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'Afterthought' crimes and the felony murder rule in Illinois

Last month, the Mississippi Supreme Court held that a defendant who decided to commit a robbery after killing his victim could be convicted of capital murder on the basis of a "felony-murder" theory. In other words, in order to convict the defendant of murder, the state didn't have to prove that he intended to kill his victim or even that he caused his victim's death as a result of a robbery attempt. Rather, the state only had to demonstrate that the robbery was committed as an "afterthought" to the killing. *Batiste v. State*, ___ So. 3d ___ (Miss., May 16, 2013).

If you think Mississippi's expansion of the much-criticized felony-murder doctrine seems bizarre, you should know that Illinois is among the small handful of states in which the courts have adopted the same perplexing rule.

Most lawyers will remember debating the merits of felony murder during their first-year criminal law class. The rule makes a defendant liable for murder if, during the commission of a felony, he causes someone's death. The prosecution doesn't have to prove that the defendant intended to kill his victim, or that he knew his victim would die, or even that he acted with indifference to the value of his victim's life. Under the traditional felony-murder rule, even a non-negligent accidental death that occurs during the commission of a felony can result in a murder conviction.

To the extent we can glean a purpose for the rule, it's to encourage bad actors to commit inherently dangerous crimes in a safer, less life-threatening manner — "to limit the violence that accompanies the commission of forcible felonies." *People v. Rosenthal*, 394 Ill. App. 3d 499, 503 (2009).

For obvious reasons, felony murder is the darling of the prosecutor's office, eliminating the need to prove to a jury that the defendant wanted or expected the victim to die. In contrast, most academics and jurists disclaim the rule, viewing it as an affront to the bedrock criminal law principle

that we apportion punishment to blameworthiness. It's one of the rare exceptions to the requirement that the state must prove up a mens rea (culpable mind) to go along with the actus reus (culpable act).

But the new rule in Mississippi brings incoherence to the state's felony-murder doctrine and should remind us that the same irrationality has been entrenched in Illinois' law for fully a quarter century.

The typical fact pattern in which "afterthought" felonies lead to murder liability involves opportunistic robberies. For example, in Illinois, defendants have been convicted of first-degree murder on a felony-murder theory where they decided after their victim's death to take jewelry, *People v. Flores*, 128 Ill. 2d 66, 97 (1989), a truck, *People v. Pitsonbarger*, 142 Ill. 2d 353, 366 (1990) and an automobile, *People v. Ward*, 154 Ill. 2d 272, 288 (1992). In another case, the defendant committed arson after his victim's death. *People v. Thomas*, 137 Ill. 2d 500, 512 (1990).

Actually, to be precise, each of these defendants unsuccessfully argued they could be convicted of first-degree murder only if the jury found that their victims were killed while they were actually "attempting or committing a forcible felony." 720 ILCS 5/9-1(a)(3).

In each of these cases, the Illinois Supreme Court held it was "of no significance" that the underlying felony did not commence prior to the fatal blows struck by the defendants, since "the precise timing of the offenses is not necessarily indicative of [the] defendant's intent." *People v. Richardson*, 123 Ill. 2d 322, 359 (1988).

Although a defendant who steals a wallet after his victim's death may have formed the intent to steal the wallet well before the victim's death, the Illinois courts have drawn conclusions from this premise that are logically insupportable. Juries should, of course, be instructed that it's permissible to find a defendant was in the course of committing a felony which led to the victim's death even if the consummation of the felony didn't occur until after the



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death. But that's not what the Illinois courts have required since *Richardson*.

Instead, juries are absolved altogether of responsibility for determining whether a death was in fact the result of the defendant's attempt or commission of a forcible felony. It's enough for first-degree murder liability if the killing and subsequent commission of the felony happened "essentially simultaneously." *Id.*

This is bad law and bad policy. In effect, the Illinois Supreme Court has rewritten the General Assembly's felony-murder statute by eliminating its causation requirement. And, sadly, this encroachment on legislative authority undermines the only plausible rationale for having a felony-murder rule in the first place — to deter persons who are committing forcible felonies from engaging in especially dangerous conduct.

There are other untoward knock-on effects too. A defendant who is indicted on a felony-murder theory cannot argue that his victim's death was an accident. In addition, he won't be allowed to contend that he killed in self-defense. Nor will he have the opportunity

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to offer a heat-of-passion defense that might mitigate his conviction from murder to manslaughter, since neither of these defenses is available when the state proceeds on a felony-murder theory.

In the *Batiste* case from Mississippi, for example, the defendant argued that he killed his roommate during a fight after his roommate jabbed him with a sword and called him a "bitch." *Batiste* claimed he left the apartment and didn't return for over an hour, at which point he decided to make off with his dead roommate's wallet. The prosecution argued that *Batiste* could be convicted on a felony-murder theory — meaning that the killing took place "in the course of" another felony — even if the idea of robbery occurred to him only after his roommate was dead.

The court agreed with the prosecution and *Batiste* was precluded from arguing to the jury that he killed in self-defense, or in the heat of passion, even though these were plausible characterizations of his state of mind during the events.

To be sure, the defendants in these homicide cases are not sympathetic characters and each might well merit a conviction for first-degree murder. But the state should be put to the proof of each element of the crime as directed by the legislature — whether by proving a requisite mens rea or that the killing actually took place in the course of a forcible felony, rather than just near in time to a forcible felony that may in fact have entirely been an afterthought on the part of the defendant.

The good news is that there have been no reported cases involving "afterthought" felony murders in the past decade in Illinois. Perhaps that's due in part to the demise of the death penalty in the state or perhaps it's because prosecutors have grown uncomfortable invoking the crazy doctrine. Hopefully, the lack of reported decisions does not reflect defense lawyers' acceptance of the rule, nor their despair that the Illinois Supreme Court will never revisit it.