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A New Approach to Felony Murder in Illinois

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A New Approach to Felony Murder in Illinois

JASON M. CIESLIK, J.D.*

In August of 2019, six teenagers drove to a rural area of Lake County, Illinois, in a stolen vehicle with the intention of burglarizing vehicles. Startled, the homeowner retrieved his gun, went out on the porch, and observed one of the teens approaching him, with what the homeowner determined to be a weapon. The homeowner fired his gun and killed one of the teens. The remaining five teens were charged with felony murder. At the time of this incident, Illinois applied the “proximate-cause theory” to felony murder.

In response, the General Assembly amended the felony-murder rule with the intent to create an “agency theory.” However, the current version does not make this clear. It is possible that the proximate-cause theory would still apply and remain the most logical application of the law. Regardless, rather than attempting to abolish the proximate-cause theory, public concerns could have been addressed through amended sentencing provisions.

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I. BACKGROUND: LAKE COUNTY FIVE

In the early morning hours of August 13, 2019, six teenagers drove in a stolen 2015 Lexus from Chicago to rural Lake County, Illinois,¹ with the intent of committing vehicle burglaries.² Of the six teenagers, one was eighteen years of age, three were seventeen years of age, one was sixteen years of age, and one was fourteen years of age.³ The teens drove up a long driveway around 1:25 a.m. towards a rural home.⁴ The homeowner was awakened when he observed headlights approaching his home.⁵ As the homeowner was about to go outside, he observed two individuals get out of the vehicle and begin to approach the home, with one of the individuals holding something in their hand.⁶ At this time, the homeowner armed himself with his legally owned gun.⁷ Out of fear for his and his wife's safety, he fired his gun, striking the fourteen-year-old occupant.⁸ The teens subsequently fled the scene and led the police on a high-speed chase.⁹ Once in police custody, the police found a hunting knife and a cell phone containing GPS coordinates of homes in the area.¹⁰ The fourteen-year-old was subsequently pronounced dead.¹¹

The Lake County State's Attorney's Office charged all five teens as adults with the crime of felony murder.¹² Under Illinois law, when a death occurs during the commission of a forcible felony (such as burglary in this case), the State's Attorney may charge the offenders with first-degree murder.¹³ Within a month, the felony-murder charges were dismissed, and the

1. Yin, Dan Moran, Annie Sweeney & Jason Meisner, *Licensed Gun Owner Shoots and Kills 14-Year-Old Boy During Attempted Car Theft in Lake County; 5 Teens Charged with Murder*, CHI. TRIB. (Aug. 14, 2019, 5:53 PM), <https://www.chicagotribune.com/news/breaking/ct-lake-county-gurnee-homicide-chase-chicago-4-arrested-20190813-vic4fzjmwbf43n2r23bjapjine-story.html>.

2. Julia Jacobo, *Murder Charges Dropped Against 5 Teens After 14-Year-Old Killed During Burglary Attempt in Illinois*, ABC NEWS (Sept. 19, 2019, 1:22 PM), <https://abcnews.go.com/US/murder-charges-dropped-teens-14-year-killed-burglary/story?id=65721305> [<https://perma.cc/RE3U-G3N9>].

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Jacobo, *supra* note 2.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. Yin, Moran, Sweeney & Meisner, *supra* note 1.

13. 720 ILL. COMP. STAT. 5/9-1 (Current through P.A. 101-673 of the 2020 Reg. Sess., and P.A. 102-4 of the 2021 Reg. Sess. Some statute sections may be more current, see credits for details).

offenders were charged with lesser offenses.¹⁴ The public was highly concerned that the application of the felony-murder rule to juveniles was unfair and unjust.¹⁵

This Article will address the following issue: what happens when, during the commission of a forcible felony, a victim, police officer, or third party, directly causes the death of another, rather than the felon or co-felon? Illinois subscribes to the “proximate-cause theory”¹⁶ when applying felony murder as opposed to the “agency theory,” which is followed by a majority of jurisdictions.¹⁷ Under the agency theory, none of the teens in the Lake County case would have been charged with felony murder.

For an individual to be charged with felony murder, their conduct must cause the death while in the commission or attempted commission of a forcible felony.¹⁸ Illinois has codified a number of predicate offenses that qualify as “forcible felonies.”¹⁹ Thus, a burglary victim who jumps from a third-story window to their death during the commission of a burglary will provide a satisfactory basis for felony murder.²⁰ If the felonious act caused the death, the defendant can be held responsible.²¹ The rationale for holding a defendant responsible for a death during the commission of a felony was expressed in *People v. Payne*, in which the court held that, “It reasonably might be anticipated that an attempted robbery would meet with resistance, during which the victim might be shot either by himself or someone else in attempting to prevent the robbery, and those attempting to perpetrate the robbery would be guilty of murder.”²²

14. Jacobo, *supra* note 2.

15. Editorial Board, *Editorial: Felony Murder Charges Were Dropped Against Five Teens in Lake County. Illinois Should Tighten Its Overly Broad Statute*, CHI. TRIB. (Sept. 20, 2019, 4:48 PM), <https://www.chicagotribune.com/opinion/editorials/ct-editorial-lake-county-felony-murder-20190920-20190920-pbggtc2rorfcrkhdps5dj5eq-story.html>.

16. *People v. Dekens*, 695 N.E.2d 474, 475 (Ill. 1998) (“Illinois follows the ‘proximate cause’ theory . . .”).

17. *People v. Lowery*, 687 N.E.2d 973, 976 (Ill. 1997) (stating that a majority of jurisdictions apply the agency theory of liability).

18. WAYNE R. LAFAYE, *CRIMINAL LAW* 744 (Thomson W. ed., 4th ed. 2003).

19. 720 ILL. COMP. STAT. 5/2-8 (Current through P.A. 101-673 of the 2020 Reg. Sess., and P.A. 102-4 of the 2021 Reg. Sess. Some statute sections may be more current, see credits for details) (“[T]reason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnaping, kidnaping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement and any other felony which involves the use or threat of physical force or violence against any individual.”).

20. *See People v. Smith*, 307 N.E.2d 353, 355-56 (Ill. 1974).

21. *Id.*

22. *People v. Payne*, 194 N.E. 539, 543 (Ill. 1935).

The Illinois felony-murder rule has been called excessively broad and punitive.²³ Advocates for reform argue that the felony-murder rule creates mass incarceration; is unfair to juveniles; does not create a safer community; is abused; permits overreaching; and is heavy-handed.²⁴ In response to the Lake County case, proposed bills have been submitted in an attempt to narrow the scope and application of the felony-murder rule.²⁵ As part of a sweeping criminal justice reform bill, the modified felony-murder rule in Illinois was signed by Governor J.B. Pritzker.²⁶ The new felony-murder statute attempts to move Illinois from a proximate-cause theory to an agency theory.²⁷

This Article will provide: a brief overview of felony murder in the United States; the minority view (proximate-cause theory) and the majority view (agency theory); an in-depth review of how the proximate-cause theory developed in Illinois and the justifications for applying this theory; a review of the proposed bills by the Illinois legislature and the new felony-murder statute; and Alabama's application of the felony-murder rule. Lastly, this Article will address: the concerns in adopting an agency theory; the potential interpretation issues concerning the new statute; and suggested alternatives to the agency theory without abandoning the proximate-cause approach.

II. HISTORY OF FELONY MURDER IN AMERICA

Initially, the English common law permitted prosecution of a defendant for felony murder when a death occurred during the commission or at-

23. Rita Oceguera, *Sweeping Criminal Justice Reform Package Would Curtail Felony Murder Prosecutions in Illinois*, INJUSTICE WATCH (Jan. 13, 2021, 2:45 PM), <https://www.injusticewatch.org/news/2021/criminal-justice-reform-felony-murder-prosecutions-illinois/> [https://perma.cc/294E-GABX].

24. *Id.*

25. S.B. 2292, 101st Gen. Assemb. (Ill. 2019); H.B. 1615, 101st Gen. Assemb. (Ill. 2019).

26. Rachel Hinton, *Pritzker Hails Newly Signed Criminal Justice Reform Bill as 'Substantial Step' in Erasing 'Systemic Racism'*, CHI. SUN-TIMES (Feb. 22, 2021, 5:19 PM), <https://chicago.suntimes.com/2021/2/22/22295393/illinois-governor-jb-pritzker-criminal-justice-reform-bill-cash-bail-police-bodycams> [https://perma.cc/7FE2-CY7E].

27. Compare 720 ILL. COMP. STAT. 5/9-1(a)(3) (Current through P.A. 102-5 of the 2021 Reg. Sess. Some statute sections may be more current, see credits for details), with 720 ILL. COMP. STAT. 5/9-1(a)(3) (Current through P.A. 101-673 of the 2020 Reg. Sess., and P.A. 102-4 of the 2021 Reg. Sess. Some statute sections may be more current, see credits for details), and *People v. Dekens*, 695 N.E.2d 474, 477 (Ill. 1998) (applying the latter statute stating, "Illinois follows the proximate cause theory of felony murder, as opposed to the agency theory. Consistent with the proximate cause theory, liability should lie for any death proximately related to the defendant's criminal conduct.").

tempted commission of a felony.²⁸ Over time, numerous states adopted felony murder.²⁹ Initially, the felony-murder rule applied to all felonies regardless of the degree of danger related to the underlying felony.³⁰ Pursuant to the common law, the felony-murder rule applied to any murder committed in the commission of any felony.³¹ Both the English and American courts observed the harshness of the rule and began to limit its application.³² In most cases, the felony-murder rule was restricted to felonies that involved a high risk that someone might be killed.³³ For example, if it were a felony to sell liquor to a consumer, and that consumer later drinks himself to the point of inebriation in a blizzard and freezes to death, the seller should not be deemed a murderer.³⁴ States that have adopted the felony-murder doctrine have limited the rule to either: setting forth which specific felonies would qualify; strict interpretation of proximate or legal cause; narrowing the time period during which the felony is in the process of commission; or requiring the underlying felony to be independent of the homicide.³⁵

Although a majority of states do recognize felony murder in some capacity,³⁶ there are at least five states that either do not recognize felony murder or have completely abolished the doctrine.³⁷ Some courts have found that the absence of intent or malice, when the death is accidental or

28. LAFAVE, *supra* note 18.

29. *Id.*

30. *Id.* (citing ROY MORELAND, THE LAW OF HOMICIDE 42 (Bobbs-Merrill 1952)).

31. Jenkins v. State, 230 A.2d 262, 267 (Del. 1967) (discussing the felony-murder rule in Delaware).

32. LAFAVE, *supra* note 18, at 744.

33. *Id.*

34. *Id.* (citing People v. Pavlic, 199 N.W. 373 (Mich. 1924)).

35. *Id.*

36. See *infra* notes 41 & 52 and accompanying text.

37. See HAW. REV. STAT. ANN. § 707-701 (West current through the end of the 2021 Special Session, pending text revision by the revisor of statutes. Some statute sections may be more current; see credits for details) (Commentary – “The wiser course, it seems, would be to follow the lead of England and India and abolish the felony-murder rule in its entirety.”); KY. REV. STAT. ANN. § 507.020 (West current through the end of the 2021 regular session) (The statute . . . “does . . . however, abandon the doctrine of felony murder as an independent basis for establishing an offense of homicide.”); People v. Aaron, 299 N.W.2d 304, 329 (Mich. 1980) (“Today we exercise our role in the development of the common law by abrogating the common-law felony-murder rule.”); State v. Millette, 299 A.2d 150, 153 (N.H. 1972) (“Neither the legislature nor our court ever adopted a presumption of malice from the commission of an unlawful act whether felony or misdemeanor.”); State v. Ortega, 817 P.2d 1196, 1204 (N.M. 1991) (“Under the statute . . . proof that a killing occurred during the commission or attempted commission of a felony will no longer suffice to establish murder in the first degree. In addition to proof that the defendant *caused* . . . the killing . . . there must be proof that the defendant *intended* to kill An unintentional or accidental killing will not suffice.”).

incidental to the underlying felony, violates the fundamental criminal law requirement of a culpable mental state.³⁸ Other jurisdictions cite a lack of deterrent effect,³⁹ and deaths that occur during the underlying felony need to be judged separately with intent as the focus.⁴⁰

A. PROXIMATE CAUSE V. AGENCY

A minority of jurisdictions apply the proximate-cause theory to the felony-murder rule.⁴¹ Under the proximate-cause theory, liability for felony murder will attach for any death that arises out of the underlying felony.⁴² A defendant can be held responsible for the death of another, if the actions committed during the forcible felony “sets in motion a chain of events which were or should have been in contemplation when the motion was initiated.”⁴³ States that favor the proximate cause approach cite deter-

38. *People v. Aaron*, 299 N.W.2d 304, 317 (Mich. 1980) (citing *People v. Washington*, 402 P.2d 130 (Cal. 1965)) (“The felony-murder rule thus ‘erodes the relation between criminal liability and moral culpability.’”).

39. HAW. REV. STAT. ANN. § 707-701 (West current through the end of the 2021 Special Session, pending text revision by the revisor of statutes. Some statute sections may be more current; see credits for details) (Commentary – “Nor does the felony-murder rule serve a legitimate deterrent function. The actor has already disregarded the presumably sufficient penalties imposed for the underlying felony.”).

40. KY. REV. STAT. ANN. § 507.020 (West current through the end of the 2021 regular session) (“[D]eaths occurring in the course of other felonies must be judged under the ‘intentional’ and ‘wantonness with extreme indifference’ . . .”).

41. For jurisdictions that apply the proximate-cause theory to felony murder, *see, e.g.*, *People v. Dekens*, 695 N.E.2d 474, 476 (Ill. 1998) (stating that the agency theory is followed by a majority of jurisdictions); *People v. Hernandez*, 624 N.E.2d 661, 665 (N.Y. 1993) (stating that proximate-cause theory to be more consistent with fundamental principles of law); *State v. Oimen*, 516 N.W.2d 399, 404, 408 (Wis. 1994) (Wisconsin felony-murder statute permits a defendant to be charged with felony murder when a co-felon is killed by the one resisting the felony. This court also recognized that a vast majority of states have adopted the agency theory); *Mikenas v. State*, 367 So. 2d 606, 608-09 (Fla. 1978) (upholding defendant’s conviction for felony murder of a co-felon who was shot and killed by a police officer); *State v. Lopez*, 845 P.2d 478, 481 (Ariz. Ct. App. 1992) (holding that where the killing is a result of the underlying felony, and is a natural and proximate result thereof, it is committed in furtherance of the felony); *Miers v. State*, 251 S.W.2d 404, 408 (Tex. Crim. App. 1952) (in affirming the conviction, the court stated that the defendant set in motion the cause in which occasioned the death of the victim).

42. *Dekens*, 695 N.E.2d at 476; *People v. Lowery*, 687 N.E.2d 973, 975-76 (Ill. 1997).

43. *Lowery*, 687 N.E.2d at 976. *See also* *State v. Glover*, 50 S.W.2d 1049, 1054-55 (Mo. 1932) (“[T]he appellant had reason to think that members of the fire department . . . would congregate . . . to fight the fire, and thus would place themselves within perilous range of the flames and . . . the ensuing homicide was a natural and probable consequence of the arson . . .”).

rence,⁴⁴ the dangerousness of the underlying felony that can lead to foreseeable consequences,⁴⁵ the value of the co-felon's life,⁴⁶ and preventing death of innocent people.⁴⁷ The federal courts have also applied the proximate-cause theory⁴⁸ to the federal statute on murder.⁴⁹ The Eleventh Circuit Court of Appeals determined that Congress did not intend to limit responsibility for a death when the death was directly caused by one of the participants.⁵⁰ The federal statute was drafted broadly enough to encompass the death of an accomplice engaged in one of the statute's enumerated felonies.⁵¹

A majority of jurisdictions subscribe to the agency theory when applying the felony-murder rule.⁵² Under the agency theory, if a killing occurs growing out of the commission of a felony, no liability will attach if the actions are directly attributed to one other than the defendant or those who took part in the underlying felony.⁵³ Thus, unless either the felon or co-felon directly cause a death during the commission of the underlying felo-

44. *People v. Klebanowski*, 852 N.E.2d 813, 822 (Ill. 2006) (rule seeks to deter those from committing forcible felonies.); *United States v. Martinez*, 16 F.3d 202, 207 (7th Cir. 1994) (stating that the felony-murder rule “creates marginal deterrence of dangerous felonies even when the principal danger is to the felons themselves.”).

45. *Lowery*, 687 N.E.2d at 977 (“[F]elon’s attempt to commit a forcible felony set in motion a chain of events which were or should have been within his contemplation when the motion was initiated . . .”); see also *Miers*, 251 S.W.2d at 408.

46. *Martinez*, 16 F.3d at 207 (“The lives of criminals are not completely worthless . . .”).

47. *Mikenas v. State*, 367 So. 2d 606, 609 (Fla. 1978) (The “ultimate purpose of the felony murder statute itself which is, we think, to prevent the death of innocent persons likely to occur during the commission of certain inherently dangerous and particularly grievous felonies.”).

48. *Martinez*, 16 F.3d at 207 (“The better rule . . . is that the death of a felon, whether by his own hand or that of another felon, in the course of any of the felonies . . . listed in the statute, is a felony murder.”).

49. See 18 U.S.C.A. § 1111 (Westlaw through Pub. L. No. 117-36 with the exception of Pub. L. No. 116-283)

50. *United States v. Tham*, 118 F.3d 1501, 1509 (11th Cir. 1997).

51. *Id.*

52. See *Commonwealth v. Redline*, 137 A.2d 472, 476 (Pa. 1958) (affirming the adoption of the agency theory); *Comer v. State*, 977 A.2d 334, 339 (Del. 2009) (stating that the agency theory represents the majority rule); *State v. Pina*, 233 P.3d 71, 78 (Idaho 2010) (stating that Idaho has consistently applied the agency theory to felony murder); *Com. v. Tejada*, 41 N.E.3d 721, 726 (Mass. 2015) (stating that a majority of States have adopted the “agency theory” as applied to felony murder); *Campbell v. State*, 444 A.2d 1034, 1037 (Md. 1982) (stating that a majority of jurisdictions have adopted the “agency theory” of felony murder); *People v. Washington*, 402 P.2d 130, 134 (Cal. 1965) (holding that a defendant cannot be found guilty of felony murder if neither he nor his accomplice killed the victim in furtherance of the criminal design); See also LAFAVE, *supra* note 18 (stating that most of the recent cases support the agency theory of liability).

53. *People v. Dekens*, 695 N.E.2d 474, 476 (Ill. 1998); *People v. Lowery*, 687 N.E.2d 973, 976 (Ill. 1997).

ny, there can be no felony-murder. States that have adopted the agency approach have cited several reasons in favor. First, malice aforethought cannot be attributable to a co-felon when a third party intervenes.⁵⁴ Second, when a third party or victim resist and a death results, the act that causes the death must be in furtherance of the underlying felony.⁵⁵ Some courts have reasoned that deterrence is not accomplished by holding co-felons responsible for deaths committed by those not engaged in the underlying felony.⁵⁶ Another common argument against the proximate-cause theory as applied to the felony-murder doctrine is that the proximate-cause theory is a tort concept that has no place in criminal prosecutions.⁵⁷ And lastly, it is suggested that the proximate-cause theory could lead to absurd results.⁵⁸

III. FELONY MURDER IN ILLINOIS

The earliest known statute resembling the felony-murder rule in Illinois is referenced in the Committee Comments of the First-Degree Murder statute.⁵⁹ The statute contained a proviso to involuntary manslaughter stating that “an involuntary killing is murder if it ‘shall happen in the commission of an unlawful act, which in its consequences naturally tends to destroy life of a human being, or is committed in the prosecution of a felonious intent.’”⁶⁰ It is important to note that proof of specific intent to commit the act of murder is not required.⁶¹ It does require a criminal act that is dangerous to human life, and/or intent to commit a felony.⁶²

Of course, the statute did not address how the court should apply the law when someone other than a felon or co-felon directly causes the death of another. One of the earliest known applications of this situation involving the felony-murder rule in Illinois was in 1888 in *Butler v. People*.⁶³ However, the Illinois Supreme Court did not apply the proximate-cause theory. Rather, the court applied the principles of the agency theory. The

54. *Campbell v. State*, 444 A.2d 1034, 1039 (Md. 1982) (citing *Sheriff, Clark Cnty. v. Hicks*, 506 P.2d 766, 768 (Nev. 1973)).

55. *Id.* (citing *People v. Wood*, 167 N.E.2d 736, 738 (N.Y. 1960)).

56. *Id.* at 1041 (citing *People v. Washington*, 402 P.2d 130, 133 (Cal. 1965)).

57. *State v. Canola*, 374 A.2d 20, 30 (N.J. 1977).

58. *Washington*, 402 P.2d at 134 (The court provides the following example: Two men rob a store and leave in different directions. The merchant gives chase to one of the robbers, and the merchant shoots the robber. Even though neither robber fired a gun, the surviving robber would be charged with felony murder).

59. 720 ILL. COMP. STAT. ANN. 5/9-1 (West 2016) (Committee Comments – 1961, Revised in 1971 by Charles H. Bowman).

60. *Id.* (Provision remained unchanged in subsequent revisions).

61. *People v. Goldvarg*, 178 N.E. 892, 893 (Ill. 1931).

62. *Id.*

63. *Butler v. People*, 18 N.E. 338 (Ill. 1888).

defendants were attending a crowded horse show near a tent.⁶⁴ They became noisy and disruptive to the point where the marshal requested that they keep quiet.⁶⁵ The defendants failed to heed the request of the marshal, which prompted the marshal to arrest one of the defendants.⁶⁶ The other defendants proceeded to strike the marshal, who suffered a strike to the head.⁶⁷ During the conflict, the marshal removed his revolver and fired a shot, killing an innocent bystander.⁶⁸ The defendants involved in the riot were charged with manslaughter and convicted.⁶⁹ On appeal, the court reversed the conviction stating that, “[i]t would be a strange rule of law, indeed, to hold a man liable for a crime which he did not commit, which he did not advise, and which was committed without his knowledge or assent. . . .”⁷⁰ The court reasoned that there was no collaboration between the defendants and the marshal.⁷¹ The two parties were on opposite sides, and therefore there was no common design or purpose between the two.⁷² Therefore, the defendants could not be found guilty for the acts of the marshal.⁷³ Without explicitly stating as much, this holding was consistent with an agency theory of liability.

Interestingly, forty-seven years after the *Butler* decision, the Illinois Supreme Court was tasked with addressing how to apply the felony-murder rule to a death that may or may not have been directly caused by one of the felons.⁷⁴ As has been pointed out, the *Payne* decision makes no reference to the *Butler* decision, nor applies the agency theory.⁷⁵ The earliest case in Illinois that sets forth the proximate-cause theory of liability as applied to felony-murder was *People v. Payne*.⁷⁶ The defendants conspired to rob the victims at their home.⁷⁷ Two of the defendants who assisted in planning the robbery would not be present during the robbery.⁷⁸ When they arrived at the victim’s home, gunfire was exchanged between the defendants and the vic-

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Butler*, 18 N.E. at 338.

69. *Id.*

70. *Id.* at 340.

71. *Id.* at 339.

72. *Id.*

73. *Butler*, 18 N.E. at 339.

74. *People v. Payne*, 194 N.E. 539 (Ill. 1935).

75. Kara Houck, *People v. Dekens: The Expansion of the Felony-Murder Doctrine in Illinois*, 30 LOY. U. CHI. L.J. 357, 371 (1999) (discussing the historical application of the proximate-cause theory of liability to felony murder in Illinois).

76. *Payne*, 194 N.E. at 539.

77. *Id.* at 540-41.

78. *Id.* at 541.

tims.⁷⁹ One of the victims was killed during the exchange of gunfire.⁸⁰ Each of the defendants were charged with felony murder.⁸¹ On appeal, the defendants argued that the jury instructions were issued in error because they allowed the jury to find the defendants guilty even though they were not present during the killing, but part of the conspiracy.⁸² The Illinois Supreme Court affirmed the convictions and stated that, “[i]t reasonably might be anticipated that an attempted robbery would meet with resistance, during which the victim might be shot either by himself or someone else in attempting to prevent the robbery, and those attempting to perpetrate the robbery would be guilty of murder.”⁸³ Furthermore, the outcome was reasonably foreseeable because it was within the scope of the natural and probable consequences of the felony.⁸⁴

Since *Payne*, there have been a number of cases that applied the principles of the *Payne* decision.⁸⁵ The amended statute of 1961 read as follows and remained in effect until July 1, 2021:

- (a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death: . . .
- (3) he or she is attempting or committing a forcible felony other than second degree murder.⁸⁶

Illinois has applied the proximate-cause theory very broadly to the felony-murder rule as illustrated in the cases below.

The most illustrative case in Illinois on the application of the proximate-cause theory to the felony-murder rule is *People v. Lowery*.⁸⁷ In *People v. Lowery*, the defendant and his accomplice intended on robbing three victims.⁸⁸ The defendant approached the three victims, displayed a gun, and

79. *Id.*

80. *Id.*

81. *Payne*, 194 N.E. at 540.

82. *Id.* at 542-43.

83. *Id.* at 543.

84. *Id.*

85. *People v. Allen*, 309 N.E.2d 544, 548-49 (Ill. 1974) (first citing *Payne*, 194 N.E. at 543; and then citing 720 ILL. COMP. STAT. ANN. 5/9-1 (West 2016)) (Committee Comments – 1961, Revised in 1971 by Charles H. Bowman); *People v. Hickman*, 319 N.E.2d 511, 511-13 (Ill. 1974) (affirming the conviction of fleeing felons from a forcible felony where police officer accidentally shot and killed another officer); *People v. Lowery*, 687 N.E.2d 973, 976 (Ill. 1997) (citing *Payne*, 194 N.E. at 539); *People v. Dekens*, 695 N.E.2d 474, 476 (Ill. 1998) (citing *Payne*, 194 N.E. at 539); *People v. Hudson*, 856 N.E.2d 1078, 1085 (Ill. 2006) (citing *Payne*, 194 N.E. at 543).

86. 720 ILL. COMP. STAT. 5/9-1 (West 2016).

87. *Lowery*, 687 N.E.2d at 973.

88. *Id.* at 975.

forced one of the victims into an alley.⁸⁹ The defendant made a demand for the money, and a struggle followed.⁹⁰ The victim eventually obtained possession of the gun in the struggle, and the defendant ran from the alley away from the victim.⁹¹ As the defendant ran away, he passed two women.⁹² The defendant heard gunshots and one of the women was shot and killed.⁹³ The defendant was eventually apprehended and identified as the individual who attempted to rob the victim.⁹⁴ A jury found the defendant guilty of felony murder, armed robbery, and attempted armed robbery.⁹⁵ The appellate court reversed holding that there was insufficient evidence to sustain a conviction on the felony-murder count.⁹⁶ On appeal, the Illinois Supreme Court reversed.⁹⁷ In reversing the appellate court, the Illinois Supreme Court focused on the proximate-cause theory as applied to the felony-murder rule.⁹⁸ Liability attaches for “any death proximately resulting from the unlawful activity—notwithstanding the fact that the killing was by one resisting the crime.”⁹⁹ This court relied on *Payne* in its decision.¹⁰⁰ In its analysis, the court stated that liability in both civil and criminal cases to be similar when an individual is killed or injured.¹⁰¹ Tort law holds an individual responsible for the unlawful acts that they set into motion that result in damage, and the same should hold true in criminal cases.¹⁰² The court held that the defendant was culpable because it was reasonably foreseeable that the robbery victim would retaliate.¹⁰³ The court reasoned that the defendant set in motion a chain of events that led to the decedent’s death, which he should have contemplated.¹⁰⁴

A year later, the Illinois Supreme Court addressed the issue of whether a defendant could be charged with felony murder when the decedent was a co-felon who was killed by the intended victim.¹⁰⁵ In *People v. Dekens*, an undercover police officer arranged a drug transaction between the defend-

89. *Id.*

90. *Id.*

91. *Id.*

92. *Lowery*, 687 N.E.2d at 973.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Lowery*, 687 N.E.2d at 979.

98. *Id.* at 975.

99. *Id.* at 975-76

100. *Id.* at 976; *see also* *People v. Payne*, 194 N.E. 539 (Ill. 1935).

101. *Lowery*, 687 N.E.2d at 976.

102. *Id.*

103. *Id.* at 978.

104. *Id.*

105. *People v. Dekens*, 695 N.E.2d 474, 475 (Ill. 1998).

ant and the decedent.¹⁰⁶ The defendant and the decedent had planned to rob the police officer.¹⁰⁷ On the date of the drug transaction, the defendant pointed a gun at the officer, and the officer fired his weapon at the defendant.¹⁰⁸ The officer was then grabbed by the decedent.¹⁰⁹ The officer shot the decedent who later died as a result of his injuries.¹¹⁰ The defendant was subsequently charged with the decedent's death under the felony-murder theory.¹¹¹ The trial court granted the defendant's motion to dismiss the first-degree murder charge, holding that a defendant could not be liable for the death of a co-felon when the act was not done in furtherance of the common design to commit the felony.¹¹² The appellate court affirmed the trial court.¹¹³ On appeal, the Illinois Supreme Court, citing *Lowery* and *Payne*, reversed and reaffirmed the application of the proximate-cause theory, stating that "liability should lie for any death proximately related to the defendant's criminal conduct."¹¹⁴ The court further stated that the application of the felony-murder doctrine is not dependent on the guilt of the person killed during the felony or the identity of the person who causes the death.¹¹⁵ Thus, liability will attach regardless of whether the decedent was a co-felon or an innocent bystander.¹¹⁶ Instructive in its decision, the court relied on the committee comments to 720 ILCS 5/9-1 when responding to the defendant's argument that the scope of the felony-murder doctrine be limited in scope to innocent victims.¹¹⁷ "It is immaterial whether the killing in such a case is intentional or accidental, or is committed by a confederate without the connivance of the defendant . . . or even by a third person trying to prevent the commission of the felony."¹¹⁸ The Illinois Supreme Court reversed the appellate and circuit courts.¹¹⁹

The Illinois courts have also convicted and sentenced juveniles under the felony-murder rule prior to the Lake County case. In *People v. Hudson*, a fifteen-year-old defendant was convicted of first-degree murder under the felony-murder theory.¹²⁰ The defendant and his accomplice entered a bar-

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Dekens*, 695 N.E.2d at 475.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 477.

115. *Dekens*, 695 N.E.2d at 477.

116. *Id.* at 477-78.

117. *Id.* at 478.

118. *Id.*

119. *Id.*

120. *People v. Hudson*, 856 N.E.2d 1078, 1080 (Ill. 2006).

bershop with firearms with the intent to rob those inside.¹²¹ Unbeknownst to the defendant and his accomplice, one of the patrons was an off-duty police officer who was carrying his service revolver.¹²² As the defendant's accomplice made the demand for everyone to throw their money on the ground, the officer pulled out his service weapon and commanded the defendant's accomplice to "freeze" multiple times.¹²³ The accomplice pointed his weapon at the officer and the officer shot and killed him.¹²⁴ The defendant challenged his conviction on appeal arguing that the trial court improperly instructed the jury as to the causation element of the felony-murder charge.¹²⁵ The Illinois Supreme Court affirmed the conviction,¹²⁶ relying in large part on its previous decisions in both *Dekens* and *Lowery*.¹²⁷

More recently, in an unpublished opinion¹²⁸ from the First District Appellate Court of Illinois, the court reaffirmed the holding of *Lowery*.¹²⁹ In *People v. Givens*, the defendants were in the process of committing a burglary of an electronics store.¹³⁰ The police arrived during the execution of the burglary and announced their presence.¹³¹ In an attempt to escape, the defendants drove a van from inside the garage of the store through the garage door and struck one of the officers who was outside of the business.¹³² Believing that the officer who was struck was now under the van, police fired several shots at the van, striking all three defendants and killing one.¹³³ The two remaining co-defendants were charged and convicted of felony murder.¹³⁴ The court upheld the convictions¹³⁵ despite the defendants' arguments that the proximate-cause theory was unconstitutional, and that the State of Illinois should adopt the "agency theory of liability."¹³⁶

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Hudson*, 856 N.E.2d at 1082.

126. *Id.* at 1088.

127. *Id.* at 1083-88.

128. ILL. SUP. CT. R. 23(E) precludes unpublished opinions from being cited as precedent except in limited circumstances.

129. *People v. Givens*, 2018 IL App (1st) 152031-U, ¶ 27 (stating that "when a felon commits a forcible felony that sets into motion a chain of events, which . . . should have been within his contemplation when the motion was initiated" is responsible for any resulting deaths).

130. *Id.* ¶¶ 6-8.

131. *Id.* ¶ 8.

132. *Id.* ¶ 11.

133. *Id.* ¶¶ 12-13.

134. *Givens*, 2018 IL App (1st) 152031-U, ¶ 5.

135. *Id.* ¶ 61.

136. *Id.* ¶ 24.

The Illinois Supreme Court declined to review the decision of the First District,¹³⁷ as well as the United States Supreme Court.¹³⁸

To summarize, the felony-murder rule in Illinois seeks to deter those from committing forcible felonies by holding them accountable if a death occurs.¹³⁹ Because forcible felonies represent actions that are extremely violent, Illinois law “seek[s] the broadest bounds for the attachment of criminal liability.”¹⁴⁰ A defendant’s culpability is not limited to the underlying forcible felony.¹⁴¹ The proximate-cause approach extends the reach of a defendant’s criminal liability in a felony-murder case.¹⁴² It is important to note that Illinois has narrowed the scope of the felony-murder rule and it is not as broad as it once was.¹⁴³ Nevertheless, the scope of the felony-murder rule was not narrowed as it applied to the proximate-cause analysis.

IV. PROPOSED ILLINOIS LEGISLATIVE BILLS

Six months prior to the Lake County case, HB 1615 was introduced in an attempt to modify the felony-murder statute.¹⁴⁴ It read as follows:

[A] person who kills an individual without lawful justification commits first degree murder if he or she acting alone, commits or attempts to commit a forcible felony other than second degree murder and, in the course of and in furtherance of the crime, he or she personally causes the death of an individual. Provides that a person who kills an individual without lawful justification commits first degree murder if he or she, when acting with one or more participants, commits or attempts to commit a forcible felony other than second degree

137. *People v. Givens*, 119 N.E.3d 1033 (Ill. 2019) (petition for leave to appeal denied).

138. *Givens v. Illinois*, 140 S. Ct. 566 (2019) (petition for writ of certiorari to the Appellate Court of Illinois, First District denied).

139. *People v. Dennis*, 692 N.E.2d 325, 335 (Ill. 1998) (citing *People v. Viser*, 343 N.E.2d 903, 909 (Ill. 1975)).

140. *Id.*

141. *Id.*

142. *Id.* (citing *People v. Lowery*, 687 N.E.2d 973 (Ill. 1997)).

143. *See People v. Morgan*, 758 N.E.2d 813, 838 (Ill. 2001) (holding that the predicate conduct constituting the independent felony that provides the basis for felony murder, must involve felonious conduct aside from the killing itself. Thus, crimes such as aggravated battery or aggravated discharge of a firearm that resulted in a fatal shooting would eliminate the second-degree murder statute and the necessity of the State to prove intent).

144. H.B. 1615, 101st Gen. Assemb. (Ill. 2019).

murder, and in the course of and in furtherance of the offense, another participant in the offense causes the death of an individual, and he or she knew that the other participant would engage in conduct that would result in death or great bodily harm.¹⁴⁵

Although text and records are sparse on the debate and discussion of the proposed changes to the Illinois felony-murder rule, DuPage County State's Attorney, Bob Berlin, testified before the Illinois House of Representatives' Judiciary Criminal Committee in opposition to HB 1615.¹⁴⁶ In opposition to the bill, the State's Attorney argued that a defendant's commission of a forcible felony that sets in motion a chain of events that lead to death should be held accountable.¹⁴⁷

HB 1615 died in session¹⁴⁸ but SB 2292 was introduced in October of 2019 which provided:

[I]n addition to other elements of the offense, a person commits first degree murder if he or she: (1) acting alone, commits or attempts to commit a forcible felony other than second degree murder and, in the course of and in furtherance of the crime, he or she personally causes the death of an individual or (2) when acting with one or more participants, commits or attempts to commit a forcible felony other than second degree murder, and in the course of and in furtherance of the offense, another participant in the offense causes the death of an individual, and he or she knew that the other participant would engage in conduct that would result in death or great bodily harm (rather than killing an individual when attempting or committing a forcible felony other than second degree murder).¹⁴⁹

145. *Id.*

146. *Bob Berlin Testifies in Opposition of Decriminalizing Felony Murder*, BOB BERLIN (Nov. 26, 2019), <https://www.bobberlin.com/news/hb1615> [<https://perma.cc/W3TA-NJJC>].

147. *Id.*

148. H.B. 1615, 101st Gen. Assemb. (Ill. 2019), <https://www.ilga.gov/legislation/BillStatus.asp?DocNum=1615&GAID=15&DocTypeID=HB&LegId=116146&SessionID=108&GA=101> [<https://perma.cc/L5HL-5S4Y>] (showing session sine die); Rhys Saunders, *Illinois Gets Away With Felony Murder*, 108 ILL. BAR J. 14 (2020).

149. S.B. 2292, 101st Gen. Assemb. (Ill. 2019).

SB 2292 also died in session¹⁵⁰ but two additional bills were introduced in February of 2020,¹⁵¹ and April of 2020.¹⁵² The first was introduced in the House and provided as follows:

[T]he offense of first degree murder for killing an individual without lawful justification during the attempted commission or commission of a forcible felony only applies when the death is caused by a person engaged as a principal or an accessory in the attempted commission or commission of the forcible felony.¹⁵³

The second was an amendment to the earlier bill, SB 2292, introduced in the Senate, which provided as follows:

[H]e or she is attempting or committing a forcible felony other than second degree murder, and the death is caused by a person engaged as a principal or an accessory in the attempted commission or commission of that felony.¹⁵⁴

The first two bills¹⁵⁵ are a clear attempt by the General Assembly to establish an agency theory to felony murder. Arguably, the last two bills create more ambiguity in an attempt to establish the agency theory.¹⁵⁶ The language in each of these bills is substantially different than the previous

150. S.B. 2292, 101st Gen. Assemb. (Ill. 2019), <https://www.ilga.gov/legislation/BillStatus.asp?DocNum=2292&GAID=15&DocTypeID=SB&LegId=122183&SessionID=108&GA=101> [<https://perma.cc/8EVQ-3EKV>] (showing session sine die); Rhys Saunders, *Illinois Gets Away With Felony Murder*, 108 ILL. BAR J. 14 (2020).

151. H.B. 5631, 101st Gen. Assemb. (Ill. 2020).

152. Amendment S.B. 2292, 101st Gen. Assemb. (Ill. 2020).

153. H.B. 5631, 101st Gen. Assemb. (Ill. 2020).

154. Amendment S.B. 2292, 101st Gen. Assemb. (Ill. 2020).

155. H.B. 1615, 101st Gen. Assemb. (Ill. 2019); S.B. 2292, 101st Gen. Assemb. (Ill. 2019).

156. H.B. 5631, 101st Gen. Assemb. (Ill. 2020); Amendment S.B. 2292, 101st Gen. Assemb. (Ill. 2020).

felony-murder rule.¹⁵⁷ The statute that was eventually signed into law was House Bill 3653,¹⁵⁸ effective July 1, 2021, and read as follows:

[H]e or she, acting alone or with one or more participants, commits or attempts to commit a forcible felony other than second degree murder, and in the course of or in furtherance of such crime or flight therefrom, he or she or another participant causes the death of a person.¹⁵⁹

Although the intent of the legislature was to create an agency theory to the felony-murder statute, some questions remain as to whether it can or will still be interpreted as a proximate-cause theory.¹⁶⁰ With HB 1615, this bill seeks to limit accountability to those who “personally” cause the death of another during the commission of a forcible felony.¹⁶¹ SB 2292 limits accountability even further by providing additional protection against a proximate-cause application.¹⁶² Thus, under SB 2292, not only does it limit accountability to those who personally cause the death of another, it limits another participant’s accountability to whether they “knew that the other participant would engage in conduct that would result in death or great bodily harm”¹⁶³ The new statute does not contain any of this limiting language.¹⁶⁴

157. See 720 ILL. COMP. STAT. 5/9-1 (2020) (“(a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death: . . . (3) he or she is attempting or committing a forcible felony other than second degree murder.”).

158. H.B. 3653, 101st Gen. Assemb. (Ill. 2021) (showing the public act which amended 720 ILL. COMP. STAT. 5/9-1), <https://www.ilga.gov/legislation/BillStatus.asp?DocNum=3653&GAID=15&DocTypeID=HB&SessionID=108&GA=101> [<https://perma.cc/MW59-PYXU>].

159. 720 ILL. COMP. STAT. 5/9-1(a)(3) (Current through P.A. 102-5 of the 2021 Reg. Sess. Some statute sections may be more current, see credits for details).

160. *Final Felony Murder Language in House Bill 3653, Senate Amendment 2 As Passed, January 2021*, RESTORE JUST. ILL. (Feb. 2, 2021), <https://restorejusticeillinois.org/faq-final-felony-murder-language-in-hb3653sa2-as-passed-january-2021/> [<https://perma.cc/Q5QD-YGB6>].

161. H.B. 1615, 101st Gen. Assemb. (Ill. 2019).

162. S.B. 2292, 101st Gen. Assemb. (Ill. 2019).

163. *Id.*

164. See 720 ILL. COMP. STAT. 5/9-1 (Current through P.A. 102-695 of the 2021 Reg. Sess. Some statute sections may be more current, see credits for details).

V. ALABAMA'S FELONY-MURDER STATUTE

Alabama's felony-murder statute is very similar to that of the new Illinois felony-murder statute.¹⁶⁵ The Alabama courts apply the proximate-cause analysis to felony murder.¹⁶⁶ Alabama's felony-murder statute reads as follows:

(3) He or she commits or attempts to commit arson in the first degree, burglary in the first or second degree, escape in the first degree, kidnapping in the first degree, rape in the first degree, robbery in any degree, sodomy in the first degree, aggravated child abuse under Section 26-15-3.1, or any other felony clearly dangerous to human life and, in the course of and in furtherance of the crime that he or she is committing or attempting to commit, or in immediate flight therefrom, he or she, or another participant if there be any, causes the death of any person.¹⁶⁷

The commentary to Alabama's felony-murder rule provides the following guidance:

Under a wholly unrestricted felony-murder rule, defendants may be held liable for the most serious crime known, which was neither intended nor foreseeable. The underlying rationale that defendant has shown himself to be a "bad person," and that this is enough to exclude arguments bearing on the gravity of the harm actually committed, probably was more defensible at early common law when legal conceptions were rooted in simple moral attitudes. Today a more dominant rationale in justification of at least, a restricted version of the rule is that defendant has shown that he is a "dangerous person" who has knowingly engaged in a dangerous crime that by its very nature is highly suscepti-

165. Compare ALA. CODE § 13A-6-2 (1975) (Westlaw current through the end of the 2021 Regular Session), with 720 ILL. COMP. STAT. 5/9-1 (Current through P.A. 102-695 of the 2021 Reg. Sess. Some statute sections may be more current, see credits for details).

166. *Witherspoon v. State*, 33 So. 3d 625, 626 (Ala. Crim. App. 2009).

167. ALA. CODE § 13A-6-2 (a)(3) (1975) (Westlaw current through the end of the 2021 Regular Session).

ble of causing death and which, in fact, did cause death. Such a departure from a subjective test of criminal liability is justified for the protection of the public The first draft of § 13A-6-2 proposed a feature of some modern codes that defendant is not guilty of criminal homicide under the felony-murder section if he can show that he did not commit the homicidal act nor aid it and that he was not armed, and had not reasonable ground to believe that any of his participants were armed or intended to commit any act dangerous to human life. However, the Advisory Committee declined to adopt this extrication theory and preferred a stricter criterion.¹⁶⁸

The commentary to Alabama's felony-murder rule presumes foreseeability when the defendant has chosen to engage in an act dangerous to human life. Further, no safe harbor is provided to accomplices who may have engaged in the common criminal design but did not play a direct role in the dangerous act to human life.

In *Witherspoon v. Alabama*, the defendant was convicted of first-degree robbery and felony murder.¹⁶⁹ Two masked men, one of which was the defendant, entered a service station store demanding money from the clerk.¹⁷⁰ The clerk grabbed his gun and shot the defendant's accomplice.¹⁷¹ The clerk ordered the defendant on the ground until the police arrived.¹⁷² The accomplice was pronounced dead on the scene caused by a gunshot wound to the chest.¹⁷³ On appeal, the defendant argued that the felony-murder rule should not apply when the victim of the felony caused the death of the participant in the underlying felony.¹⁷⁴ The appellate court cited the causal relationship statute, which states: "A person is criminally liable if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was sufficient to produce the result and the conduct of the actor clearly insufficient."¹⁷⁵ In the commentary to this statute, it states that "[i]f the actual result is not within the contemplation of the actor, or within the area of risk

168. *Id.* (See § 13A-6-2 Commentary).

169. *Witherspoon*, 33 So. 3d at 626.

170. *Id.* at 626.

171. *Id.*

172. *Id.*

173. *Id.* at 627.

174. *Witherspoon*, 33 So. 3d at 627.

175. *Id.* at 627 (citing ALA. CODE § 13A-2-5(a) (2022)).

of which he should have been aware, he is not deemed to have ‘caused’ the result.”¹⁷⁶ The court posed the question as it related to these facts of “whether the ultimate result was foreseeable to the original actor.”¹⁷⁷ The Alabama Court of Criminal Appeals further cited the decision from the Illinois Supreme Court in *People v. Lowery* in support of the proximate-cause application to the felony-murder rule.¹⁷⁸ The court also cited *People v. Dekens*, another Illinois Supreme Court case, in support of applying the proximate-cause theory to the facts of this case.¹⁷⁹ The court affirmed the felony-murder conviction, holding that the defendant’s accomplice would not have been killed but for the actions of the defendant and his accomplice, who were participants.¹⁸⁰ Furthermore, the clerk’s reaction by grabbing the gun and shooting one of the participants was a foreseeable result of the participant’s conduct in the robbery.¹⁸¹

Other cases in Alabama have caused the public to question the application of the felony-murder rule in Alabama since the *Witherspoon* case. In one such case in 2015, five armed teens drove to a quiet neighborhood to commit a burglary.¹⁸² A neighbor observed the teens entering an empty home and called the police.¹⁸³ As the police arrived, one of the officers ran towards the back of the home when he approached 16 year-old A’donte Washington, who was carrying a gun.¹⁸⁴ The officer fired his weapon, which killed the teen.¹⁸⁵ The four other teens were charged with felony murder.¹⁸⁶ The prosecutor, C.J. Robinson, defended charging the teens with felony murder stating that it was foreseeable that a gunfight would ensue

176. *Id.* at 628.

177. *Id.* (discussing *Lewis v. State*, 474 So. 2d 766, 771 (Ala. Crim. App. 1985)). In *Lewis*, the victim and the defendant were playing Russian roulette. After the game was over, the defendant put the gun away and left the room. The victim then retrieved the gun and shot himself. The court reversed the defendant’s conviction, holding that it was not foreseeable that the victim would retrieve the gun after the game had ended and shoot himself. *Id.*

178. *Witherspoon*, 33 So. 3d at 630 (citing *People v. Lowery*, 687 N.E.2d 973 (Ill. 1997)) (“In general, Illinois law provides that a defendant may be charged with murder pursuant to the proximate cause theory of felony murder.”).

179. *Id.* at 630 (citing *People v. Dekens*, 695 N.E.2d 474 (Ill. 1998)) (“[A] defendant may be liable for murder where the one resisting the crime causes the death of the defendant’s cofelon [*sic*].”).

180. *Id.*

181. *Id.*

182. Megan Thompson & Mori Rothman, *Convicted of Murder, but a Police Officer Pulled the Trigger*, PBS (Sep. 14, 2019, 5:21 PM), <https://www.pbs.org/newshour/show/convicted-of-murder-but-a-police-officer-pulled-the-trigger> [<https://perma.cc/7TF9-JJ8C>].

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

during a burglary when the police arrived.¹⁸⁷ A defendant in Alabama can be charged with felony murder when a death occurs during the commission of a felony that is clearly dangerous to human life.¹⁸⁸ Three of the teens pled guilty and were sentenced to 25 years in prison.¹⁸⁹ However, the fourth teen, Lakeith Smith, rejected the offer on the basis that he did not pull the trigger.¹⁹⁰ He was subsequently found guilty at trial and sentenced to 65 years in prison.¹⁹¹

On January 3, 2018, two teen brothers attempted to steal a vehicle outside a Food Mart with a female passenger inside the vehicle.¹⁹² The driver, who was inside the Food Mart, saw the two brothers inside the vehicle and went out to confront the two.¹⁹³ An altercation followed, and shots were fired.¹⁹⁴ One of the brothers collapsed and died near the scene.¹⁹⁵ The remaining brother was arrested and charged under Alabama's felony-murder statute.¹⁹⁶

VI. ARGUMENT

A. INTERPRETATION OF "CAUSES"

The newly codified felony-murder statute in Illinois is problematic. House Bill 1615 and Senate Bill 2292 clearly attempt to establish an agency theory to the felony-murder statute.¹⁹⁷ First, by limiting a single felon's culpability to "personally caus[ing] the death of an individual."¹⁹⁸ And if there is another participant, limiting their culpability to knowing "that the other participant would engage in conduct that would result in death or great bodily harm."¹⁹⁹ In both instances, the language specifically addresses the acts of the participant causing the death of another. Two additional bills were introduced that weren't as specific as the previous two bills men-

187. Thompson & Rothman, *supra* note 182.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. Kenneth Miller, *Teen Indicted in Shooting Death of Twin Brother During Robbery*, BIRMINGHAM REAL-TIME NEWS (Mar. 6, 2019, 5:44 p.m.) https://www.al.com/news/birmingham/2018/03/teen_indicted_in_shooting_deat.html [<https://perma.cc/HEJ7-YCSU>].

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. H.B. 1615, 101st Gen. Assemb., (Ill. 2019); S.B. 2292, 101st Gen. Assemb., (Ill. 2019).

198. *Id.*

199. *Id.*

tioned.²⁰⁰ House Bill 5631 and Senate Bill 2292 read in part that “the death is caused by a person engaged as a principal or an accessory in the attempted commission or commission of a felony.”²⁰¹ The relevant portion of the current felony-murder statute reads in part, “he or she, or another participant causes the death of a person.”²⁰² Without any floor debate²⁰³ to explicitly move Illinois towards an agency-theory approach, the Illinois courts may still rely on precedent to interpret “causes.”

There are two primary problems with the current version of the statute. First, the Illinois Supreme Court has defined “causal relation” in felony-murder cases.²⁰⁴ The *Lowery* court solidified this position stating that the principles of proximate cause from tort law were consistent with public policy to hold a felon responsible when he sets in motion a chain of events that leads to death.²⁰⁵ Illinois has applied the proximate-cause theory since *Payne* and has not deviated from this theory since.²⁰⁶ The current version of the statute does not distance itself enough from proximate cause to make it clear that the intent of the legislature was to create an agency theory. It is still within reason that the courts interpret this statute as a proximate-cause theory. It could still be argued that a defendant or co-defendant caused the death through a chain of events set off by one of the enumerated forcible felonies. The legislature could have made clear that Illinois was now an agency jurisdiction by inserting the word “actually”²⁰⁷ or “personally”²⁰⁸ between “participant” and “causes.”²⁰⁹

200. H.B. 5631 101st Gen. Assemb., (Ill. 2020), Amendment S.B. 2292 101st Gen. Assemb., (Ill. 2020).

201. *Id.*

202. 720 Ill. Comp. Stat. 5/9-1 (Current through P.A. 102-5 of the 2021 Reg. Sess. Some statute sections may be more current, see credits for details).

203. 02 FEB FAQ: Final Felony Murder Language in House Bill 3653, Senate Amendment 2 as Passed, January 2021, RESTORE JUST. ILL., <https://restorejusticeillinois.org/faq-final-felony-murder-language-in-hb3653sa2-as-passed-january-2021/> [<https://perma.cc/V3FN-NULF>].

204. *People v. Lowery*, 687 N.E.2d 973, 976 (“Causal relation is the universal factor common to all legal liability.”).

205. *Id.*

206. *See People v. Allen*, 309 N.E.2d 544, 548-49 (Ill. 1974).

207. 02 FEB FAQ: Final Felony Murder Language in House Bill 3653, Senate Amendment 2 as Passed, January 2021, RESTORE JUST. ILL., <https://restorejusticeillinois.org/faq-final-felony-murder-language-in-hb3653sa2-as-passed-january-2021/> [<https://perma.cc/Q5QD-YGB6>]; *Senate Committee Written Testimony*, ILL. GEN. ASSEMB., <https://ilga.gov/senate/SenateCommittee101WrittenTestimony.asp> [<https://perma.cc/8F47-XC9J>] (Senate Committee on Criminal Law is without any written testimony on the subject of felony murder).

208. H.B. 1615 101st Gen. Assemb. (Ill. 2019); S.B. 2292, 101st Gen. Assemb. (Ill. 2019).

209. 720 ILL. COMP. STAT. 5/9-1 (Current through P.A. 102-5 of the 2021 Reg. Sess. Some statute sections may be more current, see credits for details).

B. ACCOUNTABILITY

The second issue with the language of the new statute²¹⁰ is that House Bill 1615 and Senate Bill 2292 attempt to limit a co-felon's criminal liability for the murder.²¹¹ Specifically, both drafts require the State to prove that the felon knew that the co-felon would engage in acts that would cause death or were likely to cause death or great bodily harm.²¹² Pursuant to the Accountability statute in Illinois, co-felons who enlist in a common criminal design to form the underlying felony, and acts that facilitate that common design, are considered to be acts of all involved.²¹³ Thus, an accomplice who "inten[ds] to promote or facilitate" the commission of the underlying forcible felony by aiding, soliciting, or abetting another person,²¹⁴ can be held accountable for felony murder if a death occurs during the commission of the underlying felony.²¹⁵ The purpose of the felony-murder doctrine is to deter others from committing forcible felonies that, by their nature, are violent.²¹⁶ Accountability, on the other hand, seeks to deter individuals from intentionally assisting others in committing crimes.²¹⁷ Even if the recently adopted statute is interpreted as an agency theory, co-felons could still be held responsible under Illinois's broad definition of accountability. Under the agency theory, the cause of death during the commission of the underlying felony must be the direct result of an act by one of the agents of the crime. For example, when a co-felon, during a robbery, is unaware of another co-felon carrying a gun, that accidentally discharges, killing an individual, the original co-felon, under both accountability and felony-murder principles, is still held criminally liable, for both the robbery and

210. *Id.* ("[H]e or she or another participant causes the death of a person.").

211. 02 FEB FAQ: *Final Felony Murder Language in House Bill 3653, Senate Amendment 2 as Passed, January 2021*, RESTORE JUST. ILL., <https://restorejusticeillinois.org/faq-final-felony-murder-language-in-hb3653sa2-as-passed-january-2021/> [<https://perma.cc/Q5QD-YGB6>]; H.B. 1615 101st Gen. Assemb. (Ill. 2019) ("[A]nother participant in the offense causes the death of an individual, and he or she knew that the other participant would engage in conduct that would result in death or great bodily harm."); S.B. 2292, 101st Gen. Assemb. (Ill. 2019) ("[A]nother participant in the offense causes the death of an individual, and he or she knew that the other participant would engage in conduct that would result in death or great bodily harm . . .").

212. H.B. 1615 101st Gen. Assemb., (Ill. 2019); S.B. 2292, 101st Gen. Assemb. (Ill. 2019).

213. 720 ILL. COMP. STAT. 5/5-2 (Current through P.A. 102-178 of the 2021 Reg. Sess. Some statute sections may be more current, see credits for details).

214. *Id.*

215. *People v. Shaw*, 713 N.E.2d 1161, 1174 (Ill. 1998) ("Accountability for felony murder, in turn, exists only if defendant may be deemed legally responsible for the felony that accompanies the murder.").

216. *People v. Dennis*, 692 N.E.2d 325, 335 (Ill. 1998).

217. *Id.*

felony murder. Alternatively, if the victim, in self-defense, fires a gun and kills a co-felon to thwart the robbery, the surviving co-felon could still be charged for felony murder within the spirit and purpose of the Illinois Accountability statute.²¹⁸

C. ALABAMA V. ILLINOIS FELONY MURDER

Alabama's felony-murder statute²¹⁹ is very similar to Illinois's felony-murder statute.²²⁰ The key portion of both statutes is the last sentence. Illinois's reads "he or she or another participant causes the death of a person."²²¹ Alabama's statute reads that "he or she, or another participant if there be any, causes the death of any person."²²² The only difference between the two statutes is that Alabama's adds "if there be any"²²³ and uses the word "any" as opposed to "a" before "person."²²⁴ Alabama had adopted the proximate-cause theory at a time when the felony-murder statute in Illinois was not similar in substance or content.²²⁵ Nevertheless, Alabama still chose to apply proximate cause to its statute, using Illinois precedent in

218. See *Shaw*, 713 N.E.2d at 1174 ("Accountability for felony murder, in turn, exists only if defendant may be deemed legally responsible for the felony that accompanies the murder.").

219. ALA. CODE § 13A-6-2 (a)(3) (1975) (Westlaw current through the end of the 2021 Regular Session).

220. Compare ALA. CODE § 13A-6-2 (a)(3) (1975) (Westlaw current through the end of the 2021 Regular Session), with 720 ILL. COMP. STAT. 5/9-1 (Current through P.A. 102-5 of the 2021 Reg. Sess. Some statute sections may be more current, see credits for details).

221. 720 ILL. COMP. STAT. 5/9-1(a)(3) (Current through P.A. 102-5 of the 2021 Reg. Sess. Some statute sections may be more current, see credits for details).

222. ALA. CODE § 13A-6-2 (a)(3) (1975) (Westlaw current through the end of the 2021 Regular Session).

223. *Id.*

224. Compare ALA. CODE § 13A-6-2 (a)(3) (1975) (Westlaw current through the end of the 2021 Regular Session), with 720 ILL. COMP. STAT. 5/9-1 (Current through P.A. 102-5 of the 2021 Reg. Sess. Some statute sections may be more current, see credits for details).

225. Compare 720 ILL. COMP. STAT. 5/9-1 (Current through P.A. 101-673 of the 2020 Reg. Sess., and P.A. 102-4 of the 2021 Reg. Sess. Some statute sections may be more current, see credits for details) ("(a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death: . . . (3) he or she, acting alone or with one or more participants, commits or attempts to commit a forcible felony other than second degree murder."), with ALA. CODE § 13A-6-2 (a)(3) (1975) (Westlaw current through the end of the 2021 Regular Session) ("(3) He or she commits or attempts to commit arson in the first degree, burglary in the first or second degree, escape in the first degree, kidnapping in the first degree, rape in the first degree, robbery in any degree, sodomy in the first degree, aggravated child abuse under Section 26-15-3.1, or any other felony clearly dangerous to human life and, in the course of and in furtherance of the crime that he or she is committing or attempting to commit, or in immediate flight therefrom, he or she, or another participant if there be any, causes the death of any person.").

support.²²⁶ In a strange twist, twelve years after *Witherspoon*, Illinois drafted and codified a statute incredibly similar to Alabama's felony-murder statute in an attempt to establish an agency theory. Thus, it is plausible that based on the extensive and lengthy history of the proximate-cause application to felony murder in Illinois,²²⁷ the Illinois Supreme Court may still interpret the new statute as a proximate-cause theory. Without committee comments or any floor discussion expressing a change on how felony murder is applied to third party, non-participants who cause a death, the Illinois Supreme Court may still apply proximate-cause theory to these cases.

D. PROXIMATE CAUSE PROVIDES ACCOUNTABILITY

One of the primary arguments against the proximate-cause theory, is that when a resisting victim kills a co-felon, he does so in justifiable self-defense.²²⁸ Thus, severing any criminal responsibility of the surviving co-felon.²²⁹ However, this argument becomes much more problematic when the deceased is an innocent bystander who was shot by the resisting victim of a forcible felony.²³⁰ Can self-defense be justified in this circumstance? It would be incredibly difficult to explain to the family of the deceased that no one will be held accountable for this death. However, that is exactly what would occur if an agency theory is adopted. In all of these cases, the defendant and his accomplices set in motion a chain of events that led to death. It should be irrelevant who "directly" causes the death during the commission of a forcible felony. But-for the acts of the individuals who set in motion the acts that create the forcible felony, the death would not have occurred.²³¹ Under an agency theory, the human life that is unnecessarily

226. See *Witherspoon v. State*, 33 So.3d 625, 628-31 (Ala. Crim. App. 2009).

227. *People v. Allen*, 309 N.E.2d 544, 548-49 (Ill. 1974) (citing *Payne* and the committee comments to the murder statute); *People v. Hickman*, 319 N.E.2d 511-13 (Ill. 1974) (affirming the conviction of fleeing felons from a forcible felony where police officer accidentally shot and killed another officer); *People v. Lowery*, 687 N.E.2d 973, 976 (Ill. 1997) (citing *Payne*); *People v. Dekens*, 695 N.E.2d 474, 476 (Ill. 1998) (citing *Payne*); *People v. Hudson*, 856 N.E.2d 1078, 1085 (Ill. 2006) (citing *Payne*).

228. *Commonwealth v. Redline*, 137 A.2d 472, 483 (Pa. 1958) ("In the present instance, the victim of the homicide was one of the robbers who, while resisting apprehension in his effort to escape, was shot and killed by a policeman in the performance of his duty. Thus, the homicide was justifiable and, obviously, could not be availed of, on any rational legal theory, to support a charge of murder.").

229. *Id.* ("How can anyone, no matter much of an outlaw he may be, have a criminal charge lodged against him for the consequences of the lawful conduct of another?").

230. See *Lowery*, 687 N.E.2d at 975.

231. *Id.* at 976. ("It is equally consistent with reason and sound public policy to hold that when a felon's attempt to commit a forcible felony sets in motion a chain of events which were or should have been within his contemplation when the motion was initiated, he

taken is not valued. Neither felon nor co-felon is held accountable when the death occurs by the hand of a resisting victim. The proximate-cause theory resolves this issue.

E. DETERRENCE

Proponents of the agency theory argue that the proximate-cause theory does not act as a deterrent.²³² It is argued that the individual committing the felony must know the result of the felony and its possible consequences.²³³ Thus, if the unintended act of killing by a third party occurs, that act cannot be deterred, nor could the felon know that the victim would kill the co-felon.²³⁴ However, the Seventh Circuit Court of Appeals in *United States v. Martinez*²³⁵ stated that there is at least a marginal deterrent effect when the proximate-cause theory is applied, and that the agency theory is misplaced.²³⁶ The court stated that a victim or police officer is more likely to shoot a felon when the felon is armed while engaging in a crime of violence.²³⁷ It is not beyond the realm of possibility that a resisting victim chooses to defend themselves when confronted by an armed felon. This likelihood certainly increases with the relatively recent change in the Illinois law permitting concealed carry of firearms.²³⁸

should be responsible for any death which by direct and almost inevitable sequence results from the initial criminal act.”).

232. *Campbell v. State*, 444 A.2d 1034, 1041 (Md. 1982) (“One reason for declining to extend the felony-murder doctrine is that such an extension would not achieve the rule’s basic purpose. Manifestly, the purpose of deterring felons from killing by holding them strictly responsible for killings they or their co-felons commit is not effectuated by punishing them for killings committed by persons not acting in furtherance of the felony.”); Kara M. Houck, *People v. Dekens: The Expansion of the Felony-Murder Doctrine in Illinois*, 30 LOY. U. CHI. L.J. 357, 387 (1999) (citing *Commonwealth ex rel. Smith v. D.N. Myers*, 261 A.2d 550 (Pa. 1970)).

233. Houck, *supra* note 232.

234. *Id.* at 388.

235. *United States v. Martinez*, 16 F.3d 202, 207 (7th Cir. 1994).

236. *Id.* (“Cases that refuse to apply the felony-murder rule when the death is caused by someone outside the criminal enterprise, typically a victim or police officer, do so on the mechanical ground that the acts of these outsiders cannot be attributed to the criminal by the principles of the law of agency Those cases lose sight of the deterrent function of the doctrine . . . , a function grounded in criminal law rather than agency law.”); *See also United States v. Tham*, 118 F.3d 1501, 1510 (11th Cir. 1997) (“Society reaps these deterrent benefits anytime punishment is imposed for a death that foreseeably results from commission of a felony Punishment imposed for the death of a cofelon may deter future dangerous felonies to the same extent as punishment imposed for the death of our most valued citizen.”).

237. *Martinez*, 16 F.3d at 207.

238. *See* 430 ILL. COMP. STAT. 66/10 (Current through P.A. 102-178 of the 2021 Reg. Sess. Some statute sections may be more current, see credits for details).

F. CHANGES IN SENTENCING WITHOUT ABOLISHING PROXIMATE CAUSE

A less drastic measure to minimize the impact of a 20 to 60 year²³⁹ or natural life sentence,²⁴⁰ would be to amend the sentencing statute to account for how the death occurred in felony-murder situations. Illinois House Bill 3653 made numerous changes and amendments to the Unified Code of Corrections²⁴¹ and could have included an amendment to the first-degree murder sentencing statute.²⁴² Rather than eradicate the application of the proximate-cause theory, a court could take into account the age of the offender(s) and the circumstances that led to the death of the individual. Thus, one may not be sentenced as harshly if the death were by the hands of a police officer, resisting victim, or a juvenile felon/co-felon, but nevertheless “proximately caused” by a felon or co-felon. This deviation in sentencing would address the concerns of those demanding a change in Illinois’ application of the proximate-cause theory to felony murder,²⁴³ but still account for a death that was taken as a result of those who chose to engage in a forcible felony.

G. DOWNGRADE THE OFFENSE WITHOUT ABOLISHING PROXIMATE CAUSE

Consistent with modifying the sentencing guidelines, the Illinois General Assembly could have decided to downgrade the offense and reduce the punishment.²⁴⁴ Eight states have chosen this path.²⁴⁵ Illinois could have chosen to create a new degree to felony murder with a separate sentencing scheme. Again, by downgrading the offense but maintaining the proximate-

239. See 730 ILL. COMP. STAT. 5/5-4.5-20(a) (Current through P.A. 102-178 of the 2021 Reg. Sess. Some statute sections may be more current, see credits for details).

240. See 730 ILL. COMP. STAT. 5/5-8-1 (Current through P.A. 102-178 of the 2021 Reg. Sess. Some statute sections may be more current, see credits for details).

241. Bill Status of HB3653, Illinois General Assembly, <https://www.ilga.gov/legislation/BillStatus.asp?DocNum=3653&GAID=15&DocTypeID=HB&SessionID=108&GA=101> [<https://perma.cc/54G4-QZFE>].

242. See 730 ILL. COMP. STAT. 5/5-4.5-20(a) (Current through P.A. 102-178 of the 2021 Reg. Sess. Some statute sections may be more current, see credits for details).

243. Rita Ocegüera, *Sweeping Criminal Justice Reform Package Would Curtail Felony Murder Prosecutions in Illinois*, INJUSTICE WATCH (Jan. 12, 2021), <https://www.injusticewatch.org/news/2021/criminal-justice-reform-felony-murder-prosecutions-illinois/> [<https://perma.cc/TTS3-J9WZ>].

244. *People v. Aaron*, 299 N.W.2d 304, 315 (Mich. 1980).

245. *Id.* Ohio reduced or abolished felony murder by defining involuntary manslaughter as “the death of another proximately resulting from the offender’s commission or attempt to commit a felony.” *Id.* Alaska, Louisiana, New York, Pennsylvania, and Utah reduced felony murder to second-degree murder. *Id.* Minnesota downgraded felony murder to a third-degree murder. A felony murder in Wisconsin is a class B felony with a maximum sentence not to exceed 20 years. *Id.*

cause application to felony murder, the General Assembly could both address the concerns of the public, but account for the actions of felons who set in motion a chain of events that led to death, even though it was not the intended result.

VII. CONCLUSION

The proximate-cause theory holds felons accountable, not only for the underlying felony, but for the deaths that occur in the process of the felony, regardless of who “directly” causes the death. The criminal law is intended to punish those who disrupt the rules of society. The ultimate violation of these rules is the taking of one’s life. The agency theory simply does not consider the life taken. In an attempt to make drastic changes in the Criminal Justice Reform Bill, the Illinois General Assembly reacted to a situation without fully considering the full impact of how the law would apply. The new version of the Illinois felony-murder rule is unclear and may lead to injustice for victims of these deadly events.