

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF PENNINGTON)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,)
)
Plaintiff,)
)
vs.)
)
WILLIAM LONG,)
TRAVIS NELSON,)
TRACY LAUGHLIN, and)
GILBERT REYNA,)
)
Co-defendants.)

51CRI21-001446 (LONG)
51CRI21-001419 (NELSON)
51CRI21-001418 (LAUGHLIN)
51CRI21-001417 (REYNA)

**MEMORANDUM OPINION AND
ORDER GRANTING CO-
DEFENDANTS' MOTIONS TO
DISMISS COUNT 1**

Co-defendants, Long, Nelson, Laughlin, and Reyna are charged in a five-count indictment. The basic allegations do not seem to be in dispute. They and a fifth person, Jesus Vance, allegedly aided and abetted each other in the alleged kidnapping and assault of Jake Williams on April 9, 2021. During the incident, Williams shot and killed Vance. Predictably, Williams's alleged kidnappers are all charged with Aiding and Abetting Second Degree Kidnapping. But Long, Nelson, Laughlin, and Reyna are also charged with Aiding and Abetting the First Degree Murder of Vance, even though Williams, not any of them, killed Vance.¹

Long moved to dismiss the Aiding and Abetting First Degree Murder allegation, arguing that it fails to describe a public offense. The State concedes dismissal is in the Court's discretion. Nelson, Laughlin, and Reyna have all joined Long's motion. Long submitted briefing and an argument at an October 8, 2021,

¹ They are also all accused of two alternative counts of Aiding and Abetting the Aggravated Assault of Williams. Reyna is also accused of a fifth charge, False Personation.

hearing. The State also submitted briefing and argument. The Court has considered the briefing, submissions, relevant cases, statutes, and the argument of counsel.

The State asks the Court to apply South Dakota's felony-murder statute in a way it appears never to have been applied before. In doing so, the State seems to ask the Court to significantly depart from the classic common law approach of felony murder South Dakota has followed since statehood. And the result the State seeks has been widely rejected by courts throughout the United States. Moreover, the approach the State seeks has been identified by courts and commentators as something best-left to legislatures, not courts.

Put simply, Count 1 fails to describe a public offense. In South Dakota there is no first degree murder liability for felons when a co-felon is killed by the victim attempting to thwart the underlying felony. Accordingly, Long's motion is **GRANTED**. Since the other three co-defendants joined Long's motion, their motions are also **GRANTED**. Accordingly, it is hereby **ORDERED** the Count 1 of the Indictment is Dismissed.

PRELIMINARY STATEMENT

This Court is not dismissing all the charges against Long, Nelson, Laughlin, and Reyna. They have not moved to dismiss the charges of Aiding and Abetting Second Degree Kidnapping and multiple charges of Aiding and Abetting Aggravated Assault. Dismissal of those counts does not appear to be proper. Long is still potentially facing periods of incarceration of up to 50 years as to *both* the Aiding and Abetting Kidnapping and the Aiding and Abetting Aggravated Assault charges. A total

of 100 years, potentially.² This Order merely concludes, pursuant to South Dakota law, that Long cannot also be charged with Aiding and Abetting First Degree Murder in relation to a killing that neither he nor his co-defendants committed.

BACKGROUND

Long and his co-defendants are charged with Aiding and Abetting First Degree Murder.³ First Degree Murder is a Class A felony.⁴ That means it is punishable by a minimum of life in prison and a maximum of the death penalty.⁵

In South Dakota, the killing of one human being by another is homicide.⁶ Some homicides are murders. The most serious type of murder is the one Long is charged with, First Degree Murder. A homicide is First Degree Murder if the killer has the “premeditated design” to kill their victim.⁷ This requires that the killer, before the killing occurs, must “distinctly form” the “intention, purpose, or determination to kill” their victim.⁸ It is this premeditation and determination that often justifies convicted First Degree Murderers receiving life sentences, or the death penalty. At common law this intention and premeditation was known as “malice aforethought.” “Malice is the ‘grand criterion which now distinguishes murder from other killing.’”⁹ At common law, malice was required for murder and in South Dakota it is required for First Degree Murder. But:

² Long’s co-defendants are facing total potential maximum periods of incarceration of between 30 and 51 years.

³ It’s unclear who they were allegedly aiding and abetting. It is unlikely they could have aided and abetted each other, because if one co-felon murders during a kidnapping, the co-defendants are likely all guilty of murder, not aiding abetting murder. See *State v. Frazier*, 2002 S.D. 66. It’s difficult to comprehend how they could have aided and abetted either Vance or Williams.

⁴ S.D.C.L. § 22-16-12.

⁵ See S.D.C.L. § 22-6-1. The State is not seeking the death penalty.

⁶ S.D.C.L. § 22-16-1.

⁷ S.D.C.L. § 22-16-4(1).

⁸ S.D.C.L. § 22-16-5.

⁹ *Com. v. Redline*, 137 A.2d 472, 475 (Pa. 1958)(citing IV Blackstone, Commentaries at 198).

In certain circumstances the malice essential to murder need be neither premeditated nor express. For instance, at common law an accidental or unintentional homicide committed in the perpetration of or attempt to perpetrate a felony is murder, the malice necessary to make the killing murder being constructively imputed by the malice incident to the perpetration of the initial felony. Thus, 'if one intends to do another felony, and undesignedly kills a man, this is also murder': This type of felonious homicide, known as felony-murder, became firmly imbedded in the common law.¹⁰

Thus, at common law, one could be guilty of murder and subject to the death penalty if they killed with actual malice or if they killed with malice imputed to their killing from the malice they showed in committing an underlying felony like burglary, robbery, arson, or rape. But importantly:

In adjudging a felony-murder, it is to be remembered at all times that the thing which is imputed to a felon for a killing incidental to his felony is *malice* and *not the act of killing*. The mere coincidence of homicide and felony is not enough to satisfy the requirements of the felony-murder doctrine. It is necessary to show that the conduct causing death was done in furtherance of the design to commit the felony. Death must be a consequence of the felony.¹¹

Felony-murder is incorporated into South Dakota's First Degree Murder statute:

Homicide is also murder in the first degree when . . . committed by a person engaged in the perpetration of, or attempt to perpetrate, and arson, rape robbery, burglary, or kidnapping, or unlawful throwing, placing, or discharging of a destructive device or explosive."¹²

Long is charged pursuant to this statute. And the State concedes that his Aiding and Abetting First Degree Murder charge is "felony-murder."

¹⁰*Id.*(citing IV Blackstone, Commentaries at 200-201).

¹¹ *Id.* at 4 (citing Perkins, Malice Aforethought, 43 YALE L.J. 537 (1934)).

¹² S.D.C.L. § 22-16-4(2). There is a third way a homicide can rise to first degree murder:

Homicide is also murder in the first degree if committed by a person who perpetrated, or attempted to perpetrate, any arson, rape, robbery, burglary, kidnapping, or unlawful throwing, placing, or discharging of a destructive device or explosive and who subsequently effects the death of any victim of such crime to prevent detection or prosecution of the crime.

See generally S.D.C.L. § 22-16-4.

The felony-murder rule “is one of the most persistently and widely criticized features of American Criminal law.”¹³ Although its precise genesis is unclear, it is presumed to have originated in English common law.¹⁴ But, “the English courts never applied the felony-murder rule to hold a felon guilty for the death of his co-felon at the hands of the intended victim.”¹⁵ The State’s felony-murder charge hinges on this no longer being the case. But this limitation is neither a relic of the past nor a quirk of English law. A clear majority of American jurisdictions “refuse to convict a perpetrator of felony murder when a co-felon is killed by the victim of the initial felony.”¹⁶ Commentators observe that “it is now generally accepted that there is no felony-murder liability when one of the felons is shot and killed by the victim”¹⁷

There are a minority of jurisdictions which would allow a case like this to proceed, but this minority view “has been widely rejected.”¹⁸ And although the State’s oral argument was a little different than their written argument, they concede in their

¹³ Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 60 (2004)(collecting commentaries).

¹⁴ See generally *id.*

¹⁵ *State v. Severs* 759 S.W.2d 935, 937 (Tenn. Crim. App. 1988)(citations omitted). See also *Com. v. Tejada*, 32 Mass.L.Rptr 426, *2 (Sup.Ct.Mass. 2014)(“the historical record suggests that no English court ever applied the felony murder rule to hold a felon guilty where his co-felon was killed by the intended victim.”(citing Prevezer, *The English Homicide Act: a New Attempt to Revise the Law of Murder*, 57 CO. L. REV. 624, 634 (1957))).

¹⁶ *Davis v. Fox*, 735 S.E.2d 259, 265 (W. Va. 2012). “For other decisions in which the majority position has been adopted, see *People v. Gonzalez*, 54 Cal.4th 643, 142 Cal.Rptr.3d 893, 278 P.3d 1242, 1252 (2012); *Watkins v. State*, 125 Md.App. 555, 726 A.2d 795, 801 (Md.1999); *Sheriff v. Hicks*, 89 Nev. 78, 506 P.2d 766, 768 (1973); *State v. Suit*, 129 N.J.Super. 336, 323 A.2d 541, 548–49 (1974) (rejecting state’s argument that felony-murder statute applies to “any death which occurs without regard to the person whose action causes same”); *Jackson v. State*, 92 N.M. 461, 589 P.2d 1052, 1053 (1979); *State v. Bonner*, 330 N.C. 536, 411 S.E.2d 598, 601 (1992); *State v. Severs*, 759 S.W.2d 935, 938 (Tenn. Crim. App. 1988) (recognizing that “theory of proximate cause in relation to felony-murder is limited to acts committed by the accused or his accomplices” and stating that any attempt to extend felony-murder rule “beyond its common law limitation to acts by the felon and his accomplice ... is an appropriate action for the legislature ... not the courts”).” *Id.* at n. 4. See also *Tyson v. People*, 59 V.I. 391, 415 (V.I. 2013)(Supreme Court of the Virgin Islands adhering to the “historical common law interpretation of the felony murder rule”); and *Campbell v. State*, 444 A.2d 1034 (Md. 1982).

¹⁷ *Davis*, 735 S.E.2d at 265 (quoting Wayne R. LaFave, *Substantive Criminal Law* § 14.5(d) at pp. 456–58 (2nd ed.2003)).

¹⁸ *State v. Hicks*, 506 P.2d 766, 768 (Nev. 1973).

brief that this is an issue of “first impression.” Thus, the State is asking the Court to adopt the widely rejected minority position and abandon the “classic common-law limitations”¹⁹ preventing felony-murder from applying in a case like this.

In order to evaluate the merit of the State’s request, the Court will consider South Dakota’s felony-murder law, the minority position, the majority position, and whether judicial intervention is appropriate in the first place.

DISCUSSION

A. SOUTH DAKOTA FELONY-MURDER LAWS

The Dakota Territory was organized in 1861. The first Legislative Assembly met in Yankton in 1862 and enacted a Criminal Procedure Code.²⁰ Dakota’s first murder statute stated:

Murder is the unlawful killing of a human being, with malice aforethought, either expressed or implied. The unlawful killing may be perpetrated by poisoning, striking, drowning, stabbing, shooting, or by any other of the various forms or means by which human nature may be overcome, and death thereby occasioned.²¹

Although this statute did not specifically reference felony-murder, its existence is implied by at least other provisions of the 1862 Criminal Procedure Code. One was:

That where such involuntary killing 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, the offence shall be deemed murder.²²

And cases could proceed under the common law:

In all cases where any person or persons shall be convicted of any crimes or misdemeanors specified in the chapter, or of any offences at

¹⁹ *State v. Canola*, 374 A.2d 20, 30 (N.J. 1977) (Noting that “classic common-law limitations” prevent felony-murder from applying when the killer is a third -person not acting “in furtherance of the felonies scheme”).

²⁰ *See generally* General Laws of the Territory of Dakota, Chapter IX (1862).

²¹ *Id.* at § 18 (1862).

²² *Id.* at § 124 (1862).

common law, the court shall give judgement that the offender or offenders, so convicted. Shall pay the costs of the prosecution.²³

In 1865, the Territorial Legislature adopted a Penal Code, section 242 stated:

Homicide is murder in the following cases:

- (1) When perpetrated without authority of law, and with a premeditated design to effect the death of the person killed, or of any human being.
- (2) When perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect death of any particular individual.
- (3) When perpetrated without any design to effect death by a person engaged in the commission of any felony.²⁴

In 1887, the Territorial Legislature compiled Dakota's various codes. Section 242 of the Penal Code became § 6442 of the Compiled Laws of Dakota.²⁵ This version of murder, including the provisions for felony-murder, were still in effect after statehood.²⁶ This same language survived code revisions in 1903,²⁷ 1919,²⁸ 1939,²⁹ and 1960.³⁰ When South Dakota recompiled its laws in the 1960s, the felony murder portion of the statute was given its own section, 22-16-9, but the language remained

²³ *Id.* at § 189 (1862)(emphasis added).

²⁴ *See State v. Reddington*, 64 N.W. 170, 173 (S.D. 1895)(quoting Pen.C. 1877, § 246). Section 242 was "evidently taken from New York." *See Reddington*, 64 N.W. at 173.

²⁵ Compiled Laws of the Territory of Dakota § 6442 (1887).

²⁶ *See Reddington*, 64 N.W. at 173 (recounting an early murder case in South Dakota).

²⁷ R.Pen.C. 1903 § 246.

²⁸ South Dakota Code § 4012 (1919).

²⁹ South Dakota Code § 13.2007 (1939). The 1939 version changed some punctuation and added a fourth subsection—which was in the 1919 code at § 4016. The 1939 version read:

Homicide is murder in the following cases:

- (1) When perpetrated without authority of law, and with a premeditated design to effect the death of the person killed, or of any human being;
- (2) When perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect death of any particular individual;
- (3) When perpetrated without any design to effect death by a person engaged in the commission of any felony; or
- (4) Homicide perpetrated by an act imminently dangerous to others and evincing a depraved mind, regardless of human life, is not the less murder because there was no actual intent to injure others.

³⁰ South Dakota Code § 13.2007 (1960).

materially the same.³¹ When South Dakota codified its laws in 1976, felony murder remained at § 22-16-9.³²

In 1979 South Dakota reinstated the death penalty and reworked its murder statutes. Murder, including felony-murder, was set forth in § 22-16-4:

Homicide is murder when perpetrated without authority of law and with a premeditated design to effect the death of the person killed, or of any other human being, or when committed by a person engaged in the perpetration of, or attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, or unlawful throwing, placing, or discharging of a destructive device or explosive.³³

In 1980, section 22-16-4 was modified slightly to reflect that it defined “murder in the first degree.”³⁴ In 1992, another sentence was added to the first degree murder statute.³⁵

In 2005, the first degree murder statute was also slightly modified to its current form.³⁶

³¹ South Dakota Compiled Laws § 22-16-9 (1967)(“Homicide is murder when perpetrated without any design to effect death by a person engaged in the commission of any felony”).

³² See S.D.C.L. § 22-16-9 (1976).

³³ S.D.C.L. § 22-16-4 (1979). Section 22-16-9 was reworded as “manslaughter in commission of a lesser felony.” See 1979 SL Chapter 160 § 2A.

³⁴ See 1980 SL Chapter 173 § 9. It then read:

Homicide is murder in the first degree when perpetrated without authority of law and with a premeditated design to effect the death of the person killed, or of any other human being, or when committed by a person engaged in the perpetration of, or attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, or unlawful throwing, placing, or discharging of a destructive device or explosive.

³⁵ 1992 SL Chapter 161.(“Homicide is also murder in the first degree if committed by a person who perpetrated, or attempted to perpetrate, any arson, rape, robbery, burglary, kidnapping, or unlawful throwing, placing, or discharging of a destructive device or explosive and who subsequently effects the death of any victim of such crime to prevent detection or prosecution of the crime”).

³⁶ 2005 SL Chapter 120, § 154. It now reads:

Homicide is murder in the first degree

- (1) If perpetrated without authority of law and with a premeditated design to effect the death of the person killed, or of any other human being, including an unborn child; or
- (2) If committed by a person engaged in the perpetration of, or attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, or unlawful throwing, placing, or discharging of a destructive device or explosive.

Homicide is also murder in the first degree if committed by a person who perpetrated, or attempted to perpetrate, any arson, rape, robbery, burglary, kidnapping, or unlawful throwing, placing, or discharging of a destructive device or explosive and who subsequently effects the death of any victim of such crime to prevent detection or prosecution of the crime.

Nothing about this legislative history suggests that the Legislature has expanded felony-murder to include killings by individuals not perpetrating the underlying felony. In fact, the Legislature has *limited* felony-murder, by limiting the predicate felonies.

And, the plain language of the felony-murder statute does not suggest that the Legislature has expanded felony-murder beyond the classic common law agency approach. State Dakota law dictates that a killing is murder:

If committed by a person engaged in the perpetration of, or attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, or unlawful throwing, placing, or discharging of a destructive device or explosive.³⁷

By the plain language of the statute, the person committing the killing must be perpetrating, in this case, a kidnapping. But here, Williams plainly was not perpetrating a kidnapping, he was allegedly being kidnapped.

Other states have modified their felony-murder statutes to allow for people in Long's position to be charged with murder. For example, in Arizona a person commits first degree murder if:

Acting either alone or with one or more other persons the person commits or attempts to commit [enumerated felonies] . . . and in the course of and in furtherance of the offense or immediate flight from the offense, the person or **another person causes the death of any person**.³⁸

But South Dakota's Legislature has not adopted expansive language like this. And it is to South Dakota law this Court must adhere.

³⁷ S.D.C.L. § 22-16-4(2).

³⁸ See Leonard Birdsong, *The Felony Murder Doctrine Revisited: A Proposal for Calibrating Punishment That Reaffirms the Sanctity of Human Life of Co-Felons Who Are Victims*, 33 Ohio N.U.L. REV. 497, 511 (2007)(examining Arizona law)(emphasis added).

Long's argument that South Dakota's homicide statute prevents a killing from being both a murder and a justifiable homicide is somewhat compelling. The use of "either" with "or" suggests that a killing can only be one of the five types of homicides listed in § 22-16-1. Plainly, Williams was not charged in Vance's death, so it must have been a justifiable homicide, and cannot be a murder.³⁹ The State's only response to Long's argument was an unsupported hypothetical at oral argument suggesting that when someone pushes another in front of a moving car, that is potentially manslaughter (or murder), but also justifiable (or excusable) homicide from the perspective of the driver. But that ignores the fact that deadly motor vehicle collisions are generally not treated as homicides. They are car accidents. In the State's hypothetical, you would likely have one homicide and one motor vehicle fatality. Although this argument is not dispositive of Long's motion by itself, it illustrates that South Dakota's murder framework does not appear to have been expanded to include the type of allegations in Count 1.

There is simply no support in South Dakota's statutory framework for the State's position. Count 1 fails to describe a public offense.

B. THE MINORITY VIEW

The State argues that this Court should *adopt* the minority view, or proximate cause approach, to felony-murder. Long describes his position as the agency view, the majority approach.

Jurisdictions that have adopted a felony murder statutory provision have generally taken either the "agency" approach—the majority view; or the "proximate cause" approach—the minority view. Under the agency theory, only "those killings committed by the felon or his or

³⁹ See *State v. Leapley*, 488 N.W.2d 645, 657 (S.D. 1992) ("we hold that double homicide convictions for a single death are improper").

her agent or accomplice” fall within the purview of felony murder; whereas, a defendant may be held liable for “any death proximately resulting from [his] unlawful activity” under the proximate cause theory.⁴⁰

South Dakota recognized felony-murder prior to statehood and likely as early as 1862. The Court is unaware of any felony-murder case in the history of South Dakota, or the Territory of Dakota, where the killing was committed by someone who was not the felon or their agent or accomplice. No such case has been brought to the attention of the Court. It certainly appears South Dakota has been following the majority view for about 160 years. None of the South Dakota cases relied on by the State suggest that South Dakota does, or should, follow the minority approach.

*State v. Rhines*⁴¹ is not even a felony-murder case—Rhines was convicted of premeditated murder.⁴² Felony-murder was only an issue in Rhines’s direct appeal because he challenged, unsuccessfully, the proportionality of his death sentence vis-à-vis felony-murderers, generally. And the *Rhines* Court does not seem to take the view that felony-murder in South Dakota has been, or should be, expanded from its common law origins to broadly include *all killings* proximately flowing from a predicated felony:

The law is free to equally condemn those who murder with the intent to kill and those who also murder, but do so with the intent to rape, steal, or burn.⁴³

⁴⁰ *Tyson v. People*, 59 V.I. 391, 404 (V.I. 2013).

⁴¹ 1996 S.D. 55.

⁴² *State v. Rhines*, 1996 S.D. 55, ¶ 71.

⁴³ *Id.*

These are the words of a court that understands that the material difference between premeditated murder and felony-murder is the lack of actual malice, not the lack of killing.

In *Rough Surface*,⁴⁴ Donald Rough Surface raped, robbed, *and then killed* his uncle. A third person was not the killer. A co-felon was not killed. Donald Rough Surface likely would have been convicted under common law felony-murder. His conviction does not establish that South Dakota is a proximate cause approach state or that felony-murder has been, or should be, expanded so significantly beyond its common law limitations.

*State v. Frazier*⁴⁵ does not represent an expansive theory of felony-murder either. In *Frazier*, the South Dakota Supreme Court acknowledged that a defendant can be guilty of felony-murder when someone else was the actual killer. But in *Frazier*, the killer was Frazier's co-felon, not a victim of the underlying felony. Thus, Frazier's 2002 conviction fits squarely within the framework of traditional common law limitations of felony-murder. Nothing in *Frazier* suggest that South Dakota has expanded felony-murder to include the types of charges in Long's indictment—killings not committed by the defendant, their agent, or accomplice. That is also true of many other South Dakota felony-murder cases over the past several decades, *State v. Garza*,⁴⁶ *State v. Graham*,⁴⁷ *State v. Wright*,⁴⁸ *State v. Roubideaux*,⁴⁹ *State v. Aschmeller*,⁵⁰ and others. And, the South Dakota Supreme Court has noted that "the purpose of the felony-

⁴⁴ 440 N.W.2d 746 (S.D. 1988).

⁴⁵ 2002 S.D. 66.

⁴⁶ 2014 S.D. 67.

⁴⁷ 2012 S.D. 42.

⁴⁸ 2009 S.D. 51.

⁴⁹ 2008 S.D. 81.

⁵⁰ 209 N.W.2d 369 (S.D. 1973).

murder rule is to deter felons *from killing negligently or accidentally* by holding them strictly responsible for *killings they commit*.”⁵¹

Put simply, there is little or no support for the State’s position in South Dakota caselaw. There is little or no support in the caselaw of minority jurisdictions, either.

At oral argument, the State relied on *Commonwealth v. Moyer*,⁵² a 1947 Pennsylvania case. In *Moyer*, Moyer and Byron were tried for first degree murder after they attempted to rob a gas station owned by Shank. Shank was present with his employee, Zerbe. During the robbery, Moyer shot at Shank but missed. Shank returned fire and shot at Moyer five times, hitting him twice. Moyer retreated to his car, where Byron remained. At the car, Moyer shot again. Zerbe, “in the line of fire,” was shot and killed during the exchange. Moyer and Byron argued that Zerbe was killed by Shank’s bullet and the state argued he was killed by Moyer’s bullet. The jury convicted both Moyer and Byron of felony murder and sentenced them to death. The Pennsylvania Supreme Court upheld the convictions, noting that “men engaged in the commission of such a felony as robbery can be convicted of murder in the first degree if the bullet which causes death was fired not by the felon but by the intended victim in repelling the aggressions of the felon.”⁵³

Initially, *Moyer* is distinguishable from the case at bar because the victim of the homicide was a victim of the robbery, not an accomplice to the robbery. But setting that aside, a brief discussion of the subsequent evolution of Pennsylvania law on the matter is enlightening. In 1949, the Pennsylvania Supreme Court decided *Commonwealth*

⁵¹ *State v. O’Blasney*, 297 N.W.2d 797, 798 (S.D. 1980)(quoting *People v. Washington*, 402 P.2d 130, 13 (Cal. 1965)).

⁵² 53 A.2d 736 (Pa. 1947).

⁵³ *Com. v. Moyer*, 53 A.2d 736, 741 (Pa. 1947).

v. Almeida,⁵⁴ a case upholding a first degree murder conviction and death sentence when Almeida's co-defendant killed an off duty police officer while fleeing a robbery. Then in 1955, the Pennsylvania Supreme Court decided *Commonwealth v. Thomas*,⁵⁵ a case very similar to the one at bar. In *Thomas*, Thomas and Jackson held up a grocery store. While fleeing the robbery, an employee shot and killed Jackson. The *Thomas* court held that Thomas could face charges for murdering Jackson. It would seem that *Thomas*, not *Moyer*, is the 70-year old Pennsylvania case the state *should* be relaying on, since it is much more factually identical to the case at bar.

But *Thomas* was “repudiate[ed]” and “expressly” overruled “as an unwarranted judicial extension of the felony-murder rule” in 1958. In *Commonwealth v. Redline*,⁵⁶ Redline and Worseck committed a gun-point robbery at a restaurant. As they fled, they encountered police officers and Redline initiated a “gun battle.” Redline was wounded, and Worseck was killed by a police officer. Redline was convicted of the first degree murder of Worseck and was sentenced to a life sentence. Just like Long in the present case, Redline argued that he could not be convicted for the felony-murder of Worseck because his death was a justifiable homicide. The Pennsylvania Supreme Court reversed the judgement against Redline.

In establishing itself as “the leading decision for the majority position” the *Redline* Court dug deep into the felony-murder rule.⁵⁷ It acknowledged that “in adjudging a felony-murder, it is to be remembered at all times that the thing which is imputed to a felon for a killing coincidental to his felony is *malice* and *not the act of killing*.”

⁵⁴ 68 A.2d 595 (Pa. 1949).

⁵⁵ 117 A.2d 20 (Pa. 1955).

⁵⁶ *Com. Redline*, 137 A.2d 472 (Pa. 1958).

⁵⁷ *See Davis*, 735 S.E.2d at 263.

Where persons conspire together to commit robbery, and while carrying out such conspiracy their victim, in self-defense, discharges a fire arm at his assailants, and accidentally kills a bystander, the conspirators are not guilty of the homicide.’

...

There has not been cited to us, nor has our research disclosed, a decision in any State of the Union, or in England, that holds to opposite effect except for this court's decisions in *Commonwealth v. Almeida* and *Commonwealth v. Thomas*.

...

Beyond that, the statement in the opinion for the court in the Almeida case that ‘Our decision in *Commonwealth v. Moyer and Byron*, is authority for our decision in this case’ was without justification. The expression in the *Moyer and Byron* opinion to which the *Almeida* opinion thus alluded was that ‘A man or men engaged in the commission of such a felony as robbery can be convicted of murder in the first degree if the bullet which causes death was fired not by the felon but by the intended victim in repelling the aggressions of the felon or felons.’ That statement was a palpable gratuity as an examination of the trial record in the *Moyer and Byron*, case will at once disclose.

...

What was said in the *Moyer and Byron* opinion in such connection was, therefore, no more than an expression of the opinion writer's individual view concerning a matter *coram non judice*. In the light of the trial court's charge, the jury's verdict in that case cannot be taken to mean otherwise than that the fatal bullet was fired by one of the felons in furtherance of their criminal conspiracy. It follows that the decision in the *Moyer and Byron* case was in no sense authority for the ruling in *Almeida*.

...

The out-of-State cases cited and relied on in the Almeida opinion were equally not in point.

...

In not one of those cases was the malice imputed by the defendant's participation in the initial felony. Obviously, they were not based on the felony-murder theory.

...

The instant appeal affords an appropriate occasion for the repudiation of *Commonwealth v. Thomas*, which we now expressly overrule as an unwarranted judicial extension of the felony-murder rule.⁵⁸

In light of this subsequent history, *Moyer* is certainly not the compelling authority to adopt the minority view the State would have hoped. If it was not sufficient authority

⁵⁸ *Redline*, 137 A.2d at 480–82.

for the Court that authored it, it is difficult to comprehend how it would sufficient for this Court 60 years later.

The State also relies on two cases involving Missouri law, neither is sufficiently compelling. *State v. Baker*,⁵⁹ is a 1980 Missouri case where a felon, Baker, was convicted for the murder of a co-felon shot by someone resisting the underlying felony. Although the case is somewhat similar to the case at bar, it is distinguishable. In *Baker*, the deceased, a co-felon of Baker, was shot by Earnest Campbell, a target of the robbery. But unlike many of the cases adopting the majority view, Campbell was not merely “thwarting” the robbery, he was engaged in a gun battle initiated when Baker fired a shotgun at him. This was an important aspect of the *Baker* Court’s analysis. There was plainly more of a causal connection between Baker’s actions and the death, than if Baker had not started shooting first. In the case at bar, there is no indication that anyone other than Williams fired a gun. And it is interesting to note that, after the courts in Missouri extended the felony-murder rule to include instances where felony victims killed co-felons, its legislature changed the statute addressing felony-murder. Felony-murder is no longer first degree murder in Missouri. Now it is second degree murder, and importantly, the person who is killed must be “another person.”⁶⁰ So it is unclear whether someone like Long would be subject to felony-murder in Missouri anyway.

Moore v. Wyrick is an even less persuasive Missouri case. First, *Moore* is an Eighth Circuit case. It is a civil case filed under 42 § U.S.C. 2254, not a criminal case.

⁵⁹ 607 S.W.2d 153 (Mo. 1980).

⁶⁰ MO. REV. STAT § 565.021.

Second, it adds nothing that *Baker* doesn't. It is based on the same minority view which has been limited by the Missouri legislature.

The State also relies on *Miers v. State*,⁶¹ a 1952 Texas case. *Miers* is not directly on point either. Miers and Thorbus attempted to rob a filling station. The owner and his neighbor attempted to overpower the robbers. Thorbus shot the owner, but not fatally. Miers and neighbor fought over Miers's pistol. The neighbor was killed, either by Miers, or maybe when the neighbor accidentally shot himself in the scuffle. Either way, *Miers* is distinguishable because the person who was killed was not one of the felons.

The State also relies on a case from Chicago, *People v. Lowery*.⁶² In *Lowery*, the Illinois Supreme Court considered a case where a robbery victim shot at the robber and killed a bystander. *Lowery* has been rejected by other Courts considering the question of whether to extend the felony-murder rule to encompass instances where a felony victim kills one of the felons.⁶³ The issue with *Lowery* and its progeny is that these cases were decided "strictly on Illinois law."⁶⁴ As stated elsewhere, South Dakota law does not appear to call for this same result.

Simply put, there is insufficient support for the State's position in the caselaw they offer from minority jurisdictions.

C. THE MAJORITY VIEW

The Court has reviewed cases from several majority view jurisdictions and concludes it is the better reasoned view. Largely, these cases are more directly on point

⁶¹ 251 S.W.2d 404 (Tex. Crim. App. 1952).

⁶² 687 N.E.2d 973 (Ill. 1997).

⁶³ See *Com. v. Tejada*, 32 Mass.L.Rptr 426, *4 (Sup.Ct.Mass. 2014).

⁶⁴ See *id.*

to the facts of this case than the cases relied on by the State and in other minority view jurisdictions. Further, the felony-murder statutes in these cases are largely more similar to South Dakota's felony-murder statute than the laws in the cases relied upon by the State and in other minority view jurisdictions. A limited review of some of those decisions follows.

a. NEVADA

In *Sheriff, Clark County v. Hicks*,⁶⁵ Hicks and Branch had been indicted by a Nevadagrand jury for murder, attempted murder, and conspiracy to commit burglary. Hicks, Branch, and a third person, Murphy, drove to Myers's home and rang the bell. When Myers opened the door, Murphy forced his way into the home. Myers hit Murphy over the head with a pistol and shot him four times, killing him. This resulted in felony-murder indictments against Hicks and Branch. Hicks and Branch sought habeas relief from the trial court, which dismissed the murder and attempted murder counts.

The Nevada Supreme Court agreed with the trial court, noting that the "application of the felony-murder rule to a situation involving felons charged with murder of a co-felon killed by another in resisting the commission of a felony has been widely rejected."⁶⁶ "The felony-murder rule does not apply when the killing is done by the victim of the crime, because in such a case the malice aforethought necessary for murder is not attributable to the accomplice felon. The killing in such an instance is

⁶⁵ 506 P.2d 766 (Nev. 1973).

⁶⁶ *Sheriff, Clark County v. Hicks*, 506 P.2d 766, 768 (Nev. 1973).

done, not in the perpetration of, or an attempt to perpetrate, a crime, but rather in an attempt to thwart the felony.”⁶⁷

b. NEW JERSEY

In 1977, the Supreme Court of New Jersey decided *State v. Canola*.⁶⁸ Canola and three others robbed a store. A victim of the robbery shot and killed one of Canola’s co-felons while attempting to resist the robbery. Canola was tried for the murder of his co-felon and was sentenced to life in prison. In deciding the case, the *Canola* Court observed, “It is clearly the majority view throughout the country, that at least in theory, the doctrine of felony murder does not extend to a killing, although growing out of the commission of the felony, if directly attributable to the act of one other than the defendant or those associated with him in the unlawful purpose.”⁶⁹ The *Canola* Court also observed, “A contrary view, which would attach liability under the felony-murder rule for any death proximately resulting from the unlawful activity—even the death of a co-felon notwithstanding the killing was by one resisting the crime, does not seem, to have the present allegiance of any court.”⁷⁰

After an in-depth analysis of the issue, the *Canola* Court concluded that it would be “regressive to extend the application of the felony murder rule beyond its classic common-law limitations to acts by the felon and his accomplices to lethal acts of third persons not in furtherance of the felonies scheme Tort concepts of foreseeability and proximate cause have shallow relevance to culpability for murder in

⁶⁷ *Id.* at 768.

⁶⁸ *State v. Canola*, 374 A.2d 20 (N.J. 1977).

⁶⁹ *Id.* at 23 (N.J. 1977).

⁷⁰ *Id.*

the first degree.”⁷¹ The *Canola* Court concluded by observing that “if the course of the law as understood . . . for almost 200 years is to be altered so drastically, it should be by express legislative enactment.”⁷²

c. NEW MEXICO

In 1979, the Supreme Court of New Mexico considered *Jackson v. State*.⁷³ Jackson and a co-felon attempted to rob a pharmacy. During the attempted robbery, the pharmacist, Brunt, exchanged gunfire with the co-felon, killing him. Jackson was charged with murder in the death of his co-felon. The trial court dismissed the murder charge, “holding that the majority and best-reasoned view was that felon [Jackson] could not be held criminally responsible for the death of his co-felon when the killing was committed by the victim resisting the commission of the offense”⁷⁴ On appeal, the *Jackson* Court affirmed the trial court and adopted “the majority and best-reasoned view; namely, the felony-murder doctrine should not be expanded to cover situations where the victim of the crime kills a perpetrator.”⁷⁵

d. TENNESSEE

In 1988, the Court of Criminal Appeals of Tennessee decided *State v. Severs*.⁷⁶ In *Severs*, Severs, Weaver, and Moore attempted to steal a chainsaw from Burnette by larceny. Burnette resisted, and in the process killed Moore. Burnette was charged with manslaughter, but it was dismissed “on the basis that the homicide was justifiable.”⁷⁷

⁷¹ *Id.* at 30.

⁷² *Id.*

⁷³ 589 P.2d 1052 (N.M. 1979).

⁷⁴ *Jackson v. State*, 589 P.2d 1052 (N.M. 1979).

⁷⁵ *Id.* at 1053.

⁷⁶ 759 S.W.2d 935 (Tenn. Crim. App. 1988).

⁷⁷ *State v. Severs*, 759 S.W.2d 935 (Tenn. Crim. App. 1988).

Then, *Severs* and Weaver were charged with the felony-murder of their co-felon. The trial court dismissed the murder charges and an appeal followed.

The *Severs* Court observed that *Redline* “is representative of the those jurisdictions adhering to the agency doctrine” and that the “Pennsylvania court rejected the rationale that guilt could be found when the felonious act proximately cause the death.”⁷⁸ The *Severs* court also noted that *Redline* “comports” with the felony-murder rule as “established in common law” and the “English courts never applied the felony-murder rule to hold a felon guilty of the death of his co-felon at the hands of the intended victim.”⁷⁹

The *Severs* Court specifically analyzed Tennessee’s felony-murder statute which, like South Dakota, defines murder as a homicide committed in the perpetration of, or the attempted perpetration of certain felonies.⁸⁰ The *Severs* Court concluded that “the death resulted from the effort to thwart rather than perpetrate the felony.”⁸¹

Importantly, the *Severs* court observed that dismissal would be proper under either the agency theory or the proximate cause theory. “Similarly, the theory of proximate cause in relation to felony-murder is limited to acts committed by the accused or his accomplices which actually produce the death.”⁸² The *Severs* Court concluded with a warning to courts who would extend the scope of felony-murder judicially, “it appears that extension of the felony-murder rule beyond its common law limitations to acts by the felon and his accomplice, to include lethal actions of those

⁷⁸ *Id.* at 937.

⁷⁹ *Id.* (cleaned-up)(citations omitted).

⁸⁰ *Id.* at 938.

⁸¹ *Id.*

⁸² *Id.*

not acting pursuant of the felonious scheme, is an appropriate action for the legislature . . . not the courts.”⁸³

e. NORTH CAROLINA

In 1992, the Supreme Court of North Carolina considered *State v. Bonner*.⁸⁴ Bonner, Witherspoon, Gainey, and Stewart attempted to rob a restaurant. An off-duty police officer, acting as a security guard for the restaurant, shot and killed Gainey and Stewart. Bonner and Witherspoon were indicted for the first degree murder of Gainey and Stewart. They moved to dismiss, but their motions were denied. They then pleaded guilty and were sentenced to life for the murders, 40 additional years for armed robbery, and 20 additional years for assault. They attempted to withdraw their murder plea, but were denied. They appealed.

The *Bonner* Court, adhering to a 1924 North Carolina case, *State v. Oxendine*,⁸⁵ reversed the trial court and remanded with instructions to accept the withdraw of the murder pleas. The court also considered *Redline*, *Canola*, *Hicks*, and *Severs*. Importantly, the court was clear they could not “escape altogether criminal liability” and noted that they would still need to serve their lengthy sentences for armed robbery and assault. In a footnote, the *Bonner* court observed that only two jurisdictions (in 1992) supported the proximate cause approach: Missouri and Florida.⁸⁶ In closing, the *Bonner* Court observed that the state legislature could “impose criminal responsibility for murder under the facts presented, it could only do so prospectively, and the task is left to it.”⁸⁷

⁸³ *Id.*

⁸⁴ 411 S.E.2d 598 (N.C. 1992).

⁸⁵ 122 S.E. 568 (N.C. 1924).

⁸⁶ *State v. Bonner*, 411 S.E.2d 598, 603 at n. 1 (N.C. 1992).

⁸⁷ 122 S.E. 568, 604 (N.C. 1924).

f. IDAHO

In 2010, the Supreme Court of Idaho considered *State v. Pina*.⁸⁸ Pina was in a dispute with Naranjo. Witnesses speculated that Pina led Naranjo into a house by gunpoint. Once inside the house, Pina made Naranjo get on his knees. Their argument awoke Shores, who was asleep in a room in the house. Shores demanded the gun from Pina. After a struggle, Naranjo tried to escape out the back and Shores shot Naranjo in what he described as a “warning shot.” Naranjo was hit in the abdomen and bled to death. Shores pleaded guilty to manslaughter, but Pina was charged with murder.

The *Pina* Court embarked on a detailed history of felony-murder. The court noted that Idaho had codified felony-murder when it was a Territory, in 1864. The Court noted that the same Territorial legislature adopted a law which deferred to common law when a statute was silent. Therefore, the Idaho court concluded that Idaho’s felony-murder statute must be “viewed through the lens of the English common law at the time of adoption, which was that the felony-murder rule applied only to co-conspirators acting in concert in furtherance of the common plan or scheme to commit the underlying felony.”⁸⁹ Noting that the Idaho felony-murder statute was silent as to what theory should be applied, the common law rule—which is an agency theory—was the status of the law in Idaho.

g. WEST VIRGINIA

In 2012, the Supreme Court of Appeals of West Virginia decided, almost identical to the case at bar, *Davis v. Fox*.⁹⁰ Sands and Givens attempted to burglarize a

⁸⁸ 233 P.3d 71 (Idaho 2010)(abrogated on other grounds).

⁸⁹ *State v. Pina*, 233 P.3d 71, 77 (Idaho 2010)

⁹⁰ 735 S.E.2d 259 (W. Va. 2012).

convenience store. During the attempt, the owner's son shot and killed Givens. Sands was indicted for attempted burglary, conspiracy, and murder in the death of Givens. Sands moved to dismiss and the Circuit Judge, Fox, dismissed the murder charge for failure to allege a crime. The prosecutor, Davis, sought a writ of prohibition alleging the Circuit Court exceeded its powers. The petition was denied, and the dismissal of the indictment was upheld.

In finding that the Circuit Court properly dismissed the murder charge, the *Davis* Court analyzed West Virginia's first degree murder statute, which defines felony-murder as a homicide⁹¹ committed "in the commission of, or attempt to commit arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape . . ." et cetera.⁹² The court observed that West Virginia's murder statutes categorized murder offenses, but did not define murder. Further, the court reaffirmed that the elements of felony-murder are 1) commission or attempt to commit one of the enumerated felonies, 2) the defendant's participation in the commission or attempt, and 3) the death of the victim as a result of injuries received during the course of the commission or attempt.

And the *Davis* Court observed that the majority position is that a person cannot be convicted of felony-murder "when a co-felon is killed by the victim of the initial felony."⁹³ Quoting the Supreme Court of Virginia, the *Davis* Court opined, "while the malice inherent in the robbery provides the malice prerequisite to a finding that the homicide was murder, when the robbery victim is the person pulling the trigger there

⁹¹ The statute references "murder" not "homicide" which the *Davis* court found to be a distinction without a difference.

⁹² See W. VA. CODE § 61-2-1.

⁹³ *Davis v. Fox*, 735 S.E.2d 259, 262 (W. Va. 2012).

is no malice underlying that act which can be imputed to the co-perpetrator.”⁹⁴ Then the *Davis* Court observed “it is necessary to show that the conduct causing death was done in furtherance of the design to commit the felony.” Death must be a consequence of the felony and not merely coincidence.”⁹⁵ After offering a hypothetical illustrating the “absurdity of evoking the felony-murder doctrine to situations where the co-perpetrators are not the trigger-pullers,”⁹⁶ the *Davis* Court observed that “to date, the offense of felony murder, which has its origins in the common law of this state, has always involved the death of a victim of the felony or a police officer.”⁹⁷

D. LEGISLATURES NOT COURTS ARE THE PROPER METHOD TO CHANGE SOUTH DAKOTA’S MURDER LAWS

As explained above, this record does not support expanding the classic common law approach to felony-murder to allow Long and his co-defendants to be charged with the murder of their alleged accomplice, who was killed by their kidnapping victim. Such a drastic change is not a task best suited to a Circuit Court. As the *Bonner* Court observed, that “task is left to [the legislature].”⁹⁸ Likewise, the *Canola* Court observed, “if the course of the law as understood . . . for almost 200 years is to be altered so drastically, it should be by express legislative enactment.”⁹⁹ And the *Severs* Court noted, “it appears that extension of the felony-murder rule beyond its common law limitations to acts by the felon and his accomplice, to include lethal actions of those not acting pursuant of the felonious scheme, is an appropriate action

⁹⁴*Id.*(quoting *Wooden v. Commonwealth*, 284 S.E.2d 811, 814 (Va. 1981)).

⁹⁵ *Id.* at 263.

⁹⁶ *Id.* (quoting *People v. Washington*, 402 P.2d 130, 134 (Cal. 1965)).

⁹⁷ *Davis*, 735 S.E.2d at 267-68.

⁹⁸ *Bonner*, 122 S.E. at 604.

⁹⁹ *Canola*, 374 A.2d at 30.

for the legislature . . . not the courts.”¹⁰⁰ And commentators have observed, “It should be left to the prerogative of the legislatures of the various states, to determine which theory of liability should be applied by the courts of that state.”¹⁰¹

Dated this 22nd day of October 2021.

BY THE COURT:


THE HONORABLE JEFFREY R. CONNOLLY
CIRCUIT COURT JUDGE

ATTEST:
RANAE TRUMAN,
CLERK OF COURTS

By: _____
Deputy
(SEAL)

¹⁰⁰ *Severs*, 759 S.W.2d at 938.

¹⁰¹ Leonard Birdsong, *The Felony Murder Doctrine Revisited: A Proposal for Calibrating Punishment That Reaffirms the Sanctity of Human Life of Co-Felons Who Are Victims*, 33 Ohio N.U.L. REV. 497, 522 (2007)(It should be left to the prerogative of the legislatures of the various states, to determine which theory of liability should be applied by the courts of that state”).