Felony + Death = Felony Murder

Felony Murder: Just Because You Can . . .

by John Messinger

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The opinions expressed here are those of the author alone.

The offense of felony murder, now Penal Code Section 19.02(b)(3), was a source of confusion for many years following its codification in 1973. Now that its interpretation and application have been dramatically streamlined, the problem it poses is one of fairness more than ambiguity. This article is not intended as a history lesson, or a deep dive into what the drafters intended; Judges Cochran and Slaughter covered those in their side opinions to ***Lawson v. State*** and ***Fraser v. State***, respectively.[1] Nor is it an argument that the current state of the law is wrong. Instead, the goal is to highlight felony murder's potential for abuse and discuss some practical solutions.

I. One of these things is not like the others . . .

There are three statutory alternative manner and means of committing murder. The first, Section (b)(1), is straightforward: intentionally or knowingly causing the death of an individual.[2] A person commits murder under the second manner and means, (b)(2), if he "intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of

[1] ***Lawson v. State***, 64 S.W.3d 396, 397 (Tex. Crim. App. 2001) (Cochran, J., concurring); ***Fraser v. State***, 583 S.W.3d 564, 582 (Tex. Crim. App. 2019), reh'g denied (Oct. 30, 2019) (Slaughter, J., dissenting).

[2] TEX. PEN. CODE § 19.02(b)(1). All references to "sections" are to the Penal Code.

an individual."[3] This combines an overall less serious intent[4] with "an act clearly dangerous to human life" (ACD) that causes death. The third, (b)(3), has a similar ACD requirement but is otherwise unique. Usually called "felony murder," a person commits this manner of murder if he:

> commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from thecommission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.[5]

On its face, it appears to contemplate a specific set of circumstances that rise to the equivalent of intentionally or knowingly causing someone's death. After decades of case law, however, that is not the case. A brief review of its current interpretation shows felony murder is often an (unexpected) option for nearly any criminal episode ending in death.

1. **"Commits or attempts to commit a felony . . ."**

Considering the structure and language of (b)(1) and (b)(2), it might be reasonable to believe this clause in (b)(3) evinces the legislative intent to equate the requisite intent of the predicate felony to the intent to cause death or serious bodily injury. After all, the three manners and means of murder have long been treated as equivalent for unanimity purposes.[6] But not so. After more than thirty years on the books and numerous opinions to the contrary, the Court of Criminal Appeals (CCA) held in ***Lomax v. State*** that (b)(3) "plainly dispenses with a culpable mental

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[3] TEX. PEN. CODE § 19.02(b)(2).

[4] "Serious bodily injury" is defined to include death. TEX. PEN. CODE § 1.07(a)(46).

[5] TEX. PEN. CODE § 19.02(b)(3).

[6] ***Aguirre v. State***, 732 S.W.2d 320, 326 (Tex.Cr.App. 1982) (op. on reh'g).

state."[7] This means not only that there is no transfer of intent from predicate felony to murder, the predicate felony need not have any culpable mental state. ***Lomax*** presented the perfect offense to illustrate the point: felony DWI.[8] Felony DWI is nothing more than the commission of a strict-liability offense following two convictions for strict-liability offenses.[9] Although this broke with the prevailing understanding (and perhaps rationale) of felony murder, it conformed to the plain language of the statute.

Accordingly, even before ***Lomax***, the CCA held the jury need not be unanimous about the predicate felony when multiple predicates are pled.[10] It first declared, without much explanation, that all felonies are "basically morally and conceptually equivalent" when all that is required is a felony.[11] It later clarified that the moral and conceptual equivalence of predicates is not an applicable concern.[12] Again, this may seem odd but it jibes with the plain language of the statute.

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[7] ***Lomax v. State***, 233 S.W.3d 302, 305 (Tex.Cr.App. 2007). The only exception to dispensing with a *mens rea* for felony murder is when the State attempts to convict for felony murder under the party theory defined in Section 7.02(a)(2). *See* ***Nava v. State***, 415 S.W.3d 289, 298-300 (Tex.Cr.App. 2013).

[8] ***Lomax***, 233 S.W.3d at 303.

[9] TEX. PEN. CODE § 49.09(b)(2) ("An offense under Section 49.04, 49.045, 49.05, 49.06, or 49.065 is a felony of the third degree if it is shown on the trial of the offense that the person has previously been convicted . . . two times of any other offense relating to the operating of a motor vehicle while intoxicated, operating an aircraft while intoxicated, operating a watercraft while intoxicated, or operating or assembling an amusement ride while intoxicated.").

[10] ***White v. State***, 208 S.W.3d 467, 469 (Tex.Cr.App. 2006).

[11] ***Id***.

[12] ***Contreras v. State***, 312 S.W.3d 566, 585 (Tex.Cr.App. 2010).

2. **". . . other than manslaughter . . ."**

With this clause, the CCA broke with the plain language of the statute to honor the spirit of the prohibition. Although the only offense mentioned in (b)(3) is manslaughter, the CCA decided decades ago that it was necessary to prohibit the use of any lesser-included offense of manslaughter to prevent the statutory limitation from being "'regularly circumvented.'"[13] Because of the way lessers are determined, however, it is not clear that goal was (or remains) achieved.

When the State charges an offense, determining whether another offense is included is controlled by TEX. CODE CRIM. PROC. Article 37.09 as applied through ***Hall v. State***.[14] In the usual case -- an instruction requested at a charge conference -- ***Hall*** requires consideration of the factual allegations in the charging instrument under the cognate pleadings approach.[15] However, in ***Fraser***, the CCA said the comparison for purposes of the manslaughter-as-predicate analysis is strictly statute-to-statute because the State has not charged manslaughter.[16] In other words, all the elements of the alleged lesser must be "contained in or deducible from the statutory elements of manslaughter."[17] This can produce unusual results.

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[13] ***Johnson v. State***, 4 S.W.3d 254, 258 (Tex.Cr.App. 1999) (quoting ***Garrett v. State***, 573 S.W.2d 543, 546 (Tex.Cr.App. 1978)).

[14] 225 S.W.3d 524 (Tex.Cr.App. 2007).

[15] ***Id***. at 535-536 (comparing the statutory elements and factual averments of the charged offense to the statutory elements of the alleged lesser).

[16] ***Fraser***, 583 S.W.3d at 568-569.

[17] ***Id***. at 569.

One of the prominent cases in this line is ***Lawson***. Lawson was convicted of felony murder based on intentionally or knowingly committing an aggravated assault -- stabbing the victim -- that killed him.[18] The CCA affirmed. In a short opinion, it concluded "[a]n 'intentional and knowing' aggravated assault is not a lesser included offense of manslaughter, nor is it statutorily includable in manslaughter[,]" because those mental states are greater than that required by manslaughter.[19] Although decided well before ***Fraser***, it illustrates the effect of a strict statute-to-statute comparison. It is easy to imagine how the same act of (intentionally) stabbing a person (unintentionally) to death could be charged as either manslaughter or aggravated assault. Yet, by including a mental state greater than that required by manslaughter, this assault resulting in unintentional death can be charged as murder.

Fraser is a starker illustration of this. The predicate felonies alleged in that case were injury to a child and endangering a child.[20] Both offenses are capable of being committed recklessly (or even criminally negligently), and the charging instrument did not restrict the mental states to intentional and knowing as in ***Lawson***.[21] The CCA held this did not matter because, culpable mental states notwithstanding, "child" was an element present in both predicates but not in (or

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[18] ***Lawson v. State***, 26 S.W.3d 920, 921 (Tex.App. -- Amarillo 2000), aff'd, 64 S.W.3d at 396.

[19] ***Lawson***, 64 S.W.3d at 397.

[20] TEX. PEN. CODE §§ 22.04 (injury), 22.041 (endangering).

[21] ***Fraser***, 583 S.W.3d at 565-566.

deducible from) manslaughter.[22] Thus, if you recklessly or even criminally negligently kill a child younger than 14 or 15, you could be charged with murder.[23]

3. **". . . and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual."**

On its face, this clause suggests the ACD that causes death must be a distinct act from the felony, done (or attempted) to effectuate the felony or escape therefrom. And, in the form of the so-called "merger doctrine," it was the law . . . for a while.[24] By 1999, however, the CCA re-examined that line and rejected the requirement of "'felonious criminal conduct other than the assault causing the homicide.'"[25] That case further clarified that any felony that is not manslaughter or included in manslaughter could support felony murder.[26] The result is that the requirement that the ACD be committed or attempted "in the course of and in furtherance of the commission or attempt [of a felony]" tends toward nullity when the underlying felony is (or is based on) the ACD. To put a point on it, the CCA later shorthanded the "course and furtherance" clause as the requirement of "a connection between the underlying felony and the dangerous act."[27] This is not much of a requirement when they are the same thing.

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[22] ***Id***. at 569-570.

[23] As shown below, this is also true of recklessly killing an adult if it is carefully charged.

[24] ***Aguirre***, 732 S.W.2d at 325-326 (summarizing the ***Garrett*** line of cases, which prohibited predicate felonies "inherent in the homicide").

[25] ***Johnson***, 4 S.W.3d at 258 (quoting ***Garrett***, 573 S.W.2d at 546).

[26] ***Id***.

[27] ***Contreras***, 312 S.W.3d at 584.

As a side note, unlike (b)(2), felony murder can also be based on the *mere attempt* to commit an ACD. It is unclear under what circumstances a defendant would attempt an ACD, fail to commit it, but still cause death. A robber who accidentally shoots someone while drawing his gun to threaten his victim with it, perhaps? But it makes sense in the abstract to hold someone liable for trying to commit such an act, falling short, but managing to kill someone anyway.

II. What Does this Mean in Practice?

Again, the purpose of this paper is not to say the state of the law is wrong, legally or otherwise.[28] Even if it were possible to say with confidence it is wrong rather than merely unwise, ***Fraser*** makes it clear the CCA is not going to change it. Instead, the purpose is to highlight the peculiarities of felony murder and suggest that care be taken with its use lest the State go too far and the option be taken away. There appear few limitations to charging felony murder. Other than not charging a statute-to-statute lesser of manslaughter, the only hard rule is that the ACD be an act rather than an omission.[29] A brief survey of cases shows what is possible. You can decide whether felony murder should have been pursued.

If, as the CCA said in ***Contreras***, "[t]he point of the felony murder statute is to punish, as murder, a killing occurring during the course of a serious crime, the exact seriousness of the underlying crime not being a particular concern, so long as it is serious enough to be considered

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[28] However, it is fair to ask whether the existence of Section 19.02(b)(2) suggests an intent to limit the underlying assaults that can be elevated to murder to those committed with the intent to cause serious bodily injury. I see no evidence this argument has been considered by the CCA.

[29] ***Rodriguez v. State***, 454 S.W.3d 503, 507-508 (Tex.Cr.App. 2014) (orig. op.) (felony murder conviction predicated on injury to a child by withholding adequate nutrition and fluid was based on omission and therefore unsustainable).

a 'felony[,]'"[30] many cases fit that description without raising any red flags. It might make sense to charge someone with felony murder when they evade arrest in a vehicle and their reckless flight from police causes the death of someone else on the road,[31] or when they use a vehicle without authorization and abandon a child found therein to die of exposure and dehydration.[32] In each of these, the defendant added an element of obvious danger to an otherwise complete felony. He deserves what he gets when the worst happens as a result.

But sometimes the ACD is the predicate offense. In ***Fraser***, for example, the manner and means of the predicates (injury to a child and endangering a child) and the ACD were the same: administering diphenhydramine to a child.[33] It might make sense to use felony murder in such a case to avoid the hassle of elevated culpability requirements when some ill intent is suspected. But Fraser ran a licensed day care center out of her home and was administering Benadryl, which contains diphenhydramine, to most of the children under her care to promote napping.[34] There was no indication she was trying to harm any of the children whose well-being was essential to her livelihood. She accidentally, perhaps even recklessly, killed a child in her care. Through the statute governing injury to a child, the Legislature expressed its determination that recklessly causing serious bodily injury (which includes death) to a child is a second-degree felony, just like

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[30] ***Contreras***, 312 S.W.3d at 585.

[31] ***Gonzalez v. State***, 510 S.W.3d 10, 16 (Tex.App. -- Corpus Christi 2014, pet. ref'd). *See also* ***Medina v. State***, 962 S.W.2d 83, 85-86 (Tex.App. -- Houston [1st Dist.] 1997, pet. ref'd) (felony murder for running a red light and killing occupants of another vehicle in the course of unauthorized use of a vehicle).

[32] ***Mackey v. State***, 811 S.W.2d 643, 644-645 (Tex.App. -- Waco 1991, pet. ref'd).

[33] 583 S.W.3d at 565-566.

[34] ***Id***. at 565.

manslaughter.[35] With no additional facts, however, it can result in a murder conviction if the State chooses.

Some felony murder indictments are trickier still because they present like deconstructed manslaughters. In ***Esquivel v. State***, the State charged murder under all three manners and means.[36] To be clear, the State focused on what its evidence showed: Esquivel stood at a distance from the victim, aimed the handgun and pulled the trigger, and there were no signs of a struggle. This supports (b)(1) and (b)(2) murder all day. But the way in which felony murder was charged is noteworthy. The alleged predicate felony was intentional or knowing aggravated assault with a deadly weapon, which included (in the jury charge) both assault bodily injury and assault by threat.[37] The alleged ACD was pointing a handgun at the victim.[38] The theory of felony murder was thus an unintentional death caused by shooting with a firearm or threatening with a firearm. That sounds like manslaughter. But for the current state of the law, it would have been.

III. So What Do We Do?

There is no reason to think the CCA will entertain any complaints about their interpretation of felony murder anytime soon. That leaves at least two options for change.

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[35] TEX. PENAL CODE § 22.04(e).

[36] No. 01-16-00301-CR (Tex.App. -- Houston [1st Dist.] Sept. 7, 2017, pet. ref'd) (not designated for publication), slip op. at 1.

[37] ***Id.***, slip op. at 4.

[38] ***Id.***

1. **Advocate for a Legislative Fix.**

As Judge Newell noted in his concurrence to ***Fraser***, the CCA's current interpretation of (b)(3) began to take shape in 1999 and the Legislature has done nothing to correct any perceived errors.[39] Someone will have to explain a problem to them and suggest a solution. The potential for abuse seems most acute when an assaultive offense is used as the predicate offense. In her dissent to ***Fraser***, Judge Slaughter did a good job of explaining the various options used over time in and out of Texas to create felony-murder liability.[40] The best solution depends on how one views the purpose of felony murder.

If the purpose is to punish as murder an unintentional-but-extremely-likely death caused during serious offenses, the answer could be to tie felony murder to a list of predicate felonies; think capital murder under Section 19.03(a)(2). Combining the predictability of a list with the requirement of an ACD, inherent in the predicate or otherwise, would eliminate much of the perceived randomness of some charging decisions.

If the purpose is to create a third category of murder that is morally and conceptually equivalent to (b)(1) and (b)(2), the answer might be to prohibit assaultive offenses as predicates. As mentioned above in note 28, (b)(2) suggests the legislative intent to equate intent to kill with intent to cause serious bodily injury plus ACD. Felony murder effectively differs from (b)(2) only in that it trades the intent to cause serious bodily injury for a committed or attempted felony. It would be strange to satisfy that swap with an assaultive felony that has a lesser *mens rea*/result

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[39] ***Fraser***, 583 S.W.3d at 572 (Newell, J., concurring).

[40] ***Id***. at 588-592 (Slaughter, J., dissenting).

combination than required by (b)(2) just because it happens to be a felony; any assaultive offense with the intent to cause serious bodily injury is already a felony. This change would eliminate some of the perceived unfairness in certain charging decisions. On the other hand, it could just force the same type of creative pleading used to get around the merger doctrine back when it applied.[41]

Either of these two options could reduce the number of felony-murder prosecutions that make some practitioners on both sides uneasy.

2. **Use (or Encourage) More Cautious Prosecutorial Discretion.**

In the absence of legislative action, the only hope is that prosecutors will choose not to abuse a charging option with so few practical limitations. Again, the statute says what it says and has been interpreted relatively consistently for many years, so the question is rarely whether a given charging decision is permissible. But we should ask ourselves whether, given the detailed matrix the Legislature created to match culpability to conduct based on intent, injury, victim status, circumstances, duration, etc., we should sidestep that matrix simply because we can. What criteria are we using when we look past more obviously applicable statutes to charge murder? Do we apply them consistently? Do we use the threat of a murder charge as a bargaining tool? Or is it an option we reserve for special cases where the other viable options fail to address the severity of the defendant's conduct?

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[41] Taking the example from ***Aguirre***, 732 S.W.2d at 325-326, recklessly killing someone by shooting through a door could be manslaughter or deadly conduct -- both assaultive offenses -- or the mere property crime of state-jail criminal mischief. TEX. PENAL CODE § 28.03(b)(4).

IV. **Conclusion**

Felony murder can be an appropriate tool to seek justice. It can also be misused to punish a defendant beyond what the Legislature intended as indicated by its other enactments. How long it remains available depends largely on how carefully prosecutors use it. We should all work to encourage its responsible application.

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