

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: February 3, 1998 Revised: _____

Subject: Redefining Capital - Felony Murder

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Gomez</u>	<u>Miller</u>	<u>CJ</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>WM</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

First degree felony murder is the unlawful killing of a human being when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any of a number of felony offenses listed in section 782.04(1)(a)2., F.S. Examples of some of the offenses listed include sexual battery, burglary, and robbery. Felony murder has been characterized as a “legal fiction” because it implies the defendant’s malice aforethought to commit certain felonies. That is, “the felon is said to have the intent to commit the death--even if the killing was unintended.”

Absent from the list of offenses which form the basis of first degree felony murder is the offense of murder itself. That is to say, if a defendant unlawfully kills a human being while engaging in or attempting to murder another human being, the defendant cannot be prosecuted for *felony murder* in the first degree. However, the defendant’s killing of another human being could be prosecuted under the doctrine of transferred intent.

This CS redefines felony murder by adding “any murder” to the list of felony offenses which serves as the basis for first degree felony murder. This CS will allow prosecution for first degree murder (a capital offense) when a defendant unlawfully kills a person during the commission of another first or second degree murder. This CS allows the defendant to be prosecuted for first degree murder in most multiple murder cases.

Also, this CS will allow prosecution for second degree felony murder when a third party kills a person during an offender’s perpetration of, or attempt to perpetrate, any murder of another human being. This CS adds “murder of another human being” to the list of offenses which do not constitute third degree felony murder as defined in section 782.04(4), F.S.

This CS shall take effect on October 1, 1998.

This CS substantially amends the following section of the Florida Statutes: 782.04.

II. Present Situation:

In Florida, there are three degrees of murder. § 782.04, F.S. First degree murder is punished as a capital felony, allowing for the imposition of the death penalty. § 782.04(1), F.S. Second degree murder is punished as a first degree felony with a possible sentence of life imprisonment. § 782.04(2) & (3), F.S. Finally, third degree murder is punished as a second degree felony, with a possible sentence of imprisonment not exceeding 15 years. § 782.04(4), F.S.

First Degree Murder (Capital Murder)

There are two distinct types of first degree murder offenses. The first type is classic premeditated murder. It is the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being.

The second type of first degree murder is *felony murder*. Felony murder has been characterized as a “legal fiction” because it implies the defendant’s malice aforethought to commit certain felonies. That is, “the felon is said to have the intent to commit the death—even if the killing was unintended.” *State v. Gray*, 654 So. 2d 552 (Fla. 1995).

In Florida, first degree felony murder is the unlawful killing of a human being when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any of the following:

- ▶ Trafficking offense prohibited by s. 893.135(1)
- ▶ Arson
- ▶ Sexual battery
- ▶ Robbery
- ▶ Burglary
- ▶ Kidnapping
- ▶ Escape
- ▶ Aggravated child abuse
- ▶ Aggravated abuse of an elderly person or disabled adult
- ▶ Aircraft piracy
- ▶ Unlawful throwing, placing, or discharging of a destructive device or bomb
- ▶ Car jacking
- ▶ Home-invasion robbery
- ▶ Aggravated stalking

§ 782.04(1)(a)2., F.S. Also, first degree felony murder includes the unlawful killing of a human being:

Which resulted from the unlawful distribution of any substance controlled under s. 893.03(1), cocaine as described in s. 893.03(2)(a)4., or opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or

older, when such drug is proven to be the proximate cause of the death of the user.

§ 782.04(1)(a)3., F.S.

“The purpose of the felony murder statute is to protect the public from inherently dangerous situations caused by the commission of the felony.” *Parker v. State*, 641 So. 2d 369 (Fla. 1994). In order to obtain a conviction for felony murder, the state must prove causation, i.e., that the homicide occurred as a consequence of and while the defendant was engaged in the perpetration of the felony. *Allen v. State*, 690 So. 2d 1332 (Fla. 2d DCA 1997). Further, a killing during flight from the commission of a felony constitutes felony murder, even though the felony was complete at the time of the killing. *E.g., Parker, supra*. “In the absence of some definitive break in the chain of circumstances beginning with the felony and ending with the killing, the felony, although technically complete, is said to continue to the time of the killing.” *Mills v. State*, 407 So. 2d 218, 221 (Fla. 3d DCA 1981).

Absent from the list of offenses which form the basis for felony murder is the offense of murder itself. That is to say, if a defendant unlawfully kills a human being while engaging in or attempting to murder another human being, the defendant cannot be prosecuted for *felony murder* in the first degree. However, the defendant’s killing of another human being could be prosecuted under the doctrine of transferred intent.

Transferred Intent. If the state can prove that the defendant has premeditation as to one person, then the defendant could be charged with premeditated first degree murder as to any other *unintended victims* under the doctrine of transferred intent. The standard jury instructions define transferred intent this way, “[i]f a person has a premeditated design to kill one person and in attempting to kill that person actually kills another person, the killing is premeditated.” As the court stated in *Provenzano v. State*, 497 So. 2d 1177 (Fla. 1986):

The usual case involving the doctrine of transferred intent is when a defendant aims and shoots at A intending to kill him but instead misses and kills B. As a matter of law, this original malice is transferred from the one against whom it was entertained to the person who actually suffered the consequences of the unlawful act.

Id. at 1180 (citations omitted).

However, one appellate court has limited the application of the transferred intent doctrine to those situations where the defendant fails in his attempt to kill his intended victim. *Shellman v. State*, 620 So. 2d 1010 (Fla. 4th DCA 1993), *rev. denied*, 629 So. 2d 135 (Fla. 1993) (If intended murder is successful, no intent may be transferred to other unintended victims). Under *Shellman*, the defendant may not be prosecuted for premeditated murder on the unintended victims, although prosecution for second-degree murder or attempted second degree murder is possible. The *Shellman* rationale has not been followed by other courts. *e.g., Mordica v. State*, 618 So. 2d

301 (Fla. 1st DCA 1993). One court has stated, “[t]here are even stronger grounds for applying the principle [doctrine of transferred intent] where the intended victim is killed by the same act that kills the unintended victim.” *United States v. Sampol*, 636 F. 2d 621, 674 (D.C. Cir. 1980).

Second Degree Murder

There are two distinct types of second degree murder offenses. The first type is classic “depraved mind” murder. It is the unlawful killing of a human being “when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual.” § 782.04(2). F.S.

Another type of second degree murder is *second degree felony murder*. This type of felony murder is proven when the offender commits one of the felonies on the bullet list on page 2, but a person is killed by a person other than the offender engaged in the perpetration of or in the attempt to perpetrate such a felony. An example is where an offender is engaged in a robbery and the robbery victim takes out a gun and shoots and kills another.

Third Degree Murder

Unlike first and second degree murder, third degree murder may be proven in only one way. Third degree murder may best be characterized as *residual felony murder*, because it includes *any felony* not listed under first degree felony murder (the felonies on the bullet list on page 2). For example, if an offender “hot wires” a car and in his attempt to escape pursuing officers, he kills a pedestrian, he would be guilty of third degree murder.

III. Effect of Proposed Changes:

This CS redefines felony murder by adding “any murder” to the list of felony offenses which serve as the basis for first degree felony murder.

This CS will allow prosecution for first degree murder (a capital offense) when a defendant unlawfully kills a person during the commission of another first or second degree murder. This CS allows the defendant to be prosecuted for first degree murder in most multiple murder cases. The following hypothetical examples illustrate this CS’s effect:

Example # 1. Defendant has the premeditated intent to kill A and does so, but in the process defendant also ends up killing B, without intending to do so. Under an appellate court’s decision discussed on page 3, the defendant’s premeditated intent to kill A does not transfer over to his killing of B and the defendant may only be charged with the second degree murder of B. This CS allows the state to charge the defendant for the first degree murder of B because “any murder” is added to the list of offenses which form the basis for *felony murder*.

Example # 2. While in the kitchen of their home, the defendant gets into a heated argument with his wife, A. While continuing to argue, the defendant goes into a rage and he grabs a nearby knife. The defendant starts swinging the knife as he goes toward A. Defendant’s knife wielding fatally wounds A and also fatally wounds their son, B, who bravely attempted to protect his mother.

Under these facts, the defendant would most probably be convicted of second degree murder for both A and B (an act imminently dangerous to another and demonstrating a depraved mind without regard for human life). This CS allows the state to charge the defendant with the first degree murder of B because “any murder” is added to the list of offenses which form the basis for felony murder. Note: There will be circumstances, as this example shows, where the defendant is arguably *less* culpable for the death of the first degree murder victim than for the second degree murder victim.

The CS adds “any murder” to the list of felony murder offenses. Presumably, this would include third degree murder, however in practice it is unlikely to have this effect. As described above, third degree murder is residual felony murder, *i.e.*, a murder committed during the course of any felony not listed as a first degree felony offense. Felony murder is a “legal fiction” used to infer intent to murder from the defendant’s intent to commit a dangerous felony offense. In a felony murder situation, the defendant would be intending to perpetrate the underlying felony and not third degree murder. That is, the defendant never actually intends a third degree murder, rather he intends the felony which forms the basis for third degree murder. Third degree murder is a byproduct of the felony which resulted in a death. Consequently, it is difficult to imagine how a defendant could be said to have unlawfully killed a human being while perpetrating or attempting a third degree murder on another person.

This CS will allow prosecution for second degree felony murder when a third party kills a person during an offender’s perpetration of, or attempt to perpetrate, any murder of another human being. Consequently, in either of the examples illustrated above, if someone other than the offender kills another person during the offender’s murder of another, the offender is guilty of second degree felony murder.

This CS adds “murder of another human being” to the list of offenses which do not constitute third degree felony murder as defined in section 782.04(4), F.S. Since third degree felony murder is the “residual” offense of first degree felony murder, listing “murder of another human being” in section 782.04(4), F.S., will avoid confusion.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

On January 30, 1998, the Criminal Justice Estimating Conference considered the impact that SB 524 might have on prison beds. The Conference determined that SB 524 would have no impact on the prison population. Likewise, the CS should not have an impact.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Several other states include murder in the list of offenses which can form the basis for felony murder. For example, Maine includes murder in a list of offenses which form the basis for felony murder. Me. Rev. Stat. Ann. tit. 17-A, § 202 (1997). Other states, like Iowa, do not list specific offenses, but instead define felony murder to include all forcible felonies, which includes murder. Iowa Code Ann. §§ 707.2, 702.11 (West 1997). Finally, North Carolina presents an interesting comparison: while not specifically listing murder in its felony murder statute, it includes any felony committed or attempted with the use of a deadly weapon. N.C. Gen. Stat. § 14-17 (1997).

VIII. Amendments:

None.