup> while other states delineate specific felonies and/or degrees of felonies that qualify for a lesser degree of murder.<sup>12</sup>

Some of the states also discriminate between first and second-degree felony murder by the culpable mental state of the offender.<sup>13</sup> Several, however, distinguish lesser degrees of felony murder by requiring that a defendant be engaged in any felony *other than* the enumerated felonies in the state’s first degree or capital murder statutes.<sup>14</sup>

Figure 1 below illustrates and categorizes the different types of the felony-murder rule available among the states, the District of Columbia, and the Federal System. It also illustrates how jurisdictions in the United States identify felony murder in various statutes. There are three states that have abolished the rule altogether. The felony murder category reveals that three states identify felony murder distinct and separate from other murder statutes, 2<sup>nd</sup> dg only shows that three jurisdictions exclusively provide for felony murder in their second-degree murder statutes, deliberate homicide and murder reflects that 12 states do not allow for varying degrees of murder (although most offer some form of manslaughter). Capital/1<sup>st</sup> dg denotes that 32 jurisdictions provide for felony murder in a first-degree or capital murder statute. And of those, 21 provide for felony murder in multiple degrees of murder.

---

<sup>11</sup> See generally, Crim Code of Georgia § 16-5-3, Iowa Code § 707.5, Miss Code § 97-3-29, Nebraska Crim Code § 28-305, NM Statutes Annotated § 30-2-3, B, Ohio Revised Code § 2903.04 (B), Penal Code of Oklahoma § 21-701.8.2

<sup>12</sup> IC § 35-42-1-4, Minn Crim Code § 609.19, 1 (2), NY Penal Law § 125.25, 3, NC General Statutes Article 6 § 14-17, Tenn Code § 39-13-210 (a) (2)

<sup>13</sup> Del Crim Code Title 11 § 635 (2), NH Crim Code § 630:1-b (b), Penal Code of Okla § 21-701.8.2) Additionally, Florida differentiates second-degree murder differently by determining whether the killing was the result of a person *not* engaged in one of the qualifying felonies (§ 782.04 (3)).

<sup>14</sup> Fla Statutes § 782.04 (4), LA RS § 14:31 A (2) (a), Miss Code §97-3-27, SD Codified Laws § 22-16-9, Code of Virginia § 18.2-33)

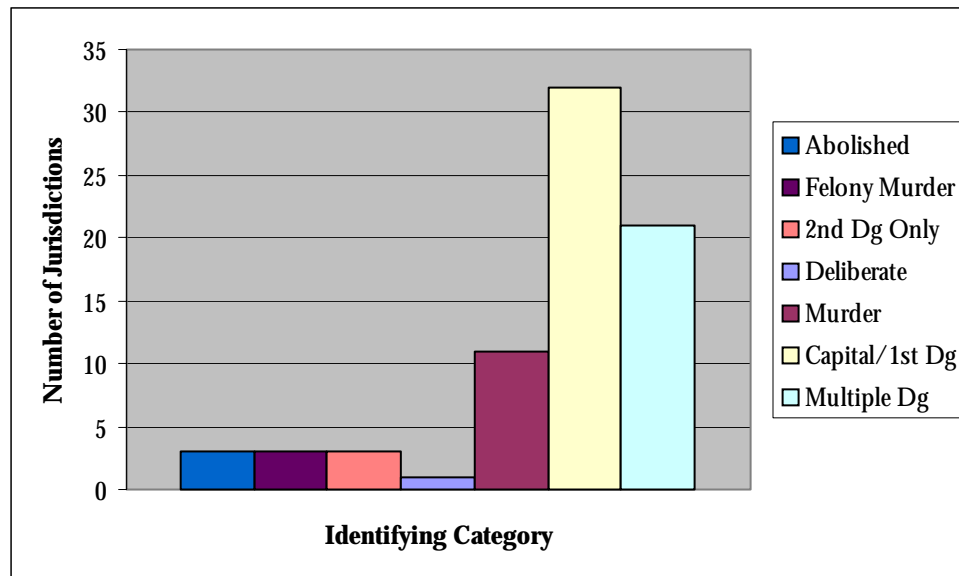


Figure 1  
Identification of Felony Murder in the U.S.

*Note: Many of the jurisdictions have overlapping categories and, therefore, the number of degrees will not equal the total number of jurisdictions that subscribe to the theory.*

In summary, a large majority of the jurisdictions (88 percent) that subscribe to the theory of felony murder identify it in the highest degree: capital murder, first-degree murder, or murder. Among those jurisdictions more than half (56 percent) also provide for lesser degrees of murder, i.e., manslaughter.<sup>15</sup> The other 12-percent allow for lesser degrees such as, second-degree murder, third-degree murder, or manslaughter. In addition, many offer various culpability situations and circumstances to be eligible for felony murder (*See* Appendix C).

<sup>15</sup> *See* Appendix A for a full breakdown of degrees by jurisdiction.

## **A REVIEW OF THE LITERATURE**

This research provides a review of the literature and discusses viewpoints and the ideology of felony murder, culpability of offenders who commit felony murder compared to those who commit other killings, along with deterrence and community sentiment as it relates to felony murder and the death penalty. It concludes with a discussion about the availability and the criteria for felony murder over 20 years ago.

In previous discussions about degrees of murder as they apply to the felony-murder rule, the literature reveals that multiple degrees continue to exist. However, a majority of the jurisdictions retain and allow for felony murder in the first degree. Even though there has been lengthy discussion among scholars about the erroneous deterrent effect relating to the application of the felony-murder rule, it remains the most common form of murder convictions in the nation (Peterson and Bailey, 1991; Myers, 1994; Myers, 1997), and the availability of the rule continues to increase. Reviewing degrees of felony murder among the states (Gilbert, 1983) and the prevalence of the rule in the nation, many courts assert that the felony-murder rule and its possible deterrent effect establishes sufficient justification for retaining the rule. Requiring offenders to be accountable for dangerous acts and subsequent killings, even if they are accidental, is reason enough to apply the felony-murder rule. Conversely, other courts and scholars believe that it is not possible to deter offenders if a killing was accidental and, therefore, unintentional and that the states should abolish the rule (Fletcher, 1980).

In considering the theory of felony murder, there are mainly two schools of thought. Proponents of the felony-murder rule, predominantly criminal justice officials, believe that if



a person participates in certain criminal behavior that is so dangerous and in itself likely to cause harm, then that individual is choosing to be involved in bad acts and, therefore, should be responsible for whatever result occurs. The other side of the argument, mainly scholars and defense counsel, believe that an individual should possess specific culpability in terms of intending or choosing that such bad acts, and resulting consequence, take place (Myers, 1994; Myers, 1997). Critics of the rule further contend that murder is particularly blameworthy because it is accompanied by an extremely high mental state and that felony-murder killings are not comparable. The intent to commit a felony, such as robbery or burglary, is not equivalent to the mental culpability required for a conviction of murder (Fletcher, 1980). The issue of blameworthiness and intent for a resulting death is clearly the argument that receives the most attention and discussion.

To further understand the issue of culpability and felony murder, Myers (1997) conducted one of the few empirical research studies about the culpability of offenders for both felony-murder killings and other types of killings, hypothesizing that both groups would be similar in circumstances. In comparing the two groups, using variables such as personal commission of the fatal act, planning of the killing, use of a weapon, and levels of culpability, Myers found a lack of support for the null hypothesis. It was contradicted when she found that defendants who were prosecuted under the felony-murder rule were less likely to have committed the fatal act than those in the non-felony-murder killing group. The common response to an offender not committing the actual killing, nor intending to do so, and holding him accountable is that the defendant's knowing participation in a dangerous felony is transformed into the malice aforethought and required mental culpability for murder (Fletcher, 1980). It is probable for a felon to be held liable for a resulting death as if

he intended the death to occur (Simmons, 1997) even if there is no proof of intent or of any culpability as to the resulting death.

In attempting to determine societal views for felony murder and the death penalty, the U.S. Supreme Court has reached tenuous conclusions about where community sentiment lies in both *Enmund v. Florida* (1982) and then *Tison v. Arizona* (1987). In conducting a survey of the states that would allow for a death sentence under such circumstances, the Justices on both sides of the argument in both cases had issues with each other's methodology. In short, there has been much discussion about the analysis and the resulting outcome in determining the "evolving standards of decency" on this issue (Finkel and Duff, 1991).

Societal views and community sentiment for felony murder as they relate to felony murder and the death penalty have been dubious at best (*See, e.g., Tison v. Arizona*, 1987; Finkel and Duff, 1991; Peterson and Bailey, 1991). A sophisticated, empirical study to gauge societal views on this issue revealed a lack of support for a death sentence for a defendant who displays reckless indifference, as the *Tison* brothers did, without being the actual triggerman (Finkel and Duff, 1991). This is in sharp contrast to what the majority asserted in their analysis in the *Tison* decision in that community sentiment supported a death sentence under such circumstances. In fact, the dissent in *Tison* stressed several of the same factors as Finkel and Duff's empirical "ninth Justice" paradigm did where the participants in the study could "reverse and remand" or "let the decision [for a death sentence] stand."

Additionally, prior research has offered a consistent lack of support for the deterrence hypothesis as it pertains to the death penalty due to variable data quality issues, such as using homicide data not specific to capital homicides. For this reason, Peterson and Bailey conducted research testing felony murder and capital punishment, and the deterrence

hypothesis exclusively using capital homicide data. In doing so, they used a time-series design and analyzed monthly felony murder rates, the frequency of executions, and the amount of time and type of television coverage of executions over the same period. After analyzing coverage from three major network stations, the different types of felony murder, and the Federal Bureau of Investigation crime data, they concluded that there was no evidence of deterrence *or* brutalization (where the number of killings increases temporarily immediately following an execution). Specifically, the availability of capital punishment, the number of executions, the amount of television coverage or the type of coverage given to the executions was not positively associated with felony murder rates (Peterson and Bailey, 1991). In other words, they found that there was no deterrent effect of felony murder from publicizing that executions were taking place.

In a rare, empirical study about felony murder and societal views, Finkel and Duff (1991) conducted two experiments to test community sentiment in using the death penalty in various felony murder situations. Using a mock juror paradigm and the “ninth Justice” paradigm, the study revealed that society would reverse and remand a death sentence in varying degrees depending upon the involvement and culpability of the defendant. The non-triggerman category was the largest in choosing to reverse a death sentence. More importantly, the result was the same in a triggerman situation.

Peterson and Bailey (1991) point out that their findings are consistent with the majority of studies that have been conducted on capital punishment and general homicides. This is not a big surprise because using the death penalty as a general deterrent is suspect in itself. Therefore, using the same punishment as a specific deterrent for felony murder the result should not be much different. The authors agree that caution should be used in

interpreting their results due to the small number of executions that took place during the study period, along with a low percentage of executions that received television coverage.

In considering the availability and degrees of the felony-murder rule today, it is necessary to review past availability and degrees of the rule. There have been a couple of previous studies (Gilbert, 1983; Fletcher, 1980; Adlerstein, 1976) that provide discussion about the various degrees of felony murder and its utilization among jurisdictions. Fletcher (1980) and Adlerstein (1976) mainly focus on various state versions of the felony-murder rule and lack of congruence in their application and utilization of the rule to the Model Penal Code's version.

A comprehensive analysis of the jurisdictions in the United States and the degrees of murder available under the felony-murder rule has not taken place since Gilbert's study in 1983. Furthermore, Gilbert mainly focused on degrees of murder and the availability of such degrees as they applied to the felony-murder rule and not what constitutes or establishes felony murder among the states, specifically, which felonies and circumstances qualify under the theory of felony murder. The last review and discussion about the criteria for felony murder in the United States has not taken place in almost 30 years (Adlerstein, 1976).

When Adlerstein's study was conducted, a large number of jurisdictions contained many of the same core felonies that qualify under the felony-murder rule today. In addition, many of the atypical felonies that were included in various state statutes in 1976 remain on the books today. However, the number of underlying felonies that qualify for first-degree, premeditated murder has more than doubled with additions to most of the felony-murder statutes since that time.

Almost 30 years ago, Adlerstein (1976) suggested that states should consider conviction of the underlying felony committed and manslaughter collectively when an offender acts with reckless disregard for human life. Today, in 2005, in an attempt to conduct and maintain a fair and equitable criminal justice system, this study suggests the same approach.

The current research updates and informs the literature to provide criminal justice professionals and scholars with current data about the felony-murder rule. The hope is that this study will be useful in facilitating decision-making efforts including charging, convicting, and sentencing as they relate to the availability and application of the felony murder-rule.

## WHAT ESTABLISHES FELONY MURDER?

The felony-murder rule is primarily utilized as a deterrent for people who would potentially commit a violent felony. The idea behind the theory is to lessen the potential for death to occur in the course of such felonies. In general, if an individual is engaged in a prescribed forcible felony and a person dies as a result of that felony, he is criminally responsible for the death of such person. The underlying assumption in the deterrent-effect logic is that the criminal justice system is dealing with rational individuals, which is a fundamental flaw inherent in the deterrent ideology and one that is seldom addressed or mentioned in the literature. In order for deterrent theory to be effective, *rational* individuals must be part of the equation. It is the opinion of this research that most of the time, the criminal justice system is not dealing with people who think rationally.

### Criteria for Felony Murder

The states that utilize the felony-murder rule statutorily define which forcible felonies they consider as qualifying, or underlying, felonies. The main characteristic the felonies have in common is that they must be dangerous or violent in nature. Jurisdictions also vary somewhat in their view of the required culpability of an offender, along with situational circumstances of the crime.

The underlying felonies that qualify a person for first-degree felony murder have increased over time by providing for a myriad of crimes that meet the criteria. Those times when mainly the index crimes from the FBI's Uniform Crime Report qualified for a first-degree felony murder conviction have long passed. The crimes that are used as predicate

felonies for felony murder include a multitude of felonies along with most of the main index crimes.

An analysis was conducted to determine the criteria for felony murder among the states, the District of Columbia, and the Federal system and focuses exclusively on the highest degree of felony murder in each jurisdiction. If a killing takes place while committing or attempting to commit such a felony, the felony-murder rule typically applies. However, there are several jurisdictions that require a specific mental state in order to qualify for the highest degree of felony murder (*See* Appendix C and Figure 2 this section).

Appendix B, Criteria for Felony Murder, provides a breakdown of the *core* felonies utilized by each of the jurisdictions. Note that some of the qualifying felonies the states offer have the same core meaning (only a different label) and, therefore, have been combined for simplicity purposes. Felonies that are eligible for lesser degrees of murder have been omitted from the analysis. Several types of felonies are the same by definition, but they qualify at a lower degree to facilitate a conviction and sentence of a lesser degree of murder. Of course, the jurisdictions that do not subscribe to the felony-murder rule have been excluded from the analysis.

Table 1 provides a breakdown in percentages of the core qualifying felonies and the prevalence of their usage within the forty-nine jurisdictions that utilize the felony-murder rule. Currently there is a total of 31 core felonies used to increase the offense of committing a dangerous felony to felony murder when a resulting death occurs in the course of such felony. The following list does not include the additional, atypical felonies that several of the jurisdictions allow (*See* Table 2 this section). There is a total of 20 atypical felonies; bringing the total potential felonies available to 51.

Table 1  
Felony Murder Elements and Percentages

<b>Core Qualifying Felonies</b>	<b>Total #</b>	<b>Percent</b>
Burglary	40	82%
Robbery	40	82%
Arson	39	80%
Kidnapping	37	76%
Escape	25	51%
Rape	20	41%
Sexual Assault	20	41%
Child Abuse/Cruelty to Children	15	31%
Controlled Substance Felony	12	24%
Sexual Offenses with a Child	12	24%
Terrorism	10	20%
Other Sexual Offenses	9	18%
Bomb or Destructive Device ( <i>throwing, placing, or discharging</i> )	6	12%
Carjacking	6	12%
Sodomy	6	12%
Drive-by Shooting/Into Building or Vehicle	5	10%
Felony ( <i>forcible/with threat or dangerous weapon</i> )	5	10%
Aircraft/Vehicle Piracy	4	8%
Drug Trafficking	4	8%
Felony ( <i>any type</i> )	4	8%
Mayhem	4	8%
Resisting Arrest	4	8%
Treason	4	8%
Forcible Rape	3	6%
Home-Invasion Robbery	3	6%
Larceny or Theft	3	6%
Murder of Another Human Being	3	6%
Aggravated Assault	2	4%
Elder/Disabled Adult Abuse	2	4%
Felony other than Second Degree Murder/Manslaughter	2	4%
Crime Punishable by Death or Life	1	2%
<b><i>Total Core Qualifying Felonies: 31</i></b>		

The above percentages are understated and lower than each felony's actual usage due to the jurisdictions that allow for *any felony* or *any dangerous felony*, for which most if not all of the identified felonies analyzed would qualify. The number of felonies available to charge a



defendant with felony murder in the United States has increased over the years, and it is anticipated that this trend will continue.

In comparing Adlerstein's study and the criteria for felony murder in 1976, several differences and similarities were revealed. For example, the number of felonies available that qualify for felony murder has more than doubled. In addition, usage of several of the main index crimes, specifically arson, burglary, kidnapping, and robbery is essentially the same in 2005 as it was almost 30 years ago. Conversely, rape has gone down considerably since 1976. This is probably due to the availability of sexual assault rising and, therefore, including the more serious offense of rape.

Sexual offenses with a child is identified almost triple the amount it was in 1976. In addition, the controlled substance felony was essentially non-existent 30 years ago, where now it is present in 24-percent of the states that subscribe to the theory of felony murder. The felony terrorism did not exist in 1976 whereas about 20-percent of the jurisdictions define it in their felony murder statutes today. Escape was utilized nominally with about 10 of the jurisdictions allowing for such felony to qualify. Currently, there are 25 jurisdictions utilizing escape in their felony-murder statutes. Furthermore, there are several felonies identified today that were not identified at all in 1976: drug trafficking, child abuse/cruelty to children, murder of another human being, carjacking, various additional types of robberies, drive-by shootings and gang felonies, elder abuse, child abuse/cruelty to children, treason, espionage, and sabotage.

As the nation has evolved, time has also changed the way Americans, and subsequently state legislatures, view how crime can best be assuaged. When considering past attacks on America, and increased abusive treatment of children, it is understandable that

legislatures would amend laws to include such crimes as terrorism, espionage, and abuse/cruelty to children to their felony murder statutes.

In most states, for an underlying felony to upgrade an offense to first-degree murder the felony must be either a first or second-degree dangerous felony. Many states, however, provide for varying degrees of qualifying felonies in their highest degree of murder. For instance, Alabama allows for robbery in any degree, but requires arson, escape, kidnapping, rape, and sodomy to be in the first degree. Burglary can be committed in either the first or second degree in several states.<sup>16</sup> Maryland also allows third degree burglary to qualify (Crim Law § 2-201 (a) (4) (iii)). Conversely, in order for burglary to qualify in New Hampshire the felony must be committed with a dangerous weapon and the death of the victim must be caused by the use of such weapon (§ 630:1 (b) (2)). In addition, North Carolina requires that a deadly weapon be used in its “any other felony” category (NC Article 6 § 14-17).

Several states place a dangerous weapon stipulation on their various robbery felonies in order for the crime to qualify under the felony-murder rule.<sup>17</sup> In addition, the state of Illinois expressly states that a defendant must be committing a dangerous felony other than second-degree murder in its felony murder statute (Chap 720 ILCS § 5/9-1 (a) (3)).

Alaska’s second-degree felony murder statute (the only degree the state allows) provides for sexual assault and sexual abuse of a minor in either the first or second degree, as well as escape. However, the state requires arson and burglary to be committed in the first degree to qualify for second-degree murder (AS § 11.411.110 (a) (3)).

---

<sup>16</sup> Ala Crim Code § 13A-6-2 (a) (3), KSA § 21-3436 (a) (9-10), NY Penal Law § 125.27(a) (vii)

<sup>17</sup> Penal Code of Okla § 21-701.7 B, SC Code § 16-3-20 (C) (a) (1), DC Code § 22-2101); South Carolina places a deadly weapon requirement on its larceny felony as well (§ 16-3-20 (C) (a) (1)).

In addition, Alaska allows a defendant to be convicted under the felony-murder rule when delivering various controlled substances to a person under the age of 19 when a death results (AS § 11.71.010 (a)). Similarly, Florida allows for felony murder if a defendant is at least 18 years of age, distributes opium, and a death occurs as a result (Fla Statutes § 782.04 (1) (a), 3).

Several states delineate felony-murder as capital murder or aggravated murder in their statutes.<sup>18</sup> Most jurisdictions do not require that a culpable, specific mental state be present to qualify for a first-degree murder conviction under the felony-murder rule. They only require that the individual commit or attempt to commit the underlying felony. Some states go a step further by explicitly stating that individual blameworthiness is not a requirement under the rule. For example, Mississippi offers language that if a defendant acts “without any design to effect death” he is guilty of first-degree murder if he is engaged in any one of the state’s qualifying felonies (Miss Code § 97-3-19). Similarly, South Dakota states in a separate statute that lack of intent to injure does not reduce the degree of the crime if the killing was the result of an act “imminently dangerous to human life and the defendant evinced a depraved mind” (SD Codified Laws § 22-16-8). Similarly, Georgia allows for a defendant to be guilty of first-degree murder for *any* felony if the defendant “causes the death of another human being irrespective of malice” (Crim Code § 16-5-1).

There are several states that provide for and require a specific mental state to qualify for first-degree murder under the felony-murder rule.

---

<sup>18</sup> Ark Crim Code § 5-10-101 (a) (1), Miss Code § 97-3-19 (2) (e-f), Ohio Revised Code § 2903.01 (B), Utah Crim Code § 76-5-202 (1) (d), and Code of Virginia § 18.2-31

For instance, Delaware states that a felony must be committed with recklessness. However, the statute also allows for *any* felony to qualify for first-degree murder when such a mental state is present (Title 11 § 636 (a) (2)). Similarly, Maine provides that a defendant “causes the death and [that] the death is a reasonably foreseeable consequence of [the crime] . . . ” (Crim Code 17-A § 202).

In addition, New Hampshire requires that a defendant “knowingly cause the death” (Crim Code § 630:1 (b)) while engaged in one of the state’s enumerated felonies to qualify for felony murder.

Louisiana requires that the defendant possess specific intent to kill or to inflict great bodily harm while engaged in a qualifying felony to be eligible for first-degree felony murder. The statute also allows for three types of robbery: armed robbery, first-degree robbery, and simple robbery in its criteria, and provides for aggravated kidnapping and second degree kidnapping. Furthermore, Louisiana requires that burglary, escape, arson, and rape be aggravated in order to qualify for first-degree felony murder (RS § 14:30 (A) (1)).

Similarly, Minnesota uses culpability language that the defendant “causes the death of a human being with intent to effect the death of the person . . . while committing [list of underlying felonies]” (Crim Code § 609.185 (a) (3)). Minnesota’s sexual offense felony, however, does not require intent (§ 609.185 (a) (2)).

South Carolina’s felony murder statute exists exclusively in the state’s listing of aggravators for the judge or jury to consider (§ 16-3-20 (C) (a) (1)). Specifically, the crime of murder is aggravated, and subject to the death penalty, if a killing occurred while the

defendant was in the commission of one of the state's qualifying felonies (Petersen and Bailey, 1991). In other words, felony murder is an automatic aggravator.<sup>19</sup>

South Dakota allows for a first-degree murder conviction under the felony-murder rule for any of its underlying felonies if the defendant "effects the death of any victim . . . to prevent detection or prosecution of the crime" (Codified Laws§ 22-16-4). In the states that subscribe to capital punishment, they primarily have this provision in their list of aggravators.

Several statutes provide for the murder of specific public officials, as well as a killing by administering poison and torture. In Appendix B, such murders have been omitted from the analysis in determining the criteria for felony murder due to the actual killing of an individual and not due to a death caused by the commission of a felony. Similarly, the act of assisting in the commission of suicide of a person under duress is also excluded for the same reason.

Several jurisdictions include other additional allowable felonies. Table 2 below lists additional, atypical felonies, along with the jurisdictions that allow for such felonies to qualify under the felony-murder rule. These are in addition to the core felonies delineated in Appendix B and Table 1.

---

<sup>19</sup> *See also* Ala Crim Code § 13A-5-40.

Table 2  
Additional, Atypical Qualifying Felonies

<b>Jurisdiction</b>	<b>Additional Qualifying Felonies</b>
Alaska	Gang ( <i>street</i> ) Felony
Arizona	Unlawful Flight from Law Enforcement Vehicle Using Minors in Drug Offenses
California	Train Wrecking
Colorado	Sale of Drugs to Minor on School Grounds
Florida	Stalking
Idaho	Extortion
Indiana	Consumer Product Tampering Criminal Deviate Conduct
Kansas	Endangering the Food Supply
Louisiana	Simple Robbery
Maryland	Burning Barn/Stable/Tobacco House/Warehouse Destructive Device ( <i>manuf/sell/distrib/transport</i> )
Minnesota	Domestic Abuse ( <i>with past pattern</i> ) Witness Tampering
North Dakota	Felonious Restraint
Oregon	Aggravated Assault on Child Under 14 Prostitution ( <i>compelling another person</i> )
United States	Sabotage Espionage
<hr/>	
<b><i>Total Jurisdictions: 14</i></b>	<b><i>Total Additional Felonies: 20</i></b>

Sentences handed down after conviction under the felony-murder rule vary among jurisdictions depending upon the degree of felony-murder allowable. However, a majority provide for first-degree felony murder and a sentence of life imprisonment without the possibility of parole or, in states that utilize it, the death penalty. Interpreted by case law, precedence dictates how the rule can be applied, along with the subsequent sentence.

All of the jurisdictions that provide for first-degree felony murder identify which felonies qualify under the felony-murder rule, whether they simply state that *any* felony clearly dangerous to human life qualifies (Ala Crim Code § 13A-6-2 (a) (3)) if the defendant causes the death of any person or the felonies are expressly enumerated, which is the predominant approach.

Iowa and Kansas are among the few exceptions. Instead of providing for a list of qualifying felonies, Iowa's statute allows for a first-degree murder conviction if an individual kills another person while participating in a "forcible felony" (Iowa Code § 707.2 (2)), along with if a killing occurs while committing child endangerment or when assaulting a child and that child's death occurs under circumstances manifesting extreme indifference to human life (§ 707.2 (5)).

Similarly, Kansas states that if an inherently dangerous felony is committed and a killing is the result, a defendant can be charged with first-degree felony murder. Kansas includes the usual underlying felonies (in a separate statute that identifies dangerous felonies) that most other states do, and they add felony theft, treason, and endangering the food supply (KSA § 21-3436).

Many jurisdictions identify varying degrees of felonies that qualify, or specific circumstances that must be present in order to qualify, under the statute. For example, Oregon requires that a defendant cause the death of a child under 14 years of age (or a dependent person) when the defendant has a legal duty to care for that individual, and the defendant acted under circumstances that were reckless manifesting extreme indifference (ORS §§ 163.115 (c) and 163.205). There must also be a pattern of assault or torture of the victim to qualify. Likewise, the state of Connecticut allows for first, second and third-degree

sexual assault (Penal Code § 53a-54c) to qualify for felony murder, and Colorado allows for sexual assault in the first or second degree, or a Class 3 felony of sexual assault on a child (Crim Code §18-3-102 (1) (b)). Connecticut's maximum sentence is life where Colorado offers a death sentence after conviction. Florida requires that the underlying felonies child abuse, abuse of an elderly person or disabled adult, and stalking to be aggravated in order to qualify for first-degree felony murder (§ 782.04 (1) (a), 2).

Delaware broadens the felony-murder rule by the language it uses in both its first-degree (Title 11 § 636 (a) (2)) and second-degree (§ 635 (2)) felony murder statutes. For example, the statute allows enforcement of the rule if the defendant was "engaged in the commission of . . . *any* felony . . ." (§ 636 (a) (2)) for which the person has a reckless or negligent mental state, respectively. The culpable standard of *reckless* provides some protection for a defendant; however, because *any* felony qualifies it increases the possibility of a conviction under Delaware's rule.

In one of the few states that identify felony murder in a separate statute, Connecticut provides some protection in requiring different underlying felonies for capital felony murder versus felony murder. For example, for capital felony murder the state requires that the crime be heightened to what is similar to aggravated murder in many states by providing for specific killings or circumstances in order to qualify under the statute. For felony murder, however, the specific statute provides for the main index crimes: robbery, burglary, and kidnapping, along with various degrees of sexual assault and escape (Penal Code Chap 952 §



53a-54c). The felony murder statute does, however, provide for an affirmative defense for an accomplice.<sup>20</sup>

Indiana's list of underlying felonies that qualify an offender to be convicted of first-degree murder is not quite as long as other states, but the broad category "criminal deviate conduct" (IC § 35-42-1-1 (2)) that is included in its list could be attached to many crimes. Indiana's felony murder statute does, however, provide an involuntary manslaughter charge (IC § 35-42-1-4) depending upon the seriousness of the felony committed when the killing occurred.

Massachusetts provides for the commission or attempted commission of a crime that is punishable by death or life imprisonment in its first-degree felony murder statute (§ 265 sec 1). The statute does not provide for an enumerated list of qualifying felonies. This is rather surprising inasmuch as Massachusetts does not allow for the death penalty.

Situational circumstances of the crime vary among the jurisdictions. Some allow for a conviction if a defendant is "in the course of and in furtherance of the crime," while the defendant is "participating in the crime" or "committing or attempting to commit or in immediate flight" from committing a qualifying felony and a resulting death occurs.<sup>21</sup> Additionally, several jurisdictions allow for the felony-murder rule to apply if the defendant causes a death while committing *any felony* or *any conduct* "under circumstances manifesting extreme indifference to the value of human life" (*See* Ark Code § 5-10-101 (a) (1) and Table 3).

---

<sup>20</sup> *See* States that Allow Conviction for a Non-Triggerman section.

<sup>21</sup> Refer to Appendix C for a comprehensive overview of situational circumstances in the U.S.

Arkansas requires that this mental state apply to all of their underlying felonies, but some states require that it only apply to specific felonies.<sup>22</sup> Similarly, Oklahoma's, child abuse/cruelty to children felony requires that the defendant "willfully or with malice injure or torture the child by using unreasonable force, or by permitting the acts to be done on the child" (Penal Code § 21-701.7, C).<sup>23</sup>

Most jurisdictions allow the felony-murder rule to apply under various situational circumstances. Such situations would appear to be inherently present if an individual is committing any crime. Even though several jurisdictions require a specific mental state for the rule to apply, most simply state that the defendant must participate or attempt to participate in one of the qualifying felonies. Appendix C provides a comprehensive overview of the situational circumstances among jurisdictions in the nation. Figure 2 below illustrates this graphically.

---

<sup>22</sup> Iowa Code 707.2, 5; Minn Crim Code § 609.185 (a) (5-7)

<sup>23</sup> *See also generally* Colo Crim Code § 18-3-102 (1) (f).

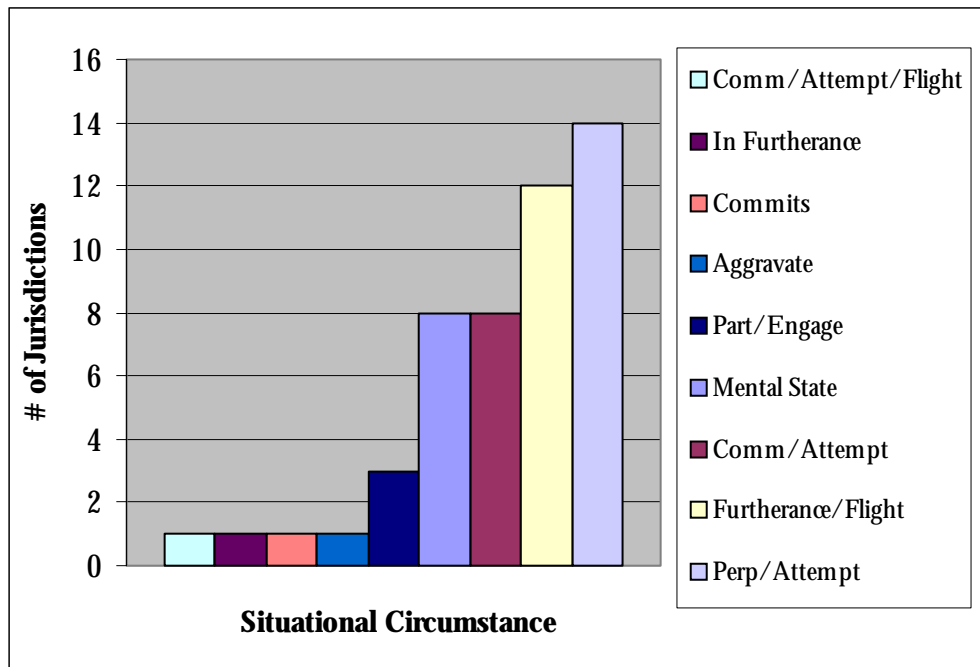


Figure 2  
Situational Circumstances

*Note: Jurisdictions that do not specifically mention that a felony qualifies in the immediate flight from the crime, case law has interpreted the statute as such (Florida being at least one of the states).*

### Intent to Kill: A Look at Culpability

When a person considers what it means to intend to commit a certain crime, probably the main thought that enters one’s mind is that an individual must willfully commit the act, or at least contemplate the act. When determining if a person is culpable or responsible for a killing, it is beneficial to consider and understand motivation or reasons for committing the act. Did this person purposely intend for the result to happen? For instance, in a landmark decision addressing the Eighth Amendment, the Arizona Supreme Court explained that the defendants who were present when multiple killings took place could be held responsible because the killings occurred as part of and in the course of an escape (from

a prison), and that the deaths would not have occurred but for the assistance of the defendants. The Court further stated that even though the defendants did not specifically intend that the deaths take place, the fact that they did not plot out the homicides in advance, or that they did not actually pull the trigger is of little significance (*Tison v. Arizona* 1987). The main question here is: Is this intent in the true sense? The Arizona Supreme Court ruled, and the U.S. Supreme Court agreed, that the circumstances in this case satisfy the requisite intent due to the offenders' "reckless indifference to the value of human life" *and* their "major participation" in the underlying felony. The *Tison* case is discussed later on in more detail.

The statutes and the courts utilize concepts such as, intentionally, knowingly, purposefully, recklessly, or with criminal negligence to describe culpability. It has been well established in the criminal law (Myers, 1997) that blameworthiness of the offender is essential to criminal responsibility and punishment. The definition, along with what constitutes each individual construct is up to the states. In repealing felony murder in Michigan (*People v. Aaron*, 1980), the court explained, "criminal liability for causing a particular result is generally not justified in the absence of some culpable mental state [with] respect to that result."

California's murder statute attempts to define culpability by explaining that the element of malice may be express or implied. Express is defined as "deliberate intention" and implied means "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart" (Penal Code § 188).<sup>24</sup>

---

<sup>24</sup> See also generally Idaho Statutes Chap 40 § 18-4002.

Express or implied malice requires no other mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice.

In the state of Alabama, if a person does not intend to commit murder then the following suffices as well, “under circumstances manifesting extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to a person other than himself, and thereby causes the death of another person” (Crim Code § 13A-6-2 (a) (2)). This seems incongruent with the basic, fundamental principle of the criminal law—that a defendant must have the specific *mens rea* in committing the crime. Most individuals convicted of felony murder are more likely to be involved with a group of offenders. Conversely, in other types of killings a defendant is more likely to act alone (Myers, 1997); solidifying the argument that several variables and situational circumstances are involved in a felony killing, leaving individual culpability and intent to kill tenuous.

Alaska phrases their culpability requirement in a second-degree murder statute as “knowing that the conduct is substantially certain to cause death or serious physical injury” or “the person knowingly engages in conduct that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life” (AS § 11.41.110).

In 2001, the Supreme Court in North Carolina ruled that one key to a felony murder conviction is that the defendant must have the requisite mental state of intent to commit the underlying felony that led to the death; simple negligence is not acceptable (Whitmire, 2003). Similarly, the U.S. Supreme Court (*Lockett v. Ohio*, 1978; *Enmund v. Florida*, 1982) has specifically ruled on intent and the need for individualized treatment of offenders, although a

later decision (*Tison v. Arizona*, 1987) set a different precedent and has compromised these rulings.

Arizona requires no specific mental state other than what is required for the commission of any of the enumerated felonies (ARS § 13-1105, B). The statute leaves the prosecution wide open, as it does in most states, to apply the felony-murder rule whenever a qualifying felony is committed.

Colorado applies the felony-murder rule in one of the broadest forms in the nation. The Colorado Supreme Court ruled, “specific intent is not an element of felony murder; to take a human life with malice is not an element of the crime” (*People v. Scheer*, 1974). Colorado’s first-degree felony murder statute allows for a defendant to be convicted under the statute if his mental state and actions are performed, “under circumstances evidencing an attitude of universal malice manifesting extreme indifference he knowingly engages in conduct which creates a grave risk of death to a person, or persons, other than himself, and thereby causes the death of another” (Crim Code § 18-3-102 (d)). In addition, Colorado’s Criminal Code attempts to clarify culpability by defining the phrase “after deliberation” as not only intentionally but that the decision to commit the act was made after the exercise of reflection and judgment concerning the act. The statute further explains “an act committed after deliberation is never one that has been committed in a hasty or impulsive manner” (§ 18-3-101 (3)). An example of a recent felony murder case is that of Lisl Auman. As Auman sat in the back of a police car, arrested and handcuffed after committing a burglary, the acquaintance she met the night before shot and killed a Denver police officer (killing himself afterwards), while fleeing the crime. She is now serving a life sentence for first-degree felony murder. Even though Lisl Auman did not intend to kill the police officer, under Colorado’s

felony-murder rule accomplices are liable if a death occurs during a felony or in immediate flight (Fortado, 2004). She would be charged with the same offense if the actual shooter were alive and also charged with murder.

The District of Columbia also uses culpability language in its first-degree murder statute where premeditated murder and felony murder are combined in one section. It states,

Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison . . . or without purpose to do so kills another in perpetrating or in attempting to perpetrate any [delineated felonies]" (§ 22-2101).

In some cases, the degree of felony murder varies based upon the culpable mental state of the offender, i.e., negligence or recklessness (*See* Del Code Title 11 § 635 (2)). In Florida, however, first-degree felony murder and second-degree felony murder list the same underlying felonies, but the difference between them is *who* does the actual killing. For instance, for first-degree felony murder, the homicide must be committed by one of the felons perpetrating the felony, while for second-degree felony murder someone other than the person(s) perpetrating the felony commits the homicide, e.g., a police officer kills a bystander, or a store owner kills an accomplice (William Van Poyck, personal phone conversation, June 11, 2005). Third-degree felony murder requires an "unlawful killing of a human being, when perpetrated without any design to effect death" when a person is engaged in the perpetration of, or attempt to commit any felony other than the felonies delineated in Florida's first and second degree felony-murder statutes (§ 782.04 (4)).

Illinois provides an explanation of intent in a separate statute. It states that a person "intends, or acts intentionally or with intent, to accomplish a result or engage in conduct described by the statute defining the offense, when his conscious objective or purpose is to

accomplish that result or engage in that conduct” (720 ILCS § 5/4-4). Louisiana requires that a defendant have “specific intent to kill or to inflict great bodily harm” in both its first and second-degree murder statutes (RS §§ 14:30 A (1), 14:30.1 A (2), respectively).

Of course, each individual state relies on the courts to consider the facts and circumstances of each case and apply them to the law. As an example, In *People v. Belk*, the Illinois Supreme Court explained that in a high-speed chase, even though the defendant was in possession of a stolen car and his blood alcohol level was above the legal limit, his actions did not constitute “the use or threat of physical force or violence against any individual” (Tuite, 2003a). The state’s high court referred to past decisions, from 1994 and 2001, stating that in both cases the defendants were involved in fatal accidents in stolen cars fleeing from police and were convicted of first-degree murder because Illinois’s murder statute provides “that a person commits murder when he knows his actions created a strong probability of death or great bodily harm” (Tuite, 2003a). In *Belk*, the Illinois Supreme Court stood firm in its reasoning that even though the defendant’s actions created a strong probability of death or great bodily harm, an individual’s knowledge that his actions might involve the threat or use of force or violence is not enough to classify such felony as a *forcible* felony. Again this goes back to the fundamental question: Did the individual *intend* the result that occurred due to individual choice and subsequent actions?

Several states allow for any felony or conduct to qualify for felony murder (whether first or second degree) if a specific culpable mental state is present when the felony occurs. Table 3 below provides a listing of the states that provide for such circumstances, along with their respective required mental state if applicable.



Table 3  
Culpability Felonies and Situations

State	Type of Crime	Circumstances Manifesting Extreme Indifference	Created Grave Risk of Death	Recklessly Caused Death	Additional Culpability Standard
Alabama	Any Conduct	x	x		Reckless
Alaska*	Any Conduct	x			Knowing
Arkansas	Any Felony	x			None
Colorado	Any Conduct	x	x		Knowing
Delaware	Any Felony			x	Reckless
New Mexico	Any Act	x			None
North Dakota	Any Act	x			None
Oklahoma*	Any Act	x			None
Utah	Any Conduct	x	x		None
Washington	Any Conduct	x	x		None
<b>Total</b>		<b>9</b>	<b>4</b>	<b>1</b>	

*\*Second-degree felony murder statute*

*Any felony or act committed with the above culpability standards is associated with each state's highest degree of felony murder.*

Arkansas and Delaware are the only states that obtain a felony requirement under the associated culpability standard. The remainder allow for felony murder if any act or conduct takes place under the specific mental state. Additionally, in the states that permit combined circumstances that also qualify if a person engages in conduct “under circumstances manifesting extreme indifference to the value of human life” in conjunction with “creating a grave risk of death”, both situations must be present to qualify under the statutes. In this instance, Alabama only requires a *reckless* state of mind; Colorado requires that the defendant *knowingly* engage in the conduct; and Utah and Washington require that defendant simply engage in the conduct.

The U.S. Supreme Court has ruled that a culpable mental state of “recklessness or extreme indifference to human life” along with being a “major participant” in an underlying (qualifying) felony is sufficient enough to warrant a death sentence (*Tison v. Arizona* 1987). The Court decided that this new culpability standard does not violate the Eighth Amendment’s ban against cruel and unusual punishment in terms of proportionate

sentencing even when a defendant is not the triggerman. The Court had defined intent to kill another way in its landmark decision involving felony murder and a death sentence in *Enmund v. Florida* (1982). In *Enmund*, the U.S. Supreme Court ruled “intent to kill includes the situation in which the defendant intended, contemplated, or anticipated that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony.” This ruling, however, has been preempted and today *Tison* is the prevailing case law.

Whether opponents or proponents of the felony-murder rule, culpability and a defendant’s state of mind is discussed more often in the argument about felony murder than anything else (Myers, 1997). Both camps realize that blameworthiness is necessary to reveal and understand in order to justify the theory of felony murder, along with criminal responsibility and subsequent punishment.

## **A MATTER OF DEGREES: MURDER REVIEWED**

This section focuses on degrees of murder available in the United States. The idea is to reveal a variety of potential alternatives for felony murder as they apply to specific cases. The main goal is to reflect upon the appropriate charge for a felony and resulting killing, and to consider the appropriate sentence and desired retribution based upon the crime committed.

Degrees of murder are variably defined among jurisdictions in the United States. Most provide for first-degree murder, some have a separate statute defining second-degree murder, and some use a combination of murder, and voluntary and involuntary manslaughter.

Degrees, or levels, are most often categorized based upon the culpability of the offender, and if applicable culpability of the accomplice who participates in the same crime.

In general, first-degree murder requires a premeditated, willful design; second-degree murder requires a mental state of recklessness; and criminal negligence (often defined as third-degree murder, or manslaughter) intuitively requires that an individual act with negligence. The Model Penal Code only defines murder and manslaughter with no varying degrees of murder (§ 210.2). This approach has only been adopted by a small number of jurisdictions in the United States.

### First-Degree Murder

First-degree murder is mainly defined as the intentional, purposeful killing of another human being, although some states add additional, or somewhat different, culpability

language to their statutes. For example, Idaho adds “any kind of willful, deliberate and premeditated killing” to its first-degree murder statute (Chap 40 § 18-4003 (a)).

Most states separate culpability standards in varying degrees in their murder and manslaughter statutes. For instance, Colorado uses culpability language “with deliberation and intent” in its first-degree murder statute (Crim Code § 18-3-102 (a)), and uses the mental state “knowingly” in its second-degree murder statute (§18-3-103 (1)). Similarly, Arizona offers, “intending or knowing that the person’s conduct will cause death, the person causes the death of another with premeditation” (ARS § 13-1105).

A majority of jurisdictions that utilize the felony-murder rule categorize it in a first-degree murder statute. Consequently, sentencing after a conviction is based on first-degree murder under most circumstances.

### Second-Degree Murder

Arizona allows for murder in the second-degree when a person commits murder without premeditation but such person “intentionally causes the death of another person, or knowing that his conduct will cause death or serious physical injury . . . ” The second-degree murder statute also allows for a reckless mental state when circumstances manifesting extreme indifference to human life the defendant’s conduct “creates a grave risk of death and causes the death of another” (ARS 11 § 13-1104).

California exclusively distinguishes between first-degree and second-degree murder by stating in its murder statute (after the underlying felonies that qualify for first-degree murder) that “all other kinds of murders are of the second degree” (Penal Code § 189). It is worth noting, however, that the California courts have interpreted the second part of the

statute to include other felonies not enumerated in the first-degree murder portion and apply such crimes as second-degree felony murder (Fletcher, 1980).

In its second-degree murder statute, Hawaii requires that a person “intentionally or knowingly cause the death of another person” (HRS §707-701.5). Applying a charge of second-degree murder in Hawaii for a felony killing would be problematic due to the defendant’s lack of intent or knowledge of the killing; hence, there is no provision for felony murder in that state.

A discussion about a charge of second-degree murder versus first-degree felony murder took place just recently as a result of the Lisl Auman case out of Colorado where a Denver police officer was tragically killed after a high-speed chase. Auman’s attorney argued that a second-degree murder sentence (8 to 48 years) would be more appropriate for her involvement in the crime (Fortado, 2004). However, Colorado only provides for first-degree felony murder, and does not allow for a lesser degree. Furthermore, the state Supreme Court has made it clear that there is no such distinction. Perhaps considering a separate statute and sentence specifically for felony murder would be a solution. For instance, Wisconsin provides for a combined, fixed sentence for a killing during a felony, along with the sentence for the specific felony committed.<sup>25</sup>

### Manslaughter

Manslaughter is generally defined as the unlawful killing of a human being without malice. The Model Penal Code states that a homicide is manslaughter when it is committed recklessly or when the homicide is committed under the influence of extreme mental or

---

<sup>25</sup> *See* Felony Murder Typology section.

emotional disturbance where there is reasonable explanation or excuse. The reasonableness is determined in the viewpoint and under the circumstances in the defendant's situation as he believed them to be (MPC § 210.3 (1) (a) and (b)). A felony murder conviction that relies on a manslaughter charge would appear to be proportional in that the defendant acted recklessly by committing a dangerous felony. However, most states chose to hold defendants to a higher degree of culpability.

Some states only categorize murder into first-degree murder and manslaughter, both voluntary and involuntary (*See* IC § 35-42-1-3 and § 35-42-1-4, respectively) instead of providing for second-degree murder. Essentially, manslaughter is synonymous with second-degree murder in this instance.

Hawaii allows for a reduced degree of first-degree murder to manslaughter as an affirmative defense if at the time of the killing the defendant was “under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation . . . determined from the viewpoint of a reasonable person in the circumstances as the defendant believed them to be” (HRS § 707-702 (2)).

Indiana relies on the seriousness of the felony committed when the killing occurred to determine whether an involuntary manslaughter charge is appropriate (§ 35-42-1-4 (c) (1)), along with considering the same charge when a misdemeanor is committed that inherently poses a risk of serious bodily injury (§ 35-42-1-4 (c) (2)). The state of Ohio includes felony murder language in its involuntary manslaughter statute by stating that, “no person shall cause the death of another . . . as a proximate result of the offender's committing or attempting to commit a felony” (Ohio Revised Code § 2903.04 (A)). This is essentially Ohio's felony-murder rule because in the state's murder statute it requires a conviction of a

previous similar offense (§ 2903.02 (C)) and for aggravated murder the offender must purposely cause death while committing one of the underlying felonies (§ 2903.01 (B)).

Many states define manslaughter by requiring recklessness as the culpability standard in causing the death of another person, or when a crime would be murder and it is committed in the midst of a sudden quarrel or heat of passion resulting from adequate provocation by the victim.<sup>26</sup>

Several states provide for assisting another person to commit suicide in their manslaughter statutes.<sup>27</sup> Many of the state statutes are left open for interpretation and in the discretion of the sentencing authority to determine the appropriate punishment.

### Felony Murder

Intuitively, the crime of murder justly deserves a serious penalty because it entails the highest culpability with regard to an intentional killing on the part of an offender. Second-degree murder or manslaughter deserves a less severe penalty because the presence and blameworthiness of recklessness or negligence is less, although the results are the same (Simons, 1997). Felony murder is heightened to varying degrees of murder (predominately first-degree murder) due to the dangerous act that accompanies a resulting death.

In other words, the act of committing one of the state's qualifying felonies constitutes a level of culpability that warrants, in most cases, a conviction for the highest degree of murder.

Myers (1997) suggests that defendants in non-felony killings are more culpable than defendants convicted of felony murder even when there are similarities in both groups such

---

<sup>26</sup> See *e.g.*, ARS § 13-1103, Ala Crim Code § 13A-6-3 (2), Maine Crim Code 17-A Chap 9 § 203.1 B, HRS § 707-702.

<sup>27</sup> See Colo Crim Code § 18-3-104 (1) (b), ARS § 13-1103, A, 3, and HRS § 707-702.

as, use of a weapon, criminal history, and mental state because defendants in non-felony killings are more likely to have planned the killing and personally committed the act. If a defendant is less culpable, logic dictates that he is less responsible for the criminal act. It would appear anomalous to apply a first-degree murder statute to a person who commits felony murder and who does not have the specific *mens rea* required for a first-degree murder conviction. Clearly, a majority of the states disagree with a total of 43 subscribing to capital murder, first-degree murder, or murder under the theory of felony murder.

Experimental studies have shown that there is a distinct separation between a felony-murder triggerman who commits an actual killing and a non-triggerman who participates in an underlying felony where a person is killed (Finkel and Duff, 1991; Myers, 1994; Myers, 1997). More importantly, there is a sharp distinction between a felony-murder triggerman and a premeditated murderer (Finkel and Duff, 1991). Clearly, there is empirical data supporting fundamental differences between murder and felony murder. However, most of the jurisdictions have not made statutory changes to reflect such differences (Fletcher, 1980). The current research and analysis of numerous statutes verifies this point.

This research espouses that *true* felony murder is when a killing occurs during the course of a felony where there is no premeditation on the part of the offender, or the offender was not even the killer. In such cases, the killing *may* have been premeditated on the part of the offender, but for the accomplice who was not the killer there was no premeditation or intent to commit murder.

Figure 3 below illustrates the degrees in which felony murder is utilized in the United States. There are currently five states that maintain that felony murder is a capital offense; however, four of them require a specific mental state. There are 14 states that exclusively



provide for first-degree murder as their lowest form of felony murder, 12 define felony murder in a deliberate murder statute, and 24 allow for a lesser degree of murder.

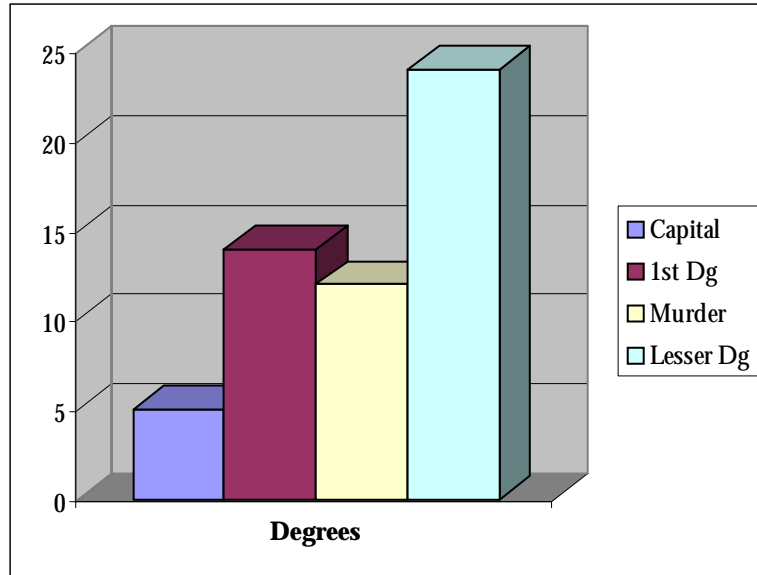


Figure 3  
Degrees of Felony Murder

## **APPLICATION OF THE FELONY-MURDER RULE: A SNAPSHOT**

Forty-nine jurisdictions total, including the District of Columbia, and the Federal system, subscribe to the felony murder theory to some degree. Out of those 49, about 88 percent allow for some form of first-degree or capital murder. This includes those jurisdictions that identify felony murder in a murder statute because they are essentially treated the same as first-degree murder. Many jurisdictions allow a conviction for a non-triggerman. Some expressly provide language in their statutes and some rely on the courts to determine if the rule applies to an accomplice. In addition, in those jurisdictions that utilize the death penalty most allow for a defendant to receive a death sentence for felony murder.

### Jurisdictions that Allow Conviction for a Non-Triggerman

Some jurisdictions that provide for felony murder in their statutes, no matter the degree, also provide language for an accomplice or codefendant. If there is no mention of a codefendant in the felony murder statute, there is a presumption that the felony-murder rule can be applied if the codefendant was a main participant in the underlying felony or if there is some nexus to the crime. The prosecution is able to bring charges in cases where an accomplice is simply present at the scene of the felony when the death occurs. The prosecutor, as in any case, determines which conviction she is most likely to win and charges the defendant accordingly. A felony murder conviction is most desirable to prosecutors because they are only required to prove intent to commit the underlying felony and not intent for the killing that resulted from the crime.

When jurisdictions explicitly allow for an accomplice to be included in their felony murder statute, it is typically defined as:

A person commits murder if acting alone or with one or more other persons, he or she commits or attempts to commit [a qualifying felony], and in the course of and in furtherance of the felony or in immediate flight therefrom, he or she *or an accomplice* [emphasis added] causes the death of any person . . .

Ark Crim Code § 5-10-101<sup>28</sup>

More than half of the jurisdictions offer no language or direction for a codefendant in their murder statutes where they define felony murder in the highest degree.<sup>29</sup> However, such jurisdictions have most likely interpreted their statutes to determine how to handle a non-triggerman case (either using the *Enmund* standard or the two-prong *Tison* test).

Because several jurisdictions require that the defendant possess a specific mental state when committing one of the underlying felonies to qualify for the highest degree of murder (mainly capital or first-degree murder), accomplice language is inapplicable due to the individual culpability requirement.<sup>30</sup>

---

<sup>28</sup> See also generally Ala Crim Code § 13A-6-2 (a) (3), AS § 11.41.110 (a) (3), ARS § 13-1105, A, 2, Colo Crim Code § 18-3-102 (b), Conn Penal Code Chap 952 § 53a-54c, Main Code Title 17-A Chap 9 § 202, 1, Miss Code § 97-3-19 (11) (c), Mont Crim Code § 45-5-102 (1) (b), NJ Code of Criminal Justice § 2C:11-3 (3), ND Crim Code § 12.1-16-01.1 (c), Penal Code of Okla § 21-701.7.B, ORS § 163.115 (b), Penn Crimes Code § 2502.(b), RCW § 9A.32.030 (1) (c).

<sup>29</sup> See Calif Penal Code § 189, Del Crim Code Title 11 § 636 (a) (2), DC Code § 22-2101 [formerly 22-2401], Fla Statutes § 782.04 (1) (a) 2, Crim Code of GA § 16-5-1, Idaho Statutes § 18-4003 (d), 720 ILCS § 5/9-1 (a) (3), IC § 35-42-1-1, Iowa Code § 707.2, 2, KSA § 21-3401 (b), Maryland Crim Law § 2-201 (a), Gen Laws of Mass § 265 Sec 1, Minn Crim Code § 609.185 (a) (3), Missouri Revised Statutes § 565.021 (2), Nebraska Crim Code § 28-303 (2), NRS § 200.030, 1 (b), NM § 30-2-1 A (2), NY Penal Law § 125.27, 1 (a) (vii), NC General Statutes 6 § 14-17, RI Criminal Offenses § 11-23-1, SC Code of Laws § 16-3-5, SD Codified Laws § 22-16-4, Tenn Code § 39-13-302 (a) (2), TX Penal Code § 19.02 (b) (3), VSA § 2301, WV Code § 61-21-1, Wisconsin Crim Code § 940.03, Wyoming Criminal Code § 6-2-101 (a), US Code Title 18 Chap 51 § 1111 (a).

<sup>30</sup> See LA RS § 14:30 A (1), NH Crim Code § 630:1 (b) (1), Ohio Revised Statutes § 2903.01 (B), Utah Crim Code § 76-5-203 (2) (d) (ii), Code of VA § 18.2-32.

The figure below illustrates the number of jurisdictions that provide accomplice language in their felony murder statutes. There are currently five states that have a specific culpability requirement, 15 provide accomplice language in their statutes, and 29 of the jurisdictions that subscribe to the felony-murder rule are void of direction regarding an accomplice. This figure only includes the highest degree allowable in each of the jurisdictions.

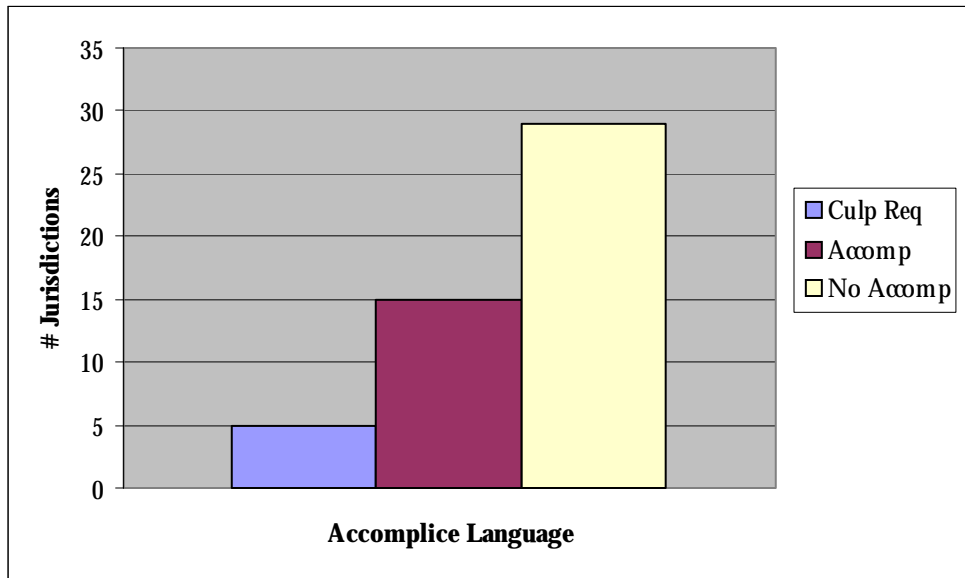


Figure 4  
Accomplice Language Among Jurisdictions

In Alaska’s second-degree murder statute, the only level provided for felony murder, the statute explicitly notes “. . . in the course of or in furtherance of that crime [the delineated felonies] or in immediate flight from that crime, any person causes the death of a person *other than one of the participants*” (AS § 11.41.110 (a) (3)).<sup>31</sup>

California does not expressly provide language about another person in its murder statute where felonies are provided that allow for first-degree felony murder (Penal Code § 189). However, the California Supreme Court has ruled that a person who commits any of

<sup>31</sup> See also Colo Crim Code § 18-3-102 (1) (b), Conn Penal Code § 952 Sec 53a-54c, ORS § 163.115 (b), RCW § 9A.32.030 (1) (c).

the qualifying felonies (in the statute) accompanied by the death of another person, is guilty of first-degree murder even if the associated killing is done by a co-felon and the killing is intentional, negligent, or accidental (Baxter, 2004).

Several jurisdictions allow for an affirmative defense for a codefendant who is a non-triggerman under certain circumstances. The statutes normally provide amelioration:

If the accomplice did not commit the homicidal act or in any way aid in its commission, was not armed with a deadly weapon, [and] did not reasonably believe that any other participant would engage in conduct that would result in serious injury.

Ark Crim Code § 5-10-102<sup>32</sup>

The affirmative defense language offers some safeguards for a non-triggerman; however, it appears that meeting the stringent criteria would be difficult in most cases.

When it comes to sentencing a non-triggerman convicted of first-degree murder and the individual is death eligible, the courts must rely on *Tison v. Arizona* (1987) when considering an accomplice's fate. In deciding whether a non-triggerman is eligible for the death penalty, often referred to as the two-prong *Tison* culpability test, determination in sentencing must focus on two things:

- 1) Whether the non-triggerman was a major participant in the underlying felony *and*,
- 2) Whether he acted with reckless indifference to the value of human life.

This mental state, the U.S. Supreme Court ruled, is highly culpable and sufficient enough to warrant a death sentence.

---

<sup>32</sup> See also generally Conn Penal Code § 952 Sec 53a-54c, Maine Crim Code Title 17-A Chap 9 § 202 (2).

Between 1977 and 1994, there were ten non-triggerman defendants convicted under the theory of felony murder who have been executed because the law of the land allows felony murder to qualify as a capital crime; whether an accomplice kills intentionally or accidentally (Brown, 1997).

#### The Death Penalty: An Option for Felony Murder

Most of the jurisdictions that utilize the death penalty have some language in their first-degree murder statute that includes felony murder. In addition, almost all of the jurisdictions that utilize the death penalty allow for a death sentence for defendants convicted of first-degree felony murder. The only exceptions are: New Hampshire, Oregon and, surprisingly, Texas. Several of them, however, require a specific *mens rea* in order to be eligible for a death sentence (*See* Appendix C and Table 4).

Additionally, Connecticut, Missouri, and Pennsylvania identify felony murder in lesser degrees, so even though they subscribe to the death penalty such sentence is not allowable for felony murder. Table 4 provides a breakdown of the maximum sentence allowed for felony murder in jurisdictions that have to the death penalty.

Table 4  
Maximum Sentence in Death Penalty Jurisdictions

Jurisdiction	Max Sentence for Felony Murder	Jurisdiction	Max Sentence for Felony Murder
Alabama	Death	Nevada	Death
Arizona	Death	New Hampshire	Life
Arkansas <sup>(1)</sup>	Death	New Jersey	Death
California	Death	New York *	Death
Colorado	Death	New Mexico	Death
Connecticut	Life	North Carolina	Death
Delaware	Death <sup>(2)</sup>	Ohio	Life/Death <sup>(4)</sup>
Florida	Death	Oklahoma	Death
Georgia	Death	Oregon	Life
Idaho	Death	Pennsylvania	Life
Illinois	Death	South Carolina <sup>(5)</sup>	Death
Indiana	Death	South Dakota	Death
Kansas *	Death	Tennessee	Death
Louisiana	Life/Death <sup>(3)</sup>	Texas	Life
Maryland	Death	Utah	Life/Death <sup>(6)</sup>
Mississippi	Death	Virginia	Life/Death <sup>(7)</sup>
Missouri	Life	Washington	Death
Montana	Death	Wyoming	Death
Nebraska	Death	United States	Death

*Under "Max Sentence Allowed for Felony Murder" the term "Life" means life imprisonment without the possibility of parole.  
\*Death penalty statutes deemed unconstitutional in 2004.*

- (1) Felony must be committed under circumstances manifesting extreme indifference to human life for both capital and first-degree murder.*
- (2) Must recklessly cause death for first-degree felony murder.*
- (3) Requires specific intent for first-degree felony murder.*
- (4) Requires that the defendant act purposely in killing during the felony to qualify for aggravated murder.*
- (5) Provides for underlying felonies in its listing of aggravators.*
- (6) Requires an intentional and knowing mental state while engaged in a felony to be death eligible.*
- (7) Requires a willful, deliberate, and premeditated killing while in the commission of a felony to qualify for capital murder.*

Figure 5 below graphically illustrates the status of felony murder and the death penalty in the United States. Out of the 38 jurisdictions that subscribe to the theory and utilize the death penalty, three jurisdictions that have first-degree felony murder do not allow a death sentence under any circumstances, three do not allow a death sentence due to providing exclusively for lesser degrees of felony murder, six states call for a specific

requisite mental state to qualify for the death penalty, and 26 allow for a death sentence following a conviction of first-degree murder for causing a death while committing an underlying felony.

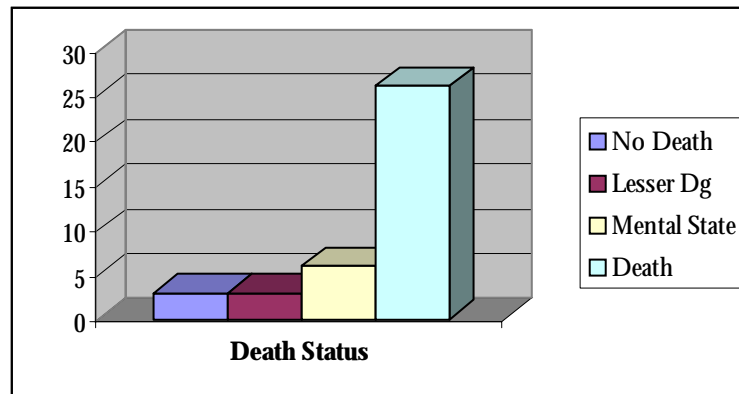


Figure 5  
Felony Murder and the Death Penalty

The literature reveals that, to a large degree, the death penalty has been reserved for those defendants convicted of felony murder (Peterson and Bailey, 1991 and Myers, 1997). In Peterson and Bailey's study on deterrence for felony murder, capital punishment and the media, data revealed that out of 93 executions, 72-percent, (during a span of 11 years) were murders related to robbery, rape, burglary, and kidnapping. These results may be misleading, however, because if a killing occurs during a felony it does not automatically mean it was exclusively felony murder, as the homicide may have been deliberate.

America's attachment to the felony-murder rule resembles the attachment to the death penalty (Fletcher, 1980). The penchant for both theories and beliefs lives on in a society that continues to separate itself from the Western world. According to the literature, support for the death penalty drops considerably when an alternative sentence of life



imprisonment without the possibility of parole is offered (*Sæ* Barkan and Cohn, 2005). Current societal views may side with Finkel and Duff (1991) in believing whether a death sentence for defendants in felony-murder situations is equitable and just or unfair and excessive.

## **PROPORTIONALITY IN CRIME AND PUNISHMENT**

The idea of punishment and, ultimately, deterrence is rooted in three components of the Classical theory of criminology: that crime should be punished with certainty, severity, and celerity (Maestro, 1973). The fundamental notion of Cesare Beccaria's theory, and the main purpose, appears to have been lost over time. Obviously, an individual must believe that punishment will be certain in order for any deterrent effect, so that is fairly clear. The celerity portion of the Classical theory is also rather straight forward, as punishment for a crime must surely be swift providing a temporal relationship if a person is to remember why he is being punished.

It is the opinion of this research that the true intent of the severity component of Beccaria's theory is what has been transformed over time, and that this distortion has compromised the integrity of the theory. The initial purpose of the severity portion of the Classical theory was meant to curtail authorities from using excessive punishment. Specifically, the severity of punishment was designed for proportionality purposes—to weigh the punishment with the crime—and not to be used to incarcerate defendants (mainly young men, but women's rates are increasing) for long periods of time.

### Sentencing

In general, the average sentence served in state prisons has decreased from 1992 to 2000. However, defendants convicted of a felony in 2000 were more likely to serve more of their sentence. In addition, in 2000 68-percent of all convicted felons received a sentence of incarceration. Although the length of sentence that a felon received from state courts decreased from 1992 to 2000, the actual time served increased during that same period

(Durose and Langan, 2003). According to Myers (1997), in many instances defendants convicted of felony murder are sentenced more severely than defendants convicted of other types of murder, although they are no more culpable.

Some states have provided safeguards for many offenders. For example, Kansas offers direction for individualized sentencing of offenders in a separate statute, which states that sentencing shall be liberally construed and that persons convicted of a crime should be dealt with in accordance with their “individual characteristics, circumstances, needs, and potentialities as revealed by case studies . . .” (KSA § 21-4601). Additionally, in Maine felony murder is considered a Class A crime and the sentencing statute directs the court to set a definite period of time not to exceed 30 years (Title 17-A Chap 51 §1252, 2, A). The sentencing authority also has guided discretion, within the state’s sentencing guidelines, to consider the facts and circumstances of each individual case and sentence the defendant accordingly. This punishment may appear excessive considering that the punishment for a person convicted of murder is a sentence of 25 years to life (Title 17-A Chap 51 §1251).

There is certainly an argument for felony murder to be reduced to second-degree murder where the sentence would, arguably, be proportionate to the crime. In the state of Maryland, the sentence for second-degree murder is incarceration for up to 30 years (Crim Law § 2-204 (b)). This type of sentencing in considering the facts and circumstances of each case, along with individualized treatment of defendants, is a fundamental concept of the criminal law.

Prosecutors favor the felony-murder rule because their job is much easier if they only have to prove that the felony was an intentional act and not prove that the killing itself was intentional (in most jurisdictions). In addition, in jurisdictions that allow for a first-degree

murder conviction and subsequent death sentence, bargaining power is always available and frequently utilized to obtain a life sentence. Is it fair and just to sentence an individual to death if the person does not *intentionally* commit murder? Clearly, this is the center of the argument.

### Should Felony-Murder Defendants be Eligible for the Death Penalty?

Sentencing for felony murder is an important topic in the discourse because a conviction under the rule allows for a sentence of death under various circumstances and in most jurisdictions. In almost all of the states that utilize the death penalty, a first-degree felony murder conviction allows a defendant to be eligible for a death sentence. Although this research does not cover the topic of the death penalty per se, since felony murder is the most common type of capital murder nationwide (Peterson and Bailey, 1991; Myers, 1997), and subsequent sentence of death, it is worth discussing.

There has been much discussion about whether the death penalty, specifically, deters the crime of murder. Capital punishment has what is called the “brutalizing” effect in that for a short time after an execution takes place the crime of murder actually increases instead of serving as a deterrent. Peterson and Bailey (1991) explained that instead of deterring killings an execution illustrates that it is appropriate to kill those who have gravely offended society. This reasoning exists in the idea that the fact that “duly appointed officials” performing such killings on “duly convicted offenders” could be forgotten by touting that such offenders deserve to die. A sentence of death as a deterrent for felony murder is tenuous due to the lack of intent to commit the killing. Furthermore, relating deterrence and the felony-murder rule is illogical due to the absence of such intent.

After the death penalty was deemed to violate the Eighth Amendment due to the arbitrary and capricious manner in which it was being applied (*Furman v. Georgia*, 1972), the state of Georgia (and most other states) scrambled to create a death penalty statute that would pass muster with the high Court. Pursuant to *Gregg v. Georgia* (1976), in designing a separate guilt and penalty phase sentencing structure specifically for death cases that the U.S. Supreme Court would accept, all death penalty jurisdictions have adopted an aggravation and mitigation process for death eligible cases. In keeping with *Gregg* jurisdictions now require that at least one aggravator be present for the defendant to be sentenced to death and, in most jurisdictions, a judge or a jury is to prove aggravating circumstances beyond a reasonable doubt when determining whether to impose a death sentence.<sup>33</sup>

In jurisdictions that do not subscribe to the death penalty, the sentence for felony murder is still quite lengthy with most allowing for life imprisonment without the possibility of parole. The state of Wisconsin approaches it differently by only permitting an additional 15 years over the sentence allowable for the felony committed when the killing takes place. Table 5 provides a list of those jurisdictions and the respective maximum sentence allowable after a conviction of felony murder.

---

<sup>33</sup> See, e.g., Ark Crim Code Title 5 Chap 6 § 5-4-603 (a), Colo Crim Code § 18-1.3-1201 (d), Del Crim Code Title 11 § 4209 (e) (1), Idaho Statutes Chap 40 § 18-4004, and LA C.Cr.P. Art. § 905.3.

Table 5  
Maximum Sentence in Non-Death Penalty Jurisdictions

<b>Jurisdiction</b>	<b>Max Sentence Allowed for Felony Murder</b>
Alaska	99 Years
Dist of Columbia	Life
Iowa	Life
Maine	30 Years
Massachusetts	Life
Minnesota	Life
North Dakota	Life
Rhode Island	Life
Vermont	Life
West Virginia	Life
Wisconsin	Specific Felony Sentence plus 15 yrs max

*Under “Max Sentence Allowed for Felony Murder” the term “Life” means life imprisonment without the possibility of parole.*

For the jurisdictions that utilize the death penalty, they typically use a weighing scheme to determine aggravators and mitigators. However, instruction and direction explaining the process is scarce. For example California, as in most jurisdictions, vaguely explains in their statute that the triers of fact will weigh the aggravators and the mitigators (Penal Code § 190.3 (k)) and determine the sentence based upon which set outweighs the other. In California both are referred to as special circumstances. Like most other jurisdictions, California’s aggravators are much lengthier, with a total of 22, than their statutory mitigators, with a total of eleven.

Idaho explicitly provides language in its sentencing statute for first-degree felony murder, which states in part that if a jury, or the court if a jury is waived, does not find a statutory aggravating circumstance beyond a reasonable doubt or if the death penalty is not sought, the court shall impose a life sentence with a minimum period of confinement of not less than ten years (Chap 40 § 18-4004).<sup>34</sup> It seems implausible that a judge or jury would not find at least *one* of the many aggravators that would apply to a defendant who commits one of Idaho's ten underlying felonies.

### *Aggravators*

The main theme identified among aggravators that jurisdictions provide for determining whether to sentence an individual to life or death are fairly consistent. The most common are the prior conviction of a violent offense aggravator, and that the defendant created a “grave risk of death” to other persons. Although some of the language may be slightly different, following is a listing of the main aggravators used by jurisdictions that utilize the death penalty after a conviction of felony murder. The list is derived from various statutes; however, most use some version as their core circumstances.

- Previously convicted of a serious offense, involving use of, or threat of, force or violence upon another person.<sup>35</sup>
- The defendant's course of conduct resulted in the deaths of two or more persons.

---

<sup>34</sup> *Ring v. Arizona* (2002) would eventually compel courts to abide by this standard (See Richardson, 2004).

<sup>35</sup> This has been construed as sufficing for a serious offense if committed on the same occasion as the homicide in question (See, e.g., ARS Crim Code § 13-703, F).

- In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered.
- The crime was committed in an especially heinous, atrocious, or cruel manner.
- The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value (Contract killing).
- The murder was outrageously or wantonly vile, horrible or inhumane in that it involved torture, or depravity of mind.
- The defendant committed the offense while in custody of the department of corrections.<sup>36</sup>
- The offense was committed for the purpose of avoiding or preventing a lawful arrest or prosecution or affecting an escape from custody.
- The murdered person was an on duty peace officer who was killed in the course of performing the officer's official duties and the defendant knew, or should have known, that the murdered person was a peace officer.

States continue to allow for additional aggravators to a degree that widening of the net is taking place at an alarming rate. Colorado is a prime example, as it allows for all of the most common aggravators, and adds several others to its list.

---

<sup>36</sup> An offender on probation for a felony offense qualifies under this aggravator.



Colorado also includes, in part, if:

- The defendant unlawfully and intentionally, knowingly, or with universal malice manifesting extreme indifference to the value of human life generally, killed two or more persons during the commission of the same criminal episode.
- The defendant's possession of the weapon used constituted a felony offense (Crim Code § 18-1.3-1201 (5)).

Delaware also provides the following additional aggravators:

- The murder was committed while the defendant was engaged in the commission of, (attempt or in fleeing) to commit any degree of rape, unlawful sexual intercourse, arson, kidnapping, robbery, sodomy or burglary.<sup>37</sup>
- The victim was 62 years of age or older.
- The victim was a child 14 years of age or younger, and the murder was committed by an individual who is at least 4 years older than the victim (Crim Code Title 11 § 4209 (e)).

---

<sup>37</sup> Like Delaware, such underlying felonies are aggravated in several of the states that utilize the death penalty; hence, a conviction under the felony-murder rule is automatically aggravated (*See also*, SC Code of Laws Chap 3 Article 1 § 16-3-5, Fla Statutes § 921.141 (a) (5)).

Arkansas adds:

- The capital murder was committed against a person whom the defendant knew or reasonably should have known was especially vulnerable to the attack because: (a) either a temporary or permanent severe physical or mental disability which would interfere with the victim's ability to flee or to defend himself; or (b) The person was twelve (12) years of age or younger (Crim Code Title 5 Chap 4; 6 § 5-4-604).

Along with the core aggravators, Florida includes additions such as:

- The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.
- The capital felony was committed by a criminal street gang member (§ 921.141 (a) (5)).

Interestingly, Illinois provides an aggravator that includes if an inmate is killed on the grounds of an institution or facility run by the Department of Corrections (Chap 720 § 5/9-1 (b) (2)). Illinois also allows aggravation of a murder if the victim was killed as a result of the hijacking of an airplane, train, ship, or bus (Chap 720 § 5/9-1 (b) (4)).

Emergency medical technicians, paramedics, ambulance drivers, and other first-aid professionals are also added to Illinois's list (Chap 720 § 5/9-1 (b) (12)), along with if the defendant was a principal administrator, organizer, or leader of a calculated criminal drug conspiracy consisting of a hierarchical position of authority superior to that of all the rest of the members (Chap 720 § 5/9-1 (b) (13)), or if the defendant knew the murdered victim was

a teacher or any other employee of a school and is on school grounds at the time of the crime (§ 5/9-1 (b) (20)).

States that have the death penalty and weigh circumstances of the crime also provide statutory mitigators that the defense can present. In all states, the list of mitigators is much shorter than the list of aggravators. This is not problematic in that it is permissible for the defense to present mitigation that is even somewhat relevant to the case. The implied message in the growing number of aggravators, however, is that the states want to pursue and secure a death sentence whenever possible. As society grows and evolves it is understandable that the number of circumstances available to aggravate a killing would also continue to grow. The concern is that as the net continues to widen and the aggravators continue to increase (most states have as many as 20) more defendants are eligible for death sentences when other sentences may be more appropriate. It is disturbing that the majority of defendants' convictions who are sentenced to death rely on the theory of felony murder (Peterson and Bailey, 1991; Myers, 1997). It is probably not too difficult to find one aggravator out of 20 when a defendant commits a dangerous felony.

### *Mitigators*

The states provide several statutory mitigators for the defense to present, which serves to mitigate the killing to some degree. If states do not provide language in their statutes that any other mitigation relevant to the case can be included it is implied. The U.S. Supreme Court decided as much in *Eddings v. Oklahoma* (1982) where the Court ruled that mitigating factors must be considered in an individualized manner as required by the Eighth

and Fourteenth Amendments in capital cases. However, jurisdictions continue to provide statutory mitigations for death cases. Some examples include:

- The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired as a result of mental disease or defect.<sup>38</sup>
- The defendant was under the influence of extreme mental or emotional disturbance.
- The absence of any significant prior conviction.
- The defendant acted under extreme duress or under the substantial domination of another person<sup>39</sup>
- The defendant was legally accountable for the conduct of another, but his participation was relatively minor.<sup>40</sup>
- The defendant could not reasonably have foreseen that his conduct would cause, or would create, a grave risk of causing death to another person.
- The defendant's age at the time of the offense.
- The influence of drugs or alcohol.

---

<sup>38</sup> Colorado adds "but not so impaired as to constitute a defense to prosecution" (§ 18-1.3-1201 (4)).

<sup>39</sup> Colorado adds the lack of a defense to this mitigator (Crim Code § 18-1.3-1201 (4)).

<sup>40</sup> Colorado again clarifies for the courts that the defendant's participation is not so minor as to be used as a defense.

Colorado provides for a few other statutory mitigating factors to be considered after conviction in a death penalty case such as:

- The extent of the defendant's cooperation with law enforcement officers or agencies and with the office of the prosecuting district attorney.
- The good faith, although mistaken, belief by the defendant that circumstances existed which constituted a moral justification for the defendant's conduct.
- The defendant is not a continuing threat to society—future dangerousness (Crim Code § 18-1.3-1201 (4)).

Some states provide for mitigation if the victim was a participant in the defendant's conduct or consented to the act.<sup>41</sup> Illinois also allows for mitigation if the defendant's background includes a history of extreme emotional or physical abuse (720 ILCS § 5/9-3 (c) (4-7)). Additionally, the state of Kansas provides mitigation if a defendant was suffering from Posttraumatic Stress Disorder at the time of the crime, which was caused by violence or abuse by the victim (KSA Article 46 § 21-4637 (h)).

Again, pursuant to *Eddings* most, if not all, non-statutory mitigation is allowable at the penalty phase of a death penalty trial. It appears that the states are providing mitigating factors in their statutes for direction, along with legal safeguards for defendants. After *Eddings*, however, it is not necessary to continue to add mitigators as it is to continue to add aggravators.

---

<sup>41</sup> See Fla Statutes § 921.141 (6), and 720 ILCS § 5/9-3 (c) (4-7).

### The Courts Decide: The Death Penalty as it Applies to a Non-Triggerman

There are three main decisions (*Enmund v. Florida*, 1982; *Cabana v. Bullock*, 1986; *Tison v. Arizona*, 1987) that were handed down by the United States Supreme Court on the issue of sentencing a non-triggerman to death under the felony-murder rule. The Court's lack of direction in these final decisions (Kling, 1988) has resulted in incongruent and unpredictable findings.<sup>42</sup>

In *Enmund v. Florida* (1982), Earl Enmund was the codefendant in a robbery of an elderly couple in their home. While he served as the lookout and getaway driver parked around the corner from the house, the couple was shot and killed by his codefendants during the robbery. Enmund was convicted of first-degree felony murder under Florida law and subsequently sentenced to death.

The U.S. Supreme Court ruled, in a 5-4 decision, that imposition of the death penalty (*Enmund v. Florida*, 1982) constituted cruel and unusual punishment under the Eighth Amendment when a person aids in a felony "where murder is committed by others but who himself does not kill, attempt to kill, intend to kill, or contemplate that life would be taken or that lethal force might be employed." The high court ruled that it was a violation of the ban against cruel and unusual punishment and vacated Enmund's death sentence.

---

<sup>42</sup> See, e.g., *Van Poyck v. State*, 1990; *Benedith v. State*, 1998.

A Mississippi case (*Cabana v. Bullock*, 1986), which was initially an Eighth Amendment claim, resulted in a Sixth Amendment issue in whether a jury or “some appropriate tribunal” should determine whether Bullock “killed, attempted to kill, or intended that a killing take place or that lethal force be used” (*Cabana v. Bullock*, 1986). Bullock was an accomplice in a killing of a friend after an argument ensued over a debt that was owed. This issue became a moot point after *Ring v. Arizona* (2002) came to light in which a trial judge alone could not determine aggravating and mitigating factors without violating a defendant’s right to a jury trial (Richardson, 2004). The outcome in the *Bullock* case, nevertheless, significantly limited the protections for defendants mandated by *Enmund* (Kling, 1988). Even though *Ring* now takes precedence over *Bullock*, the *Ring* decision was not retroactive and it is highly probable that many cases went through the courts before that time.

About five years after the *Enmund* ruling, the U.S. Supreme Court handed down another decision pertaining to a death sentence for a non-triggerman convicted under the theory of felony murder (*Tison v. Arizona*, 1987). In this case, the Court went the other way and ruled that a felony murder conviction that allows for the death penalty for a non-triggerman does not violate the U.S Constitution’s Eighth Amendment ban against cruel and unusual punishment as it applies to the states via the Fourteenth Amendment. The facts of the case reveal that the Tison brothers, Ricky, Raymond, and Donald, allegedly planned an escape to help free their father from an Arizona state prison. On escape, the three boys, their father and the father’s cellmate abducted and robbed a family of four at gunpoint. The boys stood near by while the two convicts tragically shot and killed the entire family. They were convicted in Arizona and sentenced to death under the theory of felony murder.

At the time the brothers, both Ricky and Raymond, were 19 and 20 years old, respectively, and this fact served as a mitigating factor for the lower court when determining their sentence. There were other mitigators established, but none were enough to persuade the lower court to abandon the death penalty. Police killed the third brother amidst the capture and the father (Gary Tison) died days later in the desert after fleeing.

In a heated 5-4 decision, the U.S. Supreme Court decided that the Tison brothers were guilty of first-degree felony murder, and subsequently eligible for the death penalty. The Court held that the Eighth Amendment “does not prohibit the death penalty as disproportionate in the case of a defendant whose participation in a felony that resulted in murder is ‘major’ *and* whose mental state is one of ‘reckless indifference’” (*Tison v. Arizona*, 1987). This is the standard the U.S. Supreme Court left for the state courts to apply to future cases. Sometime after this final decision, the state of Arizona apparently provided some relief for the two brothers because they currently reside at the Arizona State Penitentiary both serving life sentences (Arizona Department of Corrections).

Florida took its turn at interpreting *Tison* in *Van Poyck v. State* (1990); cert denied. William Van Poyck and his codefendant, Frank Valdes, attempted to free a friend from a state prison transport van in downtown West Palm Beach, Florida. During the incident, a prison guard was shot and killed by Valdes, and both men were convicted of first-degree felony murder and sentenced to death. On Van Poyck’s direct appeal to the Florida Supreme Court, the state’s high court specifically found that the evidence was insufficient to prove that Van Poyck was the triggerman. However, they did find that the evidence was sufficient enough to sustain a conviction of first-degree felony murder. The Court conducted a *Tison* analysis and upheld the death sentence based upon the following finding:



Although the record does not establish that Van Poyck was the triggerman, it does establish that he was the instigator and the primary participant in this crime. He and Valdez [*sic*] arrived at the scene ‘armed to the teeth.’ Since there is no question that Van Poyck played the major role in this felony murder and that he knew lethal force could be used, we find that the death sentence is proportional.

(*Van Poyck v. State*, 1990, p. 1070-71)

The above analysis appears deficient in establishing the second prong of the *Tison* test in that the defendant acted with reckless indifference to human life. For instance, being “armed to the teeth”, as the Court explained, does not seem to meet the definition of “acting with reckless indifference to human life” in that it would virtually qualify every armed person committing a felony. The U.S. Supreme Court made it clear in *Tison* back in 1987 that something more is required other than mere participation in the underlying felony for a death sentence to be appropriate. Under the *Van Poyck* rationale any armed robber, armed burglar, or armed kidnapper who participated in a crime where a homicide occurred would automatically be deemed to have met the second prong of *Tison* and would be eligible for the death penalty. This contradicts *Tison’s* holding that a mere restatement of the felony-murder rule cannot be used to establish the second prong.

There has been great concern about the two *Tison* requirements overlapping. For instance, in some felonies one could properly conclude that any major participant automatically exhibits reckless indifference to human life. Therefore, being a major participant could often provide significant support for a finding of reckless indifference (Kling, 1988). It appears that this is precisely what has happened in William Van Poyck’s case.

About eight years later, the Florida Supreme Court ruled the other way in *Benedith v. State* (1998). Arturo Benedith was sentenced to death for allegedly robbing and killing a man during a transaction in which the victim was selling his vehicle. On appeal, the Court found that even though there was sufficient evidence that Benedith robbed and murdered the victim, his death sentence was disproportionate because there was no proof of his mental state beyond a reasonable doubt nor that he actually killed the victim. The Court ruled:

Mere participation in a robbery that resulted in murder was not enough culpability to warrant the death penalty even if the defendant anticipated that lethal force might be used because the possibility of bloodshed is inherent during the commission of any violent felony and this possibility is generally foreseeable and foreseen.

(*Benedith v. State*, 1998)

Applying the *Tison* test in Arturo Benedith's case yielded him a reversal of his death sentence, which is in sharp contrast to what the Court held in 1990 in *Van Poyck v. State*. The Court explained, however, that the death penalty might be a proportional punishment if the evidence shows that the defendant was a *major participant in the crime* and that he *acted with reckless indifference to the value of human life*. What makes Benedith's case so different? How does the Court distinguish levels of reckless indifference?

The anomalous result in the *Van Poyck* case is that the Florida Supreme Court upheld a death sentence for a non-triggerman convicted of a non-premeditated murder (Van Poyck).

In contrast, the Court has vacated the death sentences of numerous felony-murder defendants, based upon *Tison*, even when the defendant was the actual killer.<sup>43</sup> In light of these cases, it appears even more inconsistent and, arguably egregious, in affirming Van Poyck's death sentence. In addition, the Florida Supreme Court has repeatedly reduced the death sentences of defendants convicted of *premeditated* first-degree murder, including multiple murders, on the grounds of disproportionality.<sup>44</sup> Therefore, despite the Florida Supreme Court's oft-repeated admonishment that “. . . in Florida, we have repeatedly stated that the ultimate punishment of death is reserved for the most aggravated and indefensible of crimes committed by the most culpable of offenders”<sup>45</sup>, Van Poyck, a man who has killed nobody, remains on Florida's death row due to the convergence of the felony-murder rule with the law of principals. Specifically, all accomplices are equally responsible under the law for all criminal acts that take place during the commission of a crime.

---

<sup>43</sup> See, e.g., *Terry v. State* (Fla. 1996), where the defendant was the triggerman in a felony murder and the death sentence was reduced to life imprisonment and, similarly, *Jackson v. State* (Fla. 1991) where the defendant was the triggerman in a robbery and resulting murder where the death sentence was reduced to life where there was insufficient evidence to establish that Jackson's state of mind had risen to such a level of reckless indifference as to warrant a death sentence for felony murder.

<sup>44</sup> See, e.g., *Fitzpatrick v. State* (Fla. 1988) where defendant's sentence was reduced to life imprisonment even though he shot and killed a police officer while holding several people hostage, and despite the existence of five aggravating factors.

<sup>45</sup> *Brennan v. State* (Fla. 1999). See also *DeAngelo v. State* (Fla. 1993) “This Court has repeatedly noted that the death penalty is reserved for the most aggravated and unmitigated of crimes” and *Larkins v. State* (Fla. 1999) “As we have stated time and again, death is a unique punishment. Accordingly, the death penalty must be limited to the most aggravated and least mitigated of first-degree murders.”

## THE COURTS IN ACTION

After surveying the nation to ascertain the status of the felony-murder rule, it seemed appropriate to take a look at how the rule is currently being applied. Below are several examples of felony murder situations from various jurisdictions in the United States.

### California

In a recent, tenuous case out of California, three defendants committed burglary and robbery that resulted in the death of a homeowner. Apparently, the three acquaintances went to one of the defendant's residence with the intent to commit the underlying crimes. After tying the homeowner up and burglarizing the house, the two boys left with the goods. The victim, (one of the defendant's stepmother) subsequently, died of asphyxiation. A jury convicted the boys under California's felony-murder rule and they were sentenced to 25 years to life in prison. On appeal, the boys alleged that their friend smothered her stepmother for her own personal reasons after they left and that there was no connection between the felony and the death (Baxter, 2004). The California Supreme Court ruled that as long as the killing *bore some relation* to the robbery the boys committed, other than just occurring temporally, the sentence could stand. The justices concluded that there was substantial evidence to determine a logical nexus in that the killing took place to eliminate the only witness to the crime. However, it is noteworthy that the Court made it a point to emphasize that the felony-murder rule is not so broad that it can be used to convict a defendant when the crime has no relation to the killing whatsoever. There must be a clear, logical connection between the killing and the felony; however, no proof is required that the killing was in furtherance of the underlying felony. This, the Court reasoned, is the check on

abuse of the rule (Baxter, 2004). Essentially, the felony-murder rule applies when a killing is committed in the perpetration of a felony as long as the killing and the felony are considered a continuous transaction.

### Colorado

In *People v. Auman*, (2002), the Colorado Supreme Court explained that an individual's liability for felony murder is not terminated upon a defendant's arrest. There was question about the phrase "immediate flight therefrom" due to *Auman* being handcuffed in the backseat of a police car when her accomplice shot and killed a Denver police officer. The Court stated that in the statute the phrase is set off by commas and is not restricted to a defendant's own immediate flight.<sup>46</sup> The jury may look to the totality of the circumstances to determine exactly when felony murder liability terminates. Furthermore, a killing committed shortly after a defendant's arrest may be a natural and probable consequence of the defendant's actions.

Colorado has one of the toughest felony murder statutes in the country. The courts there have construed the felony-murder rule to apply to circumstances when a person is not present when the killing takes place, but is present during the commission of the underlying felony. As stated earlier, the state of Colorado also only allows for first-degree felony murder; lesser degrees are not provided.

---

<sup>46</sup> Refer to Appendix C for a breakdown of the states and how they apply circumstances for felony murder.

## Illinois

In a 2001 case, the Illinois Supreme Court reestablished how the felony-murder rule should be applied. The Court, in *People v. Morgan*, reasoned that a 14-year old defendant could not be charged with felony murder based upon aggravated battery and aggravated discharge of a firearm. The Appellate Court stated, and the Illinois Supreme Court subsequently agreed, that to allow such a conviction would eliminate second-degree murder and the requirement that the state prove the requisite intentional or purposeful killing in most murder cases (Tuite, 2003b). This case contradicted the Illinois Supreme Court's ruling back in 1975 in *People v. Viser*. In *Viser*, the Court upheld a felony-murder conviction with aggravated battery as the underlying felony where the victim died from the battery. The Court was recently faced with making a decision when *People v. Pelt* (2003) was challenged. *Pelt* was found guilty of felony murder for shaking his infant son and throwing the baby across the room killing him; the underlying felony being aggravated battery.

Because the Court sided with the *Morgan* case, now the *Morgan* rule, the defendant (Pelt) was re-sentenced for the aggravated battery charge because that was the only charge left. The Illinois Supreme Court reiterated that allowing felony murder charges when the underlying felony is what caused the death would essentially "eliminate the need for the state to prove an intentional or knowing killing . . ." (Tuite, 2003b). Instead of seeking a first-degree felony murder conviction, it seems more plausible to charge the defendant with second-degree murder or manslaughter.

The Illinois Supreme Court affirmed the Appellate Court's reversal of a felony-murder conviction that included the felony aggravated possession of a stolen vehicle. In this case (*People v. Belk*, 2003), a 16-year old had stolen a van and was in high pursuit from the

police driving over 100 mph. The teen and his accomplice ended up smashing into a car at an intersection killing two people. In deciding *Belk*, the Court made a sharp distinction with previous cases in rulings where defendants knew their codefendants were armed at the time of the felony and, therefore, could infer that force would be used (Tuite, 2003a). The Illinois Supreme Court clearly does not consider these circumstances as qualifying under the state's first-degree felony murder statute. Writing for the Chicago Daily Law Bulletin, Tuite urges law practitioners in both prosecution and defense camps to consider the *Belk* Court's reasoning and apply it to other cases.

#### Maryland

The Court of Appeals in a Maryland case reversed a felony-murder conviction and explained what was unacceptable in that state. The lower court sentenced Jeffrey Allen to felony murder on the premise of a robbery that took place after the victim was killed. Allen, who was a father of three and engaged to be married, met a gay man, Butler, on "the Stroll" in Washington, D.C. Allen went to Butler's house, they had sex, and he spent the night. After waking up in the morning (being without a car and dependent upon Butler for transportation), Allen was ready to go home. After Butler balked at his request, Allen indicated that he was going to take Butler's car and drive himself home. A scuffle ensued in which Allen took a knife and stabbed Butler to death. After the killing, Allen took the car and ended up running it into a ditch; calling police shortly afterwards. Allen was convicted of, among several other charges, felony murder based upon the robbery of Butler's car. The Appeals Court ruled that the judge incorrectly erred in instructing the jury "the requisite connection between use of force and the formulation of intent to rob is satisfied if they are

part and parcel of the same occurrence which involved the death.” The Court went on to explain “an afterthought [in committing] robbery cannot serve as the basis for a felony murder where that robbery is the predicate felony” (Geier, 2004). It appears that Maryland has also set limits on how the felony-murder rule will be applied in their state.

### North Carolina

Recently, there has been heated argument about what constitutes a proportionate sentence when applying the felony-murder rule in North Carolina. A concerned citizen was so appalled by the life sentence a young girl received when she was convicted of first-degree felony murder, a group was formed called “North Carolinians for Felony Murder Rule Change.” The facts of the case state that the defendant, Janet Danahey, was angry with her boyfriend and started a blazing fire outside of his apartment building by setting a box of Christmas decorations on fire. Tragically, the fire spread killing four young adults; all affiliated with the University of North Carolina where Danahey herself is a graduate (Whitmire, 2003). This recent North Carolina case has generated a great deal of interest and concern from members of the state’s legislature. Even though Danahey was not given a death sentence, although she was threatened with it and made a deal by pleading guilty to life in prison, apparently the case instilled enough fear with the possibility of such a sentence when a person does not intend to kill anyone.

As a response, there are two bills that have been introduced in both the North Carolina Senate and the House of Representatives. One version of the bill would repeal the felony-murder rule altogether, while the other bill would remove the death penalty from the statute (Swofford, 2003). In Danahey’s case, however, when her lawyers made a deal with



the prosecution they gave up any right to appeal her life sentence, so even if the version of the North Carolina bill that passes repeals the felony-murder rule unless it is made retroactive Danahey does not have much hope.

### Washington

The legislature in Washington recently informed the state's high court that they certainly did intend to include aggravated assault as one of the underlying felonies, which increases a charge to felony murder if an individual is killed during the course of such crime. The Washington Supreme Court's belief is that an aggravated assault that results in a murder would typically be tried as second-degree murder or manslaughter and not felony murder. It appears that one of the main reasons the legislature is objecting to the ruling of the Court is because it could potentially affect approximately 300 inmates currently convicted of felony murder with an underlying felony of aggravated assault (Cook, 2003). Instead of contemplating the aftermath of such a decision, it would seem more appropriate to consider the issue on its merits rather than how many inmates could possibly be released from prison.

## WHY DOES SOCIETY PUNISH PEOPLE?

A few ideas come to mind when one thinks about why the criminal justice system, and ultimately society, punishes people. Probably the most common reason, and the concept people understand the most, is retribution. In general, society punishes people who deserve to be punished—those people who commit dangerous crime and break the law. Just deserts is a difficult theory to abandon. After all, why should the majority of society obey the laws and those who commit crime pay no consequence? Another reason society punishes offenders is incapacitation—to keep dangerous people away from the rest of society. Additionally, utilitarians believe that punishment is warranted only if it serves some greater purpose that is for the betterment of society as a whole.

When analyzing retribution, a distinct division exists between culpability and wrongdoing—*mens rea* and *actus reus*, respectively. Culpability is a necessary condition of criminal liability and it must coincide with the wrongdoing. In conduct that makes the world worse, the punishment that retribution relies upon must be a direct relation to the blameworthiness of the offender (Simons, 1997). Consider the Auman case out of Colorado. Should Lisl Auman be serving a life sentence for felony murder if she did not intend to kill the police officer? The fact that Auman was sitting in the back of a police car handcuffed is of primary consideration when answering this question. Does society believe that severe punishment is absolutely necessary under such circumstances?

Incapacitation is also a simple construct most people understand. The courts incarcerate those offenders who commit crimes and who are deemed to be a future danger to society. If bad people are segregated from the good perhaps the nation will be a safer

place. It is the opinion of this research that when people are born, they are hedonistic individuals. For instance, individuals inherently seek pleasure and avoid pain at all cost. Conversely, people can learn how to participate in evil acts, which makes it erroneously appear that they are inherently evil. Participating in a dangerous felony does not necessarily indicate that an individual has a propensity to commit violent acts, although this conclusion would seem a likely presumption. As an example, Myers's (1997) found that defendants in cases not subject to conviction under the felony-murder rule were more likely to have a prior record of serious felony convictions. In general, socialization through role models and institutions determines the type of personality (although some traits, arguably, are biological) a person will have, and subsequently, the type of behavior one will engage in throughout certain stages of life. A person must be socialized and taught how to refrain from acting in his own self-interest.

Is the crime that Lisl Auman was sentenced to life for something that she is going to do again? Is the unforeseeable killing of a police officer irredeemable? Auman was just recently granted a new trial. One may think that the reason is due to societal values and human dignity, but that is not the case. Auman will receive a new trial—and be subject to another mandatory life sentence—on a faulty jury instruction (Rivers, 2005).

Societal viewpoints change over time, and the courts eventually shift in their opinions and decisions to keep up with those changes accordingly. In *Trop v. Dulles* (1958), the U.S. Supreme Court ruled “the Eighth Amendment, prohibiting cruel and unusual punishment, draws its meaning from the ‘evolving standards of decency’ that mark the progress of a maturing society.” The high court has recently relied on such standard when deciding against executing the mentally retarded (*Atkins v. Virginia*, 2002) and lately in

March, 2005 (Associated Press) in ruling that the death penalty was unconstitutional for juveniles. In 1989, the Court ruled the other way in making its decision about juveniles and the ultimate penalty. What has changed? Clearly, societal viewpoints and the U.S. Supreme Court (due to the vote of Justice Kennedy) have changed the type of person who is ineligible to receive the ultimate punishment.

The felony murder theory, however, is a complex legal doctrine and a challenge for the majority of society to understand. Unfortunately, it may be difficult for the pendulum to swing the other way on this issue. How can society make a decision about an issue in which they are uninformed and uneducated about?

Retributivists argue that society must give offenders what they deserve, and that in itself harming them is good. Utilitarians deny that harming offenders is good in itself, but contend that the good that results from harming them (punishment) is positive in the form of crime prevention, mainly deterrence, and that this good outweighs the harm done to the defendant (Golash, 2005). In the purest sense of utility, punishment must never outweigh the benefit of the greater good and, in fact, it must better society in some way—a utility or be of some use.

The concept of felony murder is an artificial concept in the strictest sense, arguably, appealing more to emotion than to logic. Understandably, the appeal is to the sentiment that a criminal should be punished for a death that occurred during the commission of a crime he committed even if the death is unintentional, accidental, or committed by another person. After all, but for the commission of the crime the death would not have occurred. There is not much debate whether a person should be punished for such a crime, and there is little question that a defendant should be punished more harshly than for the underlying felony

alone. The severity of the punishment given under such circumstances is the unanswered question.

## CONCLUSIONS AND RECOMMENDATIONS

In reviewing and analyzing many criminal statutes for first-degree murder and first-degree felony murder, it is difficult to unite the two disparate crimes into essentially one provision for murder. For instance, in all first-degree murder statutes there is some form of culpability language, which states that an individual must kill “willfully” with “purpose” and “knowledge” or that one must “intentionally” kill with a “deliberate” and/or “premeditated” design. In the next portion of the statute, there is the phrase, “or in the perpetration or attempt to perpetrate” along with a list of qualifying felonies that apply to first-degree felony murder if a killing takes place. To coalesce felony murder with first-degree, premeditated murder seems incongruent with the basic premise of the criminal law. Specifically, attaching the same level of blameworthiness to each individual offender who commits each crime. It is the opinion of this research that the theory for allowing felony murder to qualify for first-degree premeditated murder is tenuous at best.

Furthermore, it is difficult to understand how the felony-murder rule can be viewed as such a dichotomous issue among legal professionals. Of course prosecutors favor the rule because it absolves them of having to prove specific intent for the murder in which they are seeking conviction.

Statutes and case law support the research question that the felony-murder rule is available at the highest degree in most jurisdictions. Furthermore, the research question that a death sentence is available for felony murder in a large majority of jurisdictions that utilize the death penalty was also verified. The non-triggerman question was partially supported in

that an accomplice can be convicted of felony murder and eligible for a death sentence under certain culpability situations and circumstances deemed by the courts.

Recommendations for future research include finding additional support that felony murder convictions are increasing in the nation compared to other types of murder convictions. Although Myers's study (1997) confirmed this to some degree, her research was limited to a small number of cases specific to Alameda County, California. Future research should seek to further support this hypothesis, as it is beyond the scope of this work.

In addition, analyzing sentencing data for felony murder is also suggested to determine whether sentences under the theory of felony murder are excessive compared to other types of killings. Does a person convicted of the crime of felony murder deserve the same punishment as a person convicted of unadulterated first-degree murder? These are some of the questions this research leaves unanswered.

**APPENDIX A**  
**IDENTIFICATION OF FELONY MURDER**



<b>Jurisdiction</b>	<b>Identification of Felony Murder</b>	<b>Statutes That Identify Felony Murder</b>
Alabama	Murder	Alabama Criminal Code § 13A-6-2 (a) (3)
Alaska	Second Degree Murder	Alaska Statutes § 11.41.110 (a) (3)
Arizona	First Degree Murder	Arizona Revised Statutes § 13-1105, A, 2
Arkansas <sup>(1)</sup>	Capital Murder/First Degree Murder	Arkansas Crim Code §§ 5-10-101 (a) (1) and 5-10-102 (a) (1)
California	First/Second Degree Murder	California Penal Code §189
Colorado	First Degree Murder	Colorado Criminal Code § 18-3-102 (b)
Connecticut	Felony Murder	Connecticut Penal Code Chap 952 § 53a-54c
Delaware	First <sup>(2)</sup> /Second Degree Murder	Delaware Crim Code Title 11 §§ 636 (a) (2) and 635 (2)
Dist of Columbia	First Degree Murder	D.C. Code Title 22 § 22-2101 [formerly 22-2401]
Florida	First/Second/Third Degree Murder	FL Statutes §§ 782.04 (1) (a), 2; 782.04 (3); and 782.04 (4)
Georgia	Murder/Involuntary Manslaughter	Criminal Code of Georgia §§ 16-5-1 and 16-5-3
Hawaii	Abolished	Hawaii Revised Statutes § 707-701
Idaho	First Degree Murder	Idaho Statutes Chap 40 § 18-4003 (d)
Illinois	First Degree Murder	Illinois Compiled Statutes Chap 720 § 5/9-1 (a) (3)
Indiana	Murder/Involuntary Manslaughter	Indiana Code §§ 35-42-1-1 (2), and IC 35-42-1-4
Iowa	First Degree Murder/Involuntary Manslaughter	Iowa Code §§ 707.2, 2 and 707.5
Kansas	First Degree Murder	KSA Article 34 § 21-3401 (b)
Kentucky	Abolished	See Kentucky Penal Code § 507.020
Louisiana	First <sup>(3)</sup> /Second Degree Murder/Manslaughter	LA RS §§ 14:30 A (1), 14:30.1 A (2), and 14:31 A (2) (a)
Maine	Felony Murder	Main Criminal Code Title 17-A Chap 9 §202, 1

<b>Jurisdiction</b>	<b>Identification of Felony Murder</b>	<b>Statutes That Identify Felony Murder</b>
Maryland	First Degree Murder	Maryland Criminal Law § 2-201 (a) (4)
Massachusetts	First Degree Murder	Gen Laws of Massachusetts § 265 Sec 1
Michigan	Abolished <sup>(4)</sup>	<i>See</i> Michigan Penal Code § 750.316 (1) (b)
Minnesota	First <sup>(5)</sup> /Second <sup>(6)</sup> /Third Degree Murder	Minn Crim Code §§ 609.185 (a) (3), 609.19 and 609.195 (a)
Mississippi	Capital Murder, Murder, and Manslaughter	Miss Code §§ 97-3-19 (2) (e-f), 97-3-19 (1) (c), and 97-3-27
Missouri	Second Degree Murder	Missouri Revised Statutes § 565.021(2)
Montana	Deliberate Homicide	Montana Criminal Code § 45-5-102 (1) (b)
Nebraska	First Degree Murder/Manslaughter	Nebraska Criminal Code §§ 28-303 (2) and 28-305
Nevada	First Degree Murder/Involuntary Manslaughter	Nevada Revised Statutes §§ 200.030, 1 (b) and 200.070
New Hampshire	First <sup>(7)</sup> /Second Degree Murder	NH Criminal Code §§ 630:1-a (b) (1-3) and 630:1-b (b)
New Jersey	Murder	NJ Code of Criminal Justice § 2C:11-3 (3)
New Mexico	First Degree Murder/Involuntary Manslaughter	NM Statutes Annotated 1978 §§ 30-2-1, A (2) and 30-2-3, B
New York	First/Second Degree Murder	NY Penal Law §§ 125.27, 1 (a) (vii) and 125.25, 3
North Carolina	First/Second Degree Murder	NC General Statutes Article 6 § 14-17
North Dakota	Murder	ND Criminal Code § 12.1-16-01, 1, c
Ohio	Aggravated Murder <sup>(8)</sup> /Murder/Involuntary Manslaughter	Ohio Revised Code §§ 2903.01 (B), 2903.02 (C), and 2903.04 (B)
Oklahoma	First/Second Degree Murder	Penal Code of Oklahoma §§ 21-701.7.B and 21-701.8.2
Oregon	Murder	Oregon Revised Statutes § 163.115 (b)
Pennsylvania	Second Degree Murder	Penn Crimes Code § 2502 (b)
Rhode Island	First Degree Murder	Rhode Island Criminal Offenses § 11-23-1

<b>Jurisdiction</b>	<b>Identification of Felony Murder</b>	<b>Statutes That Identify Felony Murder</b>
South Carolina <sup>(9)</sup>	Murder	SC Code of Laws Chap 3 Article 1 § 16-3-5
South Dakota	First/Second Degree Murder	SD Codified Laws §§ 22-16-4 and 22-16-9
Tennessee	First/Second Degree Murder	Tenn Code §§ 39-13-302 (a) (2) and 39-13-210 (a) (2)
Texas	Murder	Texas Penal Code § 19.02 (b) (3)
Utah	Aggravated Murder <sup>(10)</sup> /Murder	Utah Criminal Code §§ 76-5-202 (1) (d) and 76-5-203 (2) (d) (ii)
Vermont	First Degree Murder	Vermont Statutes Annotated § 2301
Virginia	Capital <sup>(11)</sup> /First/Second Degree Murder	Code of Virginia §§ 18.2-31, 18.2-32, and 18.2-33
Washington	First/Second Degree Murder	RCW 9A §§ 32.030 (1) (c) and 32.050 (1) (b)
West Virginia	First Degree Murder	West Virginia Code § 61-2-1
Wisconsin	Felony Murder	Wisconsin Criminal Code § 940.03
Wyoming	First Degree Murder	Wyoming Criminal Code of 1982 § 6-2-101 (a)
United States	First Degree Murder	US Code Title 18 Chap 51 § 1111 (a)

*(1) Felony must be committed under circumstances manifesting extreme indifference to human life for both capital and first-degree murder.*

*(2) Must recklessly cause death for first-degree felony murder.*

*(3) Requires specific intent for first-degree felony murder.*

*(4) Judicially abrogated felony murder rule in 1980, but the statute still remains law.*

*(5) Requires that the defendant cause the death with intent to effect the death of another to qualify for first-degree felony murder.*

*(6) Separates second-degree murder into intentional and unintentional murder.*

*(7) Requires a knowing mental state in order to be convicted of first-degree murder.*

*(8) Requires that the defendant act purposely in killing during the felony to qualify for aggravated murder.*

*(9) Provides for underlying felonies in listing of aggravators.*

*(10) Requires an intentional and knowing mental state while engaged in a felony to be death eligible.*

*(11) Requires a willful, deliberate, and premeditated killing while in the commission of a felony to qualify for capital murder.*

**APPENDIX B**  
**CRITERIA FOR FELONY MURDER**

Jurisdiction	Arson	Burglary	Escape	Kidnapping	Rape	Forcible Rape	Sexual Assault	Other Sexual Offenses	Sexual Offenses with a Child	Robbery	Home-Invasion Robbery	Aircraft/Vehicle Piracy	Aggravated Assault	Bomb or Destructive Device (throwing/placing/discharging)	Child Abuse/Cruelty to Children	Carjacking	Controlled Substance Felony	Crime Punishable by Death or Life	Drive-by Shooting/Into Building or Vehicle	Drug Trafficking	Elder/Disabled Adult Abuse	Felony (any type)	Felony (forcible/with threat or dangerous weapon)	Felony Other Than Second-Degree Murder/Manslaughter	Larceny or Theft	Mayhem	Murder of Another Human Being	Resisting Arrest	Sodomy	Terrorism	Treason	Total Core Felonies by State
Alabama	x	x	x	x	x					x																						7
Alaska*	x	x	x	x			x		x	x							x															8
Arizona	x	x	x	x			x		x	x					x		x			x										x		11
Arkansas	x	x	x	x	x					x		x					x													x		9
California	x	x		x	x		x		x	x						x			x							x				x		12
Colorado	x	x	x	x			x		x	x																						7
Connecticut		x		x			x			x																						4
Delaware			x											x								x						x				4
D.C.	x			x			x		x	x	x				x		x									x						9
Florida	x	x	x	x				x		x	x	x		x	x	x	x			x	x					x	x			x		17
Georgia																						x										1
Idaho	x	x	x	x	x					x					x											x				x		9
Illinois																								x								1
Indiana	x	x		x	x				x	x						x	x															8
Iowa			x												x								x									3
Kansas	x	x		x	x					x					x		x		x							x				x	x	11
Louisiana	x	x	x	x	x	x				x									x											x		9
Maine	x	x	x	x			x			x																						6
Maryland	x	x	x	x	x		x		x	x						x										x				x		11

<b>Jurisdiction</b>	<b>Arson</b>	<b>Burglary</b>	<b>Escape</b>	<b>Kidnapping</b>	<b>Rape</b>	<b>Forcible Rape</b>	<b>Sexual Assault</b>	<b>Other Sexual Offenses</b>	<b>Sexual Offenses with a Child</b>	<b>Robbery</b>	<b>Home-Invasion Robbery</b>	<b>Aircraft/Vehicle Piracy</b>	<b>Aggravated Assault</b>	<b>Bomb or Destructive Device (throwing/placing/discharging)</b>	<b>Child Abuse/Cruelty to Children</b>	<b>Carjacking</b>	<b>Controlled Substance Felony</b>	<b>Crime Punishable by Death or Life</b>	<b>Drive-by Shooting/Into Building or Vehicle</b>	<b>Drug Trafficking</b>	<b>Elder/Disabled Adult Abuse</b>	<b>Felony (any type)</b>	<b>Felony (forcible/with threat or dangerous weapon)</b>	<b>Felony Other Than Second-Degree Murder/Manslaughter</b>	<b>Larceny or Theft</b>	<b>Mayhem</b>	<b>Murder of Another Human Being</b>	<b>Resisting Arrest</b>	<b>Sodomy</b>	<b>Terrorism</b>	<b>Treason</b>	<b>Total Core Felonies by State</b>
Massachusetts																	x													x	<b>2</b>	
Minnesota	x	x	x	x				x		x					x		x		x											x	<b>10</b>	
Mississippi	x	x		x	x			x	x	x				x	x																<b>9</b>	
Missouri*																						x									<b>1</b>	
Montana	x	x	x	x	x					x			x										x								<b>8</b>	
Nebraska	x	x		x			x			x		x																			<b>6</b>	
Nevada	x	x	x	x			x		x	x	x				x															x	<b>10</b>	
New Hampshire	x	x					x			x																					<b>4</b>	
New Jersey	x	x	x	x			x			x						x														x	<b>8</b>	
New Mexico																						x									<b>1</b>	
New York	x	x	x	x	x			x		x																					<b>7</b>	
North Carolina	x	x		x	x		x			x													x								<b>7</b>	
North Dakota	x	x	x	x				x	x	x					x															x	<b>9</b>	
Ohio	x	x	x	x	x					x																				x	<b>7</b>	
Oklahoma	x	x	x	x		x				x					x		x		x	x							x				<b>11</b>	
Oregon	x	x	x	x				x		x				x	x																<b>8</b>	
Pennsylvania*	x	x		x	x	x				x																					<b>6</b>	
Rhode Island	x	x		x	x		x		x	x							x											x			<b>9</b>	
South Carolina		x		x			x			x											x				x						<b>6</b>	

Jurisdiction	Arson	Burglary	Escape	Kidnapping	Rape	Forcible Rape	Sexual Assault	Other Sexual Offenses	Sexual Offenses with a Child	Robbery	Home-Invasion Robbery	Aircraft/Vehicle Piracy	Aggravated Assault	Bomb or Destructive Device (throwing/placing/discharging)	Child Abuse/Cruelty to Children	Carjacking	Controlled Substance Felony	Crime Punishable by Death or Life	Drive-by Shooting/Into Building or Vehicle	Drug Trafficking	Elder/Disabled Adult Abuse	Felony (any type)	Felony (forcible/with threat or dangerous weapon)	Felony Other Than Second-Degree Murder/Manslaughter	Larceny or Theft	Mayhem	Murder of Another Human Being	Resisting Arrest	Sodomy	Terrorism	Treason	Total Core Felonies by State
South Dakota	x	x		x	x					x				x																		6
Tennessee	x	x		x	x					x		x		x	x										x					x		10
Texas																							x	x								2
Utah	x	x	x	x	x		x	x	x	x					x		x												x			12
Vermont	x	x					x			x			x																			5
Virginia	x	x			x			x		x																			x			6
Washington	x	x		x	x					x																						5
West Virginia	x	x	x	x			x			x							x															7
Wisconsin	x	x					x									x							x									5
Wyoming	x	x	x	x			x			x					x													x				8
United States	x	x	x	x				x		x																	x				x	8
<b>Felony Total</b>	<b>39</b>	<b>40</b>	<b>25</b>	<b>37</b>	<b>20</b>	<b>3</b>	<b>20</b>	<b>9</b>	<b>12</b>	<b>40</b>	<b>3</b>	<b>4</b>	<b>2</b>	<b>6</b>	<b>15</b>	<b>6</b>	<b>12</b>	<b>1</b>	<b>5</b>	<b>4</b>	<b>2</b>	<b>4</b>	<b>5</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>3</b>	<b>4</b>	<b>6</b>	<b>10</b>	<b>4</b>	<b>N/A</b>
<b>Percentage</b>	<b>80%</b>	<b>82%</b>	<b>51%</b>	<b>76%</b>	<b>41%</b>	<b>6%</b>	<b>41%</b>	<b>18%</b>	<b>24%</b>	<b>82%</b>	<b>6%</b>	<b>8%</b>	<b>4%</b>	<b>12%</b>	<b>31%</b>	<b>12%</b>	<b>24%</b>	<b>2%</b>	<b>10%</b>	<b>8%</b>	<b>4%</b>	<b>8%</b>	<b>10%</b>	<b>4%</b>	<b>6%</b>	<b>8%</b>	<b>6%</b>	<b>8%</b>	<b>12%</b>	<b>20%</b>	<b>8%</b>	

\*Second-degree felony murder only

The underlying felonies listed are derived from each jurisdiction's highest degree of felony murder.

**APPENDIX C**  
**CULPABILITY SITUATIONS AND CIRCUMSTANCES**



<b>Culpability Situations and Circumstances</b>	<b>Jurisdiction</b>	<b>Highest Degree of Felony Murder</b>
<u>Circumstances manifesting extreme indifference to human life and in the course of and furtherance or immediate flight</u>	Arkansas	Capital Murder
<u><i>Recklessly</i> cause death while engaged in the commission of or attempt to commit or flight after committing</u>	Delaware	First Degree Murder
<u><i>Specific intent</i> to kill or inflict great bodily harm while engaged in the perpetration of or attempt to perpetrate</u>	Louisiana	First Degree Murder
<u>Causes the death of a human being <i>with intent to effect the death</i> while committing or attempting to commit</u>	Minnesota	First Degree Murder
<u><i>Knowingly</i> causes the death of another while engaged in the commission of or while attempting to commit</u>	New Hampshire	First Degree Murder
<u><i>Purposely</i> cause death while committing or attempting to commit or while fleeing immediately after</u>	Ohio	Aggravated Murder
<u><i>Intentionally or knowingly</i> causes death while engaged in commission or attempt to commit, or in immediate flight</u>	Utah	Aggravated Murder
<u><i>Willful, deliberate, and premeditated</i> killing during the commission of or attempt to commit</u>	Virginia	First Degree Murder
<u>While committing or attempting to commit</u>	Illinois Indiana Massachusetts Montana New Mexico Oklahoma West Virginia Wisconsin	First Degree Murder Murder First Degree Murder Deliberate Homicide First Degree Murder First Degree Murder First Degree Murder First Degree Murder Felony Murder
<u>Commits or attempts to commit; in the course of and in furtherance of or in immediate flight therefrom</u>	Alabama Alaska Arizona Colorado Connecticut Kansas Maine Missouri North Dakota Oregon Texas Washington	Murder Second Degree Murder First Degree Murder First Degree Murder Felony Murder First Degree Murder Felony Murder Second Degree Murder Murder Murder Murder First Degree Murder

<b>Culpability Situations and Circumstances</b>	<b>Jurisdiction</b>	<b>Highest Degree of Felony Murder</b>
Engaged in commission of or attempt to commit or flight after committing or attempting to commit	New Jersey	Murder
Committing or attempting to commit or in furtherance of	New York	First Degree Murder
In perpetration of or attempt to perpetrate	California Dist of Columbia Florida Idaho Maryland Nebraska Nevada North Carolina Rhode Island South Dakota Tennessee United States Vermont Wyoming	Murder First Degree Murder First Degree Murder First Degree Murder First Degree Murder First Degree Murder First Degree Murder First Degree Murder First Degree Murder First Degree Murder First Degree Murder First Degree Murder First Degree Murder First Degree Murder
Murder aggravated to felony murder	South Carolina	Murder
Commits the offense	Georgia	Murder
While participating/engaged in the commission of	Iowa Mississippi Pennsylvania	First Degree Murder Capital Murder Second Degree Murder

*The delineated situations and circumstances are associated with the highest degree of felony murder in each jurisdiction.*

## LIST OF REFERENCES

- Adlerstein, J. C. (1976). *Felony-murder in the new criminal codes*. American Journal of Criminal Law. Vol. 4, Iss. 3; p. 249-274.
- Arizona Department of Corrections. Retrieved May 5, 2005, from <http://www.adc.state.az.us>
- Associated Press (2005, March 1). *High court: Juvenile death penalty unconstitutional*.
- Barkan, S. E., & Cohn, S. F. (2005 February). *On Reducing White Support for the Death Penalty: A Pessimistic Appraisal*. Criminology & Public Policy Columbus. Vol. 4, Iss. 1; p. 39-44.
- Baxter, J. (2004, June 25). Criminal Practice; Criminal Acts. *California Supreme Court Service*, Sec. Summaries of New Opinions.
- Brown, K. (1997, Summer). *A case of harmless error review of Ake errors*. Journal of Criminal Law & Criminology Chicago. Vol. 87, Iss. 3; p. 786-811.
- Cook, R. (2003, February 6). House votes to strengthen felony murder, voyeurism laws. *The Associated Press State & Local Wire*, Sec. State and Regional.
- Durose, M. R. & Langan, P.A. (June 2003). *Felony Sentences in State Courts, 2000*. Bureau of Justice Statistics Bulletin; U.S. Department of Justice Office of Justice Programs.
- Finkel, N. J., & Duff, K. B. (1991). *Felony-murder and community sentiment; testing the Supreme Court's assertions*. Law and Criminal Behavior. Vol. 15, Iss. 4; p. 405-429.
- Fletcher, G. (1980). *Reflections on felony-murder*. Southwestern University Law Review. Vol. 12, Iss. 3; p. 413-492.
- Fortado, L. (2004, June 21). *A tale of murder, and who pays the price; Case triggers debate over felony murder rule* National Law Journal. Vol. 26; No. 42; p. 6.
- Geier, P. (2004, September 3). *Maryland Court of Special Appeals Reverses Felony Murder Conviction*. The Daily Record.
- George, C.J. (2004, August 20). Criminal Law and Procedure; Criminal Acts. *California Supreme Court Service*, Sec. Summaries of New Opinions.
- Gilbert, M. (1983). *A comparative review of states' recognition of reduced degrees of felony murder*. Washington and Lee Law Review. Vol. 40, Iss. 4; p. 1601-1618.

- Golash, D. (2005). *Crime of Punishment; Traditional incapacitation of criminals is neither utilitarian nor morally defensible*. *The American Lawyer*. Vol. 27.
- Kling, L. (1988) Constitutionalizing the Death Penalty for Accomplices to Felony Murder. *American Law Review*. Vol. 26; p. 463-490.
- Maestro, M. (1973). *Cesare Beccaria and the Origins of Penal Reform*. Philadelphia: Temple University Press.
- Myers, M. (1997). *Culpability and Consequences: A Study of Felony Murder*. Unpublished doctoral dissertation, University of California, Berkley.
- Myers, M. (1994). *Felony killings and prosecutions for murder: exploring the tension between culpability and consequences in the criminal law*. *Social & Legal Studies*. Vol. 3; p. 149-179.
- Peterson, R. D., & Bailey, W. C. (1991). *Felony Murder and Capital Punishment: An Examination of the Deterrence Question*. *Criminology*. Vol. 29, Iss. 3; p. 367-395.
- Richardson, J. (2004, Winter). *Reforming the Jury Override: Protecting Capital Defendant's Rights by Returning to the System's Original Purpose*. *Journal of Criminal Law & Criminology Chicago*. Vol. 94, Iss. 2; p. 455-479.
- Rivers, R. (2005, April 1). Felony murder law too inflexible. *The Denver Post*. Sec. Denver & The West; B-07.
- Simmons, K. (1997, Summer). *When is strict criminal liability just?* *Journal of Criminal Law & Criminology Chicago*. Vol. 87, Iss. 4; p. 1075-1137.
- Swofford, S. (2003, April 19). Measure Targets Murder Penalty; The Sentencing of UNCG Graduate Janet Danahey for a Fatal Fire Inspires a Bill to Change the Felony Murder Rule. *News & Record (Greensboro, NC)*, Sec. TRIAD/STATE; p. B1.
- Tuite, P. (2003, February 26). *Intent a Key Element in Felony Murder*. *Chicago Daily Law Bulletin*. p. 6.
- Tuite, P. (2003, December 24). *The Defining Moment of Felony Murder*. *Chicago Daily Law Bulletin*. p. 5.
- Whitmire, T. (2003, January 11). Danahey, Jones cases spur debate over N.C.'s felony murder law. *The Associated Press State & Local Wire (Charlotte, NC)*, Sec. State and Regional.

## Cases Cited

*Atkins v. Virginia*, 536 U.S. 304; 122 S. Ct. 2242; 153 L. Ed. 2d 335 (2002)  
*Benedith v. State*, 717 So.2d 472 (Fla. 1998)  
*Brennan v. State*, 754 So.2d 1, 10 (Fla. 1999)  
*Cabana v. Bullock*, 474 U.S. 376; 106 S.Ct. 689; 88 L.Ed.2d 704 (1986)  
*DeAngelo v. State*, 626 So.2d 440, 443 (Fla. 1993)  
*Eddings v. Oklahoma*, 455 U.S. 104; 102 S. Ct. 869; 71 L. Ed. 2d 1 (1982)  
*Enmund v. Florida*, 458 U.S. 782; 102 S.Ct. 3368; 73 L.Ed.2d 1140 (1982)  
*Fitzpatrick v. State*, 527 So.2d 809 (Fla. 1988)  
*Furman v. Georgia*, 408 U.S. 238; 92 S. Ct. 2726; 33 L. Ed. 2d 346 (1972)  
*Gregg v. Georgia*, 428 U.S. 153; 96 S. Ct. 2909; 49 L. Ed. 2d 859 (1976)  
*Jackson v. State*, 575 So.2d 181 (Fla. 1991)  
*Larkins v. State*, 739 So.2d 90, 93 (Fla. 1999)  
*Lockett v. Ohio*, 438 U.S. 586; 98 S. Ct. 2954; 57 L. Ed. 2d 973 (1978)  
*People v. Aaron*, 409 Mich. 672; 299 N.W.2d 304 (1980)  
*People v. Auman*, 67 P.3d 741 (Colo. App. 2002)  
*People v. Belk*, 203 Ill. 2d 187; 784 N.E.2d 825 (2003)  
*People v. Morgan*, 197 Ill.2d 404 (2001)  
*People v. Pelt*, 207 Ill. 2d 434; 800 N.E.2d 1193 (2003)  
*People v. Scheer*, 184 Colo. 15, 518 P.2d 833 (1974)  
*People v. Viser*, 62 Ill.2d 568 (1975)  
*Terry v. State*, 668 so.2d 954 (Fla. 1996)  
*Tison v. Arizona*, 107 S.Ct. 1676 (1987)  
*Trop v. Dulles*, 356 U.S. 86; 78 S. Ct. 590; 2 L. Ed. 2d 630 (1958)  
*Van Poyck v. State*, 564 So.2d 1066 (Fla. 1990)

## Statutes Cited

Alabama Criminal Code of 1975  
Alaska Statutes  
Arizona Revised Statutes  
Arkansas Criminal Code 1975  
California Penal Code  
Colorado Criminal Code  
Connecticut Penal Code  
Delaware Code  
District of Columbia Code  
Florida Statutes  
Criminal Code of Georgia  
Hawaii Revised Statutes  
Idaho Statutes  
Illinois Compiled Statutes  
Indiana Code

Iowa Code  
Kansas Statutes Annotated  
Kentucky Penal Code  
Louisiana Revised Statutes  
Main Criminal Code  
Maryland Criminal Law  
General Laws of Massachusetts  
Minnesota Criminal Code of 1963  
Mississippi Code of 1972  
Missouri Revised Statutes  
Montana Criminal Code of 1973  
Nebraska Criminal Code  
Nevada Revised Statutes  
New Hampshire Criminal Code  
New Jersey Code of Criminal Justice  
New Mexico Statutes Annotated 1978  
NY Penal Law  
North Carolina General Statutes  
North Dakota Criminal Code  
Ohio Revised Code  
Penal Code of Oklahoma  
Oregon Revised Statutes  
Pennsylvania Crimes Code  
Rhode Island  
South Carolina Code of Laws  
South Dakota Codified Laws  
Tennessee Code  
Texas Penal Code  
Utah Criminal Code  
Vermont Statutes Annotated  
Code of Virginia  
Revised Code of Washington  
West Virginia Code  
Wisconsin Criminal Code  
Wyoming Criminal Code of 1982  
United States Code  
Model Penal Code, American Legal Institute

The above statutes were cited from the *Legal Information Institute*. Retrieved January 3, 2005 through May 5, 2005 from [http://straylight.law.cornell.edu/topics/state\\_statutes2.html](http://straylight.law.cornell.edu/topics/state_statutes2.html)