

There are three degrees of felony murder. *McEver v. State*, 352 So.2d 1213 (Fla. 2d DCA 1977). Pursuant to s. 782.04(1)(a)2., F.S., first degree felony murder, which is a capital felony punishable by death or life imprisonment, 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 list of offenses described in that section (e.g., capital trafficking, sexual battery, and robbery).

Felony murder does not require a premeditated design or specific intent to kill. *See e.g., Williams v. State*, 540 So.2d 188, 189, n. 3. (Fla. 1989) (" . . . [W]here the evidence shows a killing committed by someone perpetrating or attempting to perpetrate one of the enumerated felonies in the felony murder statute, premeditation is presumed as a matter of law. ").

. . . [W]hen a person is killed during the commission of certain felonies, the felon is said to have the intent to commit the death--even if the killing was unintended. The felony murder doctrine also imputes intent for deaths caused by co-felons and police.

State v. Gray, 654 So.2d 552, 553 (Fla. 1995).

The criminal intent that must be established for purposes of felony murder is "the mental element required to convict on the underlying felony." *Gurganus v. State*, 451 So.2d 817, 822 (Fla. 1984). "First degree felony murder operates by imputing the necessary state of mind to constitute premeditated murder if the elements of felony murder are shown." *Williams v. State, supra, at 189, n.3.*

A further principle regarding the felony murder doctrine is that "[t]he fact that an incidental death occurs in conjunction with a felony does not in itself make the perpetrator of the felony guilty of felony murder." *Allen v. State*, 690 So. 2d 1332, 1334 (Fla. 2d DCA 1997). To obtain a felony murder conviction, "the element of causation, i.e. that the homicide was committed in the perpetration of the felony, must be established." *Id.*

The three gradations of felony murder all make use of the following language: "engaged in the perpetration of . . . any felony." In *Jefferson v. State*, 128 So.2d 1326, 136 (Fla. 1961), the Florida Supreme Court stated that "[i]t is a homicide committed during the perpetration of a felony, if the homicide is part of the res gestae of the felony." "Res gestae" means "things done." *Black's Law Dictionary* 1173 (5th ed. 1979). The term is very difficult to define with precision. In the context of felony murder, one court has described res gestae "as embrac[ing] not only the actual facts of the transaction and the circumstances surrounding it, but the matter immediately antecedent to and having a direct causal connection with it, as well as acts immediately following it and so closely connected with it as to form in reality a part of the occurrence." *State v. Fouquette*, 221 P.2d 404, 416-17 (Nev. 1950).

In deciding whether a killing falls under the felony murder provisions of the homicide statute, more recent Florida Supreme Court cases have focused on a " 'break in the chain of circumstances' between the killing and the underlying felony." *State v. Williams, supra, at page 3, quoting Parker, supra, at 376.*

To find what the supreme court calls “a break in the chain of circumstances” between the killing and the underlying felony, courts focus on the time, distance, and causal relationship between the underlying felony and the killing. *See Parker*, 570 So.2d at 1051. “Neither the passage of time nor separation in space from the felonious act to the killing precludes a felony murder conviction when it can be said . . . that the killing is a predictable result of the felonious transaction.” *Mills [v. State]*, 407 So.2d 218, 221 (Fla. 3rd DCA 1981).

Id.

In order to find a defendant guilty of first degree felony murder, the state must prove the following:

- ▶ The victim's death.
- ▶ The victim's death occurred as a consequence of and while the defendant was engaged in the commission of any enumerated felony in s. 775.082(1)(a)1., F.S., attempting to commit any such felony, or escaping (or defendant's accomplice was escaping) from the immediate scene of any such felony.
- ▶ The victim was killed by the defendant, or the victim was killed by a person other than the defendant but that person and the defendant were principals in the commission of any of the enumerated felonies.

Pursuant to s. 782.04(3), F.S., second degree felony murder, which is a first degree felony punishable by up to life in prison, is the killing of a person during the perpetration of, or attempted perpetration of, any enumerated felonies in that section (almost identical to the enumerated felonies in felonies discussed for first degree felony murder).

Second degree felony murder "requires that the killing be performed by a nonprincipal." *Williams v. State, supra, at 188.*

The second degree felony murder statute . . . operates under a different scheme [than the first degree felony statute]; it imputes the act necessary to constitute second degree murder. The necessary elements of second degree murder include a homicide committed by the defendant or an accomplice, whereas the second degree felony murder statute addresses a homicide committed by someone other than the defendant or his accomplice. . . .

Id. at 189, n. 3.

In order to find a defendant guilty of second degree felony murder, the state must prove the following:

- ▶ The victim's death.

- ▶ The victim's death occurred as a consequence of and while the defendant was engaged in the commission of any enumerated felony in s. 782.04(3), F.S., attempting to commit any such felony, or escaping (or defendant's accomplice was escaping) from the immediate scene of any such felony.
- ▶ The victim was not killed by the defendant but the defendant knowingly aided, abetted, counseled, hired or otherwise procured the commission of one of the enumerated list of felonies.
- ▶ The person who actually killed the victim was not involved in the commission of or the attempt to commit the crime alleged.

Pursuant to s. 782.04(4), F.S., third degree felony murder, which is a second degree felony punishable by up to 15 years in prison, is the unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration or in the attempt to perpetrate any felony other than those enumerated in s. 782.04 (1)(a)2. or (3), F.S.

B. Resisting Officer with Violence

Section 843.01, F.S., provides that whoever knowingly and willfully resists, obstructs, or opposes any officer in the execution of legal process or in the lawful execution of any legal duty, by offering or doing violence to the person of such officer is guilty of a third degree felony.

The term "officer" encompasses law enforcement officers, correctional officers, correctional and county probation officers, auxiliary law enforcement officers, members of the Parole Commission, personnel or representatives of the Department of Law Enforcement, and any other person legally authorized to execute process. *See also* s. 943.10, F.S.

Regarding the mental element of the crime,

[t]he statute's plain language reveals that no heightened or particularized, i.e., no specific intent is required for the commission of this crime, only a general intent to "knowingly and willfully" impede an officer in the performance of his or her duties. In fact the statute is similar in format to the statute defining arson, which we held to be a general intent crime.

Frey v. State, 708 So.2d 918, 919 (Fla. 1998).

III. Effect of Proposed Changes:

Unless a prosecutor can prove first degree murder (premeditated design) or second degree murder for a murder committed in the perpetration of, or attempted perpetration of, resisting an officer with violence to his or her person, the prosecutor's sole choice for prosecuting such murder is third degree felony murder. The offense of resisting an officer with violence to his or her person is not enumerated in the first degree and second degree felony murder provisions of s. 782.04, F.S., the homicide statute, and therefore would fall under the catch-all third degree felony murder provision, which applies to felony offenses not enumerated in the former provisions.

Senate Bill 338 amends s. 782.04, F.S., to add the offense of resisting an officer with violence to his or her person to the list of enumerated offenses in the first degree and second degree felony murder provisions. In conformance with these changes, the bill amends the third degree felony murder provision to add the offense of resisting an officer with violence to his or her person to the list of enumerated offenses exempt from this provision because they are listed as enumerated felonies in the first and second degree felony murder provisions.

The practical effect of the bill is that a prosecutor could prosecute an unlawful killing committed during the perpetration of, or attempted perpetration of, resisting an officer with violence as a first degree or second degree felony murder (depending on who actually committed the murder) rather than as a third degree felony murder.

Conviction for first degree or second degree felony murder would likely result in considerably greater penalties being imposed than conviction for third degree felony murder. The difference, in terms of potential maximum penalties, is the difference between 15 years imprisonment (third degree felony murder) and life imprisonment (second degree felony murder and first degree felony murder) or the death penalty (first degree felony murder).

For the purpose of incorporating the amendments made by the bill to s. 782.04, F.S., in references thereto, the bill reenacts ss. 775.0823(1-6), 782.051, 903.133, 921.0022(3)(h) and (i), and 947.146(3)(i), F.S., relating to violent offenses committed against law enforcement officers, correctional officers, state attorneys, justices or judges, relating to attempted felony murder, relating to the prohibition of bail on appeal for certain felony convictions, relating to the Criminal Punishment Code offense severity ranking chart, and relating to the Control Release Authority.

The bill provides for an effective date of October 1, 2001.

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:

Senate Bill 338 is estimated to have an insignificant fiscal impact.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Criminal Justice:

Amends the description of an offense. (WITH TITLE AMENDMENT)

2 by Criminal Justice:

Amends the description of an offense. (WITH TITLE AMENDMENT)

#3 by Criminal Justice:

Amends the description of an offense.

#4 by Criminal Justice:

Amends various statutory references in s. 775.0823, F.S., relating to sentencing. (WITH TITLE AMENDMENT)