The University of Akron

From the SelectedWorks of Dana Cole

2002

Expanding Felony-Murder in Ohio: Felony-Murder or Murder-Felony?

Dana K. Cole, *University of Akron School of Law*

Available at: https://works.bepress.com/dana_cole/1/

Expanding Felony-Murder in Ohio: Felony-Murder or Murder-Felony?

DANA K. COLE[*]

Ohio's aggravated felony-murder rule and felony-murder death penalty specification provisions apply where a death occurs "while committing or attempting to commit" certain enumerated felonies. In a line of cases beginning in 1996, the Ohio Supreme Court broadly interpreted this statutory language to include situations where the intent to commit the underlying felony was formed subsequent to the death, as a complete afterthought. With these cases, the Ohio Supreme Court departed from the majority view that the intent to commit the underlying felony must precede or co-exist with the death. The author argues that this new statutory interpretation represents an unwarranted expansion of the felony-murder rule that disregards the statutory language, ignores the underlying purpose of the rule, and dispenses with traditional safeguards designed to ameliorate its harshness. The author further argues that applying this new statutory interpretation to the felony-murder death penalty specification potentially selects for death those who are not necessarily the most deserving of this ultimate punishment. The author suggests that the solution must be a legislative one.

I. INTRODUCTION

The common law felony-murder rule provides that a person will be held criminally responsible for a death that occurs "in the commission or attempted commission of" a felony.[1] Modern statutes use similar words or phrases such as "while,"[2] "during,"[3] "in perpetration of,"[4] "in the commission of,"[5] "in furtherance of," and "in the course of."[6]

---

[*] Associate Professor of Law, the University of Akron School of Law. I would like to thank Phyllis L. Crocker, Jay Dratler, Jr., Margery M. Koosed, T. Modibo Ocran, Carol A. Olson, Elizabeth A. Reilly, William D. Rich and John P. Sahl for their encouragement and helpful comments. I would also like to thank Dax Kerr, Lisa McGuire, and Kerry Renker for their research assistance.

[1] WAYNE R. LAFAVE, CRIMINAL LAW 682 (3d ed. 2000); MODEL PENAL CODE § 210.2 cmt. 6 (1980) (noting that "[t]he classic formulation of the felony-murder doctrine declares that one is guilty of murder if a death results from conduct during the commission or attempted commission of any felony"). The history of the felony-murder rule in the United States is briefly described in the commentary to the Model Penal Code. MODEL PENAL CODE § 210.2 cmt. 6 (1980). For a discussion of the history of the felony-murder rule in Ohio, see Charles D. Hering, Jr., Comment, *The Felony Murder Rule in Ohio*, 17 OHIO ST. L.J. 130 (1956).

[2] The following states use the term "while" in their felony-murder provision: Indiana, IND. CODE ANN. § 35-42-1-1(2) (West 2001); Iowa, IOWA CODE ANN. § 707.2(2) (West 2001); Minnesota, MINN. STAT. ANN. § 609.185(3) (West 2001); New Hampshire, N.H. REV. STAT. ANN. §§ 630:1(I)(b)(e),(f); 630:1-a(I)(b)(1),(2) (2001); Ohio, OHIO REV. CODE ANN. § 2903.01(B) (West 2001); Utah, UTAH CODE ANN. § 76-5-202(1)(d) (2001); Virginia, VA. CODE ANN. § 18.2-31 (Michie 2001); Wisconsin, WIS. STAT. ANN. § 940.03 (West 2001).

In what way do these phrases define the scope of the felony-murder rule? Certainly, temporal proximity is required.[7] Temporal proximity is not limited to deaths occurring at the exact moment of the felony, but includes a period before and after the completion of the felony.[8] This period begins with the initiation of an attempt to commit the underlying felony,[9] and ends when the defendant reaches "a place of temporary safety."[10] If the death occurs before the initiation of

---

[3] The following states use the term "during" in their felony-murder provision: Oklahoma, OKLA. STAT. ANN. tit. 21, § 701.7(B) (West 2001); Rhode Island, R.I. GEN. LAWS § 11-23-1(b) (2000); South Carolina, S.C. CODE ANN. § 16-3-20(C)(a) (LAW. CO-OP. 2001).

[4] The following jurisdictions use the phrase "in perpetration of" in their felony-murder provision: California, CAL. PENAL CODE § 189 (West 2001); District of Columbia, D.C. CODE ANN. § 22-2101 (2001); Florida, FLA. STAT. ANN. § 782.04 (West 2001); Idaho, IDAHO CODE § 18-4003(d) (Michie 2001); Louisiana, LA. REV. STAT. ANN. § 14:30(A)(1) (West 2001); Maryland, MD. CODE ANN. art. 27, § 410 (West 2001); Missouri, MO. ANN. STAT. § 565.021(1)(2) (West 2001); Nebraska, NEB. REV. STAT. ANN. § 28-303 (Michie 2001); Nevada, NEV. REV. STAT. ANN. § 200.030(1)(b) (Michie 2001); North Carolina, N.C. GEN. STAT. § 14-17 (2001); South Dakota, S.D. CODIFIED LAWS § 22-16-4 (Michie 2001); Tennessee, TENN. CODE ANN. § 39-13-202(a)(2) (2001); Vermont, VT. STAT. ANN. tit. 13, § 2301 (2001); Wyoming, WYO. STAT. ANN. § 6-2-101(a) (Michie 2001).

[5] The following states use the phrase "in the commission of" in their felony-murder provision: Georgia, GA. CODE ANN. § 16-5-1(C) (Harrison 2001); Illinois, 720 ILL. COMP. STAT. ANN. § 5/9-1 (West 2001); Kansas, KAN. STAT. ANN. § 21-3401(b) (2000); Maine, ME. REV. STAT. ANN. tit. 17A § 202(1) (West 2001); Massachusetts, MASS. GEN. LAWS ANN. ch. 265, § 1 (West 2001); Michigan, MICH. COMP. LAWS ANN. § 750.316(b) (West 2001); Mississippi, MISS. CODE ANN. § 97-3-19(2)(e) (2001); New Jersey, N.J. STAT. ANN. § 2C:11-3(a)(3) (West 2001); New Mexico, N.M. STAT. ANN. § 30-2-1(A)(2) (Michie 2001); Pennsylvania, 18 PA. STAT. ANN. § 2502(b) (West 2001); Washington, WASH. REV. CODE ANN. § 9A.32.030(1)(c) (West 2001); West Virginia, W. VA. CODE § 61-2-1 (2001). The Model Penal Code formulation of felony-murder also employs the phrase "in the commission of ." MODEL PENAL CODE § 210.2(1)(b).

[6] The following states use the phrase "in furtherance of" and "in course of" in their felony-murder provision: Alabama, ALA. CODE § 13A-6-2 (a)(3) (2001); Alaska, ALASKA STAT. § 11.41.100(B)(3) (Michie 2001); Arizona, ARIZ. REV. STAT. ANN. § 13-1105(a)(2) (West 2001); Arkansas, ARK. CODE ANN. § 5-10-101(a)(1) (Michie 2001); Colorado, COLO. REV. STAT. ANN. § 18-3-102(1)(b) (West 2001); Connecticut, CONN. GEN. STAT. ANN. § 53a-54c (West 2001); Delaware, DEL. CODE ANN. tit. 11, § 636(a)(2) (2001); Montana, MONT. CODE ANN. § 45-5-102(1)(b) (2001) ("in course of" only); New York, N.Y. PENAL LAW § 125.27(1)(a)(vii) (McKinney 2001); North Dakota, N.D. CENT. CODE § 12.1-16-01(1)(c) (2001); Oregon, OR. REV. STAT. § 163.115(1)(b) (2001); Pennsylvania, PA. STAT. ANN. tit. 18, § 2502(b) (West 2001); Texas, TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon 2001) ("in course of" only).

[7] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 523 (3d ed. 2001); LAFAVE, *supra* note 1, at 682–83.

[8] DRESSLER, *supra* note 7, at 523; LAFAVE, *supra* note 1, at 682.

[9] DRESSLER, *supra* note 7, at 523; LAFAVE, *supra* note 1, at 682–84.

[10] DRESSLER, *supra* note 7, at 523; LAFAVE, *supra* note 1, at 684. This window of time would include deaths that occur during the immediate flight from the scene of the felony. DRESSLER, *supra* note 7, at 523; LAFAVE, *supra* note 1, at 684. Ohio statutes make this

an attempt to commit the underlying felony, the felony-murder rule does not apply.[11] Similarly, deaths occurring after the accused has retreated to a place of temporary safety are not within the scope of the felony-murder rule.[12]

Although temporal proximity is required, the law generally demands more of a nexus between the underlying felony and the death than the "mere coincidence of time and place."[13] Typically, a causal connection between the underlying felony and the death is also required.[14] Most jurisdictions go beyond mere cause-in-fact or but-for causation and require that the death must be a natural and foreseeable consequence of the felony.[15]

In a line of cases beginning with *State v. Williams*,[16] the Ohio Supreme Court broadly interpreted the "while committing or attempting to commit" language found in Ohio's aggravated felony-murder rule and felony-murder death penalty specification statute.[17] The court essentially replaced the statutory term "while"

---

extension of time explicit by including "while . . . fleeing immediately after" language. OHIO REV. CODE ANN. §§ 2903.01(B), 2929.04(A)(7) (West 1997).

[11] United States v. Bolden, 514 F.2d 1301, 1309 (D.C. Cir. 1975) (noting that:

> [T]he trial court should have informed the jury (1) that to convict on felony-murder it was necessary that the intent to rob be formed before the homicide [and] (2) that 'intent' can only be proven by action beyond mere preparation, since until that time defendants could have abandoned the plan without legal liability);

DRESSLER, *supra* note 7, at 523; LAFAVE, *supra* note 1, at 682.

[12] DRESSLER, *supra* note 7, at 523; LAFAVE, *supra* note 1, at 684.

[13] LAFAVE, *supra* note 1, at 685.

[14] DRESSLER, *supra* note 7, at 523–24; LAFAVE, *supra* note 1, at 685–86.

[15] LAFAVE, *supra* note 1, at 685. In a foundational case frequently referenced, the Washington Supreme Court described this res gestae requirement:

> As to when a homicide may be said to have been committed in the course of the perpetration of another crime, the rule is laid down in 13 R.C.L. 845, as follows: "It may be stated generally that a homicide is committed in the perpetration of another crime, when the accused, intending to commit some crime other than the homicide, is engaged in the performance of any one of the acts which such intent requires for its full execution, and, while so engaged, and within the res gestae of the intended crime, and in consequence thereof, the killing results. It must appear that there was such actual legal relation between the killing and the crime committed or attempted, that the killing can be said to have occurred as a part of the perpetration of the crime, or in furtherance of an attempt or purpose to commit it. In the usual terse legal phraseology, death must have been the probable consequence of the unlawful act.

State v. Diebold, 277 P. 394, 395–96 (Wash. 1929).

[16] 660 N.E. 2d 724 (Ohio 1996).

[17] Ohio statutes require that the death occur "while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit," or "while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit" certain enumerated felonies. OHIO REV. CODE ANN. §§ 2903.01(B), 2929.04(A)(7) (West 1997).

with the judicially created phrase "part of one continuous occurrence."[18] The court then defined this phrase as essentially requiring only an overly broad form of temporal proximity between the underlying felony and the death. As long as the death and the underlying felony occur within the same general time frame, the felony-murder rule applies without regard to whether the death and the underlying felony were otherwise related. Even if the intent to commit the underlying felony was formed subsequent to the death, as a complete afterthought, the Ohio Supreme Court will permit the state to seek an aggravated murder conviction, and even the death penalty, under its felony-murder doctrine.[19]

In this article, I briefly describe Ohio's felony-murder statutory scheme, including Ohio's use of certain felony-murders as death penalty specifications designed to select some defendants for capital punishment. I discuss the underlying rationale for the felony-murder rule and traditional limitations or safeguards that have developed to ameliorate the harshness of the rule. I then discuss the Ohio Supreme Court's interpretation of the felony-murder rule, which until 1996, was consistent with the majority of jurisdictions.[20] Finally, I argue that

---

Ohio's aggravated felony-murder rule differs from a traditional, common law felony-murder rule in that it contains a mens rea requirement concerning the death. It is aggravated murder if the accused "*purposely* cause[d] the death of another . . . while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit [an enumerated felony]." OHIO REV. CODE ANN. § 2903.01(B) (West 1997) (emphasis added). For these felony-murders, the state does not have to prove that the killing was done "with *prior calculation and design*" as would otherwise be required to obtain an aggravated murder conviction. *Id.* at § 2903.01(A) (emphasis added). In the past few years, the Ohio legislature has added three new forms of aggravated murder that do not require proof of prior calculation and design: Ohio Revised Code section 2903.01(C) (purposely causing the death of one under thirteen years of age); section 2903.01(D) (defendant with a felony conviction who is under detention or who breaks detention and purposely causes a death); and section 2903.01(E) (purposely causing the death of a law enforcement officer under certain circumstances). *See id.* at §2903.01(C), (D), (E).

[18] *Williams*, 660 N.E.2d at 732–33 (quoting State v. Cooey, 544 N.E.2d 895 (Ohio 1989)).

[19] *Williams*, 660 N.E.2d at 733 ("[W]e find that neither the felony-murder statute nor Ohio case law requires the intent to commit a felony to precede the murder in order to find a defendant guilty of a felony-murder [death penalty] specification.").

[20] Jurisdictions following the prevailing view that there can be no felony-murder (and/or felony-murder aggravating circumstance) where the felony occurs as an afterthought to the killing include: Alabama, *see, e.g.*, Ex Parte Johnson, 620 So.2d 709, 713 (Ala. 1993); Arkansas, *see, e.g.*, Grigsby v. State, 542 S.W.2d 275, 280 (Ark. 1976); California, *see, e.g.*, People v. Ainsworth, 755 P.2d 1017, 1026 (Cal. 1988); District of Columbia, *see, e.g.*, United States v. Bolden, 514 F.2d 1301, 1307 (D.C.Cir. 1975); Idaho, *see, e.g.*, State v. Cheatham, 6 P.3d 815, 819 (Idaho 2000); Maryland, *see, e.g.*, Metheny v. State, 755 A.2d 1088, 1118 (Md. App. 2000); Massachusetts, *see, e.g.*, Commonwealth v. Christian, 722 N.E.2d 416, 423 (Mass. 2000); Michigan, *see, e.g.*, People v. Brannon, 486 N.W.2d 83, 85–86 (Mich. Ct. App. 1992); Missouri, *see, e.g.*, State v. Newman, 605 S.W.2d 781, 787 (Mo. 1980); Nebraska, *see, e.g.*, State v. Montgomery, 215 N.W.2d 881, 883–84 (Neb. 1974); New York, *see, e.g.*, People v. Joyner, 257 N.E.2d 26, 27 (N.Y. 1970); Pennsylvania, *see, e.g.*, Commonwealth v. Legg, 417

the Ohio Supreme Court's decisions, beginning with *Williams* in 1996, represent an unwarranted expansion of the felony-murder rule that disregards the statutory language and ignores the underlying purpose of the felony-murder rule. Worse yet, applying this new construction to the felony-murder death penalty specification will potentially select for death those who are not necessarily the most deserving of this ultimate punishment.

II. OHIO'S STATUTORY SCHEME

A. *Introduction: Two Felony-Murder Rules*

Ohio has two felony-murder rules.[21] One is a relatively traditional felony-murder rule,[22] which does not require the state to allege or prove any particular mens rea regarding the death.[23] Violation of this law results in a conviction for

---

A.2d 1152, 1154 (Pa. 1980); Tennessee, *see, e.g.*, State v. Buggs, 995 S.W.2d 102, 107 (Tenn. 1999); Texas, *see, e.g.*, Nelson v. State, 848 S.W. 2d 126, 131–32 (Tex. Crim. App. 1992); Wyoming, *see, e.g.*, Bouwkamp v. State, 833 P.2d 486, 492 (Wyo. 1992).

Jurisdictions following the minority view that felony-murder (and/or felony-murder aggravating circumstances) does not require that the intent to commit the underlying felony be formed prior to the act causing death include: Illinois, *see, e.g.*, People v. Ward, 609 N.E.2d 252, 275 (Ill. 1992); New Mexico, *see, e.g.*, State v. Nelson, 338 P.2d 301, 306 (N.M. 1959); North Carolina, *see, e.g.*, State v. Handy, 419 S.E.2d 545, 552 (N.C. 1992); Ohio, *see, e.g.*, State v. Williams, 660 N.E.2d 724, 732–33 (Ohio 1996); Oklahoma, *see, e.g.*, Perry v. State, 853 P.2d 198, 200 (Okla. Crim. App. 1993); Washington, *see, e.g.*, State v. Craig, 514 P.2d 151, 155–56 (Wash. 1973).

[21] OHIO REV. CODE ANN. §§ 2903.02, 2903.01(B) (West Supp. 2001). Ohio also has a so-called "felony-manslaughter" rule. *Id.* §§ 2903.04(A), (C). Pursuant to these two sections, "[n]o person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony. . . . Whoever violates this section is guilty of involuntary manslaughter . . . a felony of the first degree." *Id.* Finally, Ohio has, in addition, a so-called "misdemeanor-manslaughter" rule. §§ 2903.04(B), (C) (West Supp. 2001). Pursuant to these sections, "[n]o person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a misdemeanor of any degree, a regulatory offense, or a minor misdemeanor. . . . Whoever violates this section is guilty of involuntary manslaughter . . . a felony of the first degree." *Id.*

[22] The felony-murder rule at common law stated that a person was guilty of murder if a death occurred during the commission of any felony. It did not matter whether the death was intentional or accidental. The rule dispensed with the mens rea requirement, thereby imposing strict liability for the death if it resulted from the commission of the felony. Most modern statutes limit the rule to deaths that occur during the commission of enumerated felonies—typically dangerous felonies such as arson, burglary, rape, and robbery. *See* DRESSLER, *supra* note 7, at 515; LAFAVE, *supra* note 1, at 671.

[23] Ohio's traditional felony-murder rule provides in pertinent part:

> No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or

"murder"[24] as distinguished from the more serious offense of "aggravated murder." The penalty for murder in Ohio is an indefinite term of imprisonment for fifteen years to life.[25] Capital punishment is not an option. Section 2903.02(B) became effective in 1998.[26] This article does not, however, focus on Ohio's traditional felony-murder rule.

Ohio's other felony-murder rule is not a traditional felony-murder rule in that it contains a mens rea element requiring proof that the death was purposeful.[27] Violation of this law results in a conviction for "aggravated murder." This article focuses on this non-traditional, aggravated felony-murder rule as well as on Ohio's felony-murder death penalty specification provision.

B. *Ohio's Aggravated Felony-Murder Rule*

The Ohio Revised Code defines aggravated murder in pertinent part:

> (B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.
> (F) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.[28]

If a purposeful killing is sufficiently connected to one or more of the nine enumerated felonies, a killing that would otherwise result in a conviction for murder,[29] carrying a penalty of imprisonment for an indefinite term of fifteen

---

> second degree and that is not a violation of section 2903.03 [voluntary manslaughter] or 2903.04 [involuntary manslaughter] of the Revised Code.

§ 2903.02(B) (West Supp. 2001).

[24] *Id.* § 2903.02(D).

[25] *Id.* § 2929.02(B).

[26] The language of this 1998 addition to Ohio's felony-murder provision expressly requires a causal relationship between the underlying felony and the death. The death must be "a *proximate result* of the offender's committing or attempting to commit an offense of violence" § 2903.02(B) (emphasis added). In its 1996 decision in *Williams*, the Ohio Supreme Court was not considering this statute. This statute had not been enacted yet. Rather *Williams* interpreted the more serious aggravated felony-murder statute and felony-murder death penalty specification when dispensing with a meaningful nexus between the underlying felony and the death. State v. Williams, 660 N.E.2d 724, 733 (Ohio 1996).

[27] OHIO REV. CODE ANN. § 2903.01(B) (West Supp. 2001).

[28] §§ 2903.01(B), (F).

[29] *Id.* § 2903.02.

years to life,[30] will result in a conviction for aggravated murder carrying a penalty of imprisonment for life, or, depending on the felony, even death.[31]

1. *The Rationale for the Felony-Murder Rule*

The primary rationale for the felony-murder rule is deterrence, but deterrence of what—the commission of the underlying felony in the first instance or the killing once the felony is underway? The prevailing view is that the purpose of the felony-murder rule is to deter killings once the commission of the felony is underway.[32] Felons will be more careful while in the process of committing dangerous felonies if deaths occurring during those felonies are treated as murders.[33] The deterrence sought is not the deterrence of the underlying felony.[34] The way to increase the deterrence of the commission of the underlying felony would be to increase the penalty for its commission.[35] The deterrence sought here is the deterrence of carelessness while committing the underlying felony.[36]

Ohio's aggravated felony-murder rule seeks to deter purposeful killings during the commission of the underlying felony. The state has to prove that the killing was done "purposely,"[37] but is relieved of the more difficult burden of proving a more culpable mental state—that the killing was done "with prior calculation and design."[38] Variations of felony-murder like this have been described as "entail[ing] proof of some culpability, but by categorizing the crime as murder or first degree murder, they result in gradation at a disproportionately

---

[30] *Id.* § 2929.02(B).

[31] *See id.* §§ 2929.02(A), 2929.04(A)(7).

[32] DRESSLER, *supra* note 7, at 516; Comment, *The Merger Doctrine as a Limitation on the Felony-Murder Rule: A Balance of Criminal Law Principles*, 13 WAKE FOREST L. REV. 369, 374 (1977) ("[M]ost jurisdictions have characterized the purpose [of the felony-murder rule] to be not the deterrence of the underlying felony itself, but the deterrence of negligent or accidental killing during the perpetration of a felony."); *see* O.W. HOLMES JR., THE COMMON LAW 58–59 (1881).

[33] *See* People v. Washington, 402 P.2d 130, 133 (Cal. 1965). ("The purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit.").

[34] *See* DRESSLER, *supra* note 7, at 516–17.

[35] DRESSLER, *supra* note 7, at 516 n.119; *see* Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 450–52 (1985).

[36] *See* GEORGE FLETCHER, RETHINKING CRIMINAL LAW § 4.4.5, 297–98 (1978); *see also* Roth & Sundby, *supra* note 35, at 450–52.

[37] OHIO REV. CODE ANN. § 2903.01(B) (West Supp. 2001).

[38] *Id.* § 2903.01(A). "Prior calculation and design" is rooted in the premeditation and deliberation mens rea that was required for conviction of first degree murder in the state prior to 1974. *See* LEGISLATIVE SERVICE COMMISSION, COMMENTARY TO OHIO REV. CODE ANN. § 2903.01(A) (1997).

severe level considering the established mental fault."[39] The deterrence rationale here is that felons will be deterred from committing purposeful killings due to the risk of being charged, convicted, and punished at a level disproportionate to their mental fault.[40]

The minority position on this issue is that the felony-murder rule deters would-be felons from undertaking the commission of dangerous felonies in the first instance.[41] From this perspective, punishing as murder both accidental and deliberate killings that result from the commission of a felony is "the strongest possible deterrent" to "undertaking inherently dangerous felonies."[42]

2. *The Res Gestae Limitation—Time, Place, and Causation*

The felony-murder rule has generally been criticized as disregarding the normal rules of culpability that would require criminal responsibility to be predicated on the individual defendant's mens rea.[43] Because of the harshness of the rule, certain safeguards or limitations have evolved.[44] The most important limitation for purposes of this article is the res gestae limitation.

To give meaning to the phrase "while in the commission or attempted commission of a felony," courts commonly state that the death must occur within

---

[39] James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1441 (1994). Tomkovicz notes that "[e]very true variation of the felony-murder rule is to some extent inconsistent with . . . contemporary notions of culpability and fault." *Id.* at 1438. The criticisms of the traditional felony-murder rule are applicable to its variations.

[40] For a discussion of various ways the felony-murder rule may have a deterrent effect, see generally Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73 (1991).

[41] *See Washington*, 402 P.2d at 139 (Burke, J., dissenting) (stating that the purpose of felony-murder rule is to deter felons from undertaking inherently dangerous felonies).

[42] Roth & Sundby, *supra* note 35, at 451. *But see Washington*, 402 P.2d at 133 ("It is contended . . . that another purpose of the felony-murder rule is to prevent the commission of robberies. Neither the common-law rationale of the rule nor the Penal Code supports this contention.").

[43] *See* Richard A. Rosen, *Felony-Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1105 n.3 (1990); Tomkovicz, *supra* note 39, at 1441 ("[T]he major complaint about the felony-murder rule is that it violates generally accepted principles of culpability."). The felony-murder rule was abolished in England where it originated. *See* The Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11 § 6 (Eng.); Tomkovicz, *supra* note 39, at 1430 n.6 ("Abandoned by its motherland, the felony-murder rule, like so many outcasts, has found a niche in America.").

[44] *See* DRESSLER, *supra* note 7, at 519–27 (footnotes omitted); Tomkovicz, *supra* note 39, at 1438; *see also id.* at 1465–69 (briefly discussing some of the devices used to diminish the frequency of the rule's application and noting that "[t]his proclivity for confining the rule is often the product of hostility to the rule itself").

the res gestae of (i.e. within the things done to commit) the felony.[45] This frame of reference has temporal and geographic elements, typically beginning with a substantial step that would constitute an attempt to commit the underlying felony, and extending to a point after the technical completion of the crime (or the attempt) where the culprit has reached a place of temporary safety.[46] But the res gestae limitation requires more of a nexus between the underlying felony and the killing than the coincidence of time and place. To illustrate this point, LaFave uses the example of a bank robbery.[47] During the course of the robbery, a customer of the bank, who is completely unaware of the robbery in progress, has a heart attack and dies. Despite the fact that the death occurred at the same time and place as the robbery, the felony-murder rule does not apply. There must be more than time and place. There must be a causal connection between the underlying felony and the death.[48] The death must flow from the felony, as a direct and foreseeable consequence.[49]

C. *Ohio's Felony-Murder Aggravating Circumstance Death Penalty Specification*

Ohio's statutory scheme provides that some, but not all, aggravated murders carry a possible death sentence. In order for a defendant to be death-eligible, not only must the defendant be convicted of aggravated murder, but at least one of the nine "aggravating circumstances" must also be alleged and proved beyond a reasonable doubt.[50] Aggravating circumstances are used, theoretically, to select from the larger class of aggravated murders those most deserving of the death penalty.[51] For example, the state will impose a sentence of death if the murder or murderer is particularly reprehensible because of the age[52] or status[53] of the victim, the status of the defendant,[54] or the motive[55] for the murder.

---

[45] *See* Conrad v. State, 78 N.E. 957 (Ohio 1906); DRESSLER, *supra* note 7, at 522. The Latin expression "res gestae" or "res gesta," literally translated is "things done" or "thing transacted." BLACK'S LAW DICTIONARY 1310 (7th ed. 1999).

[46] *See* DRESSLER, *supra* note 7, at 523; LAFAVE, *supra* note 1, at 683–85.

[47] *See* LAFAVE, *supra* note 1, at 682.

[48] *See id.*

[49] *See id.* at 685.

[50] OHIO REV. CODE ANN. § 2929.04(A) (West Supp. 2001).

[51] *See* Rosen, *supra* note 43, at 1122.

[52] § 2929.04(A)(9) (listing as an aggravating circumstance that the victim was under thirteen years of age).

[53] *See id.* § 2929.04(A)(1) (listing as an aggravating circumstance that the victim was the president, vice president, president-elect or vice president-elect of the United States or the governor, lieutenant governor, governor-elect, lieutenant governor-elect or candidate for one of these offices); *see also id.* § 2929.04(A)(6) (listing as an aggravating circumstance that the victim was a law enforcement officer).

[54] *See id.* § 2929.04(A)(4) (listing as an aggravating circumstance that the offender was a prisoner in a detention facility or at large after having broken away from detention).

One of the nine enumerated aggravating circumstances is the so-called felony-murder death penalty specification found in Ohio Revised Code section 2929.04(A)(7), which provides in pertinent part:

> (A) Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment . . . and proved beyond a reasonable doubt:
>
> (7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.[56]

Aggravating circumstances are commonly referred to as death penalty "specifications" in Ohio because of the requirement they be "specified in the indictment."[57] The relevant language of the felony-murder death penalty specification provision ("while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to [an enumerated felony]")[58] tracks the language of the aggravated felony-murder provision ("while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit [an enumerated felony]").[59] Like felony

---

[55] *See id.* § 2929.04(A)(2) (listing as an aggravating circumstance that the offense was for hire); *see also id.* § 2929.04(A)(8) (listing as an aggravating circumstance "that the victim was a witness to an offense and was killed either to prevent the victim from testifying or to retaliate against the victim's testimony").

[56] *Id.* § 2929.04(A)(7).

[57] *Id.* §§ 2929.04(A), 2941.14.

[58] *Id.* § 2929.04(A)(7).

[59] OHIO REV. CODE ANN. § 2903.01 (B) (West 1997). Many other states also use felony-murder as an aggravating circumstance. As in the felony-murder provisions, the wording of these provisions varies. The following states use "in the course of" and "in furtherance of": Arkansas, ARK. CODE ANN. § 5-10-101(a)(1-2) (Michie 1997); Colorado, COLO. REV. STAT. § 16-11-103(5)(g) (2000); New York, N.Y. PENAL LAW § 125.27(1)(vii) (McKinney 1998); Washington, WASH. REV. CODE ANN. § 10.95.020(11) (West Supp. 2001).

Illinois uses "in the course of" and "while." ILL. COMP. STAT. ANN. § 5/9-1 (b)(6)–(9) (West Supp. 2001).

The following states use "*while* engaged in," "*while* committing," or "*while* in the perpetration of": Alabama, ALA. CODE § 13A-5-49(4) (West 1994 & Supp. 2000); California, CAL. PENAL CODE § 190.2(a)(17) (West Supp. 2002); Delaware, DEL. CODE. ANN. tit. 11, § 4209(e)(1)(j) (1995); Florida, FLA. STAT. ANN. § 921.141(5)(d) (West 2001); Georgia, GA. CODE ANN. § 17-10-30(b)(2) (1997); Indiana, IND. CODE ANN. § 35-50-2-9(b)(1) (West 1998 & Supp. 2001); Kentucky, KY. REV. STAT. ANN. § 532.025(2)(a)(2) (West 1999 & Supp. 2001); Maryland, MD. CODE ANN., 1957, art. 27, § 413(d)(10) (1996 & Supp. 2001); Missouri: MO. ANN. STAT. § 565.032 (2)(11) (West 1999); Nevada, NEV. REV. STAT. ANN. § 200.033(4)

murder provisions in general, the primary rationale for felony-murder as an aggravating circumstance is deterrence.[60]

1. *The Narrowing Requirement and Aggravating Circumstances*

The Eighth Amendment to the U.S. Constitution requires that the statutory criteria for imposing the death penalty substantially narrow the class of persons eligible for the death penalty from the class of persons convicted of an aggravated or first-degree murder.[61] The goal is to ensure that those who are selected for execution are more deserving of this ultimate punishment than those aggravated or first-degree murderers not selected for execution.[62] In other words, the

---

(Michie 2001); North Carolina, N.C. GEN. STAT. § 15A-2000(e)(5) (1999); Pennsylvania, 42 PA. CONST. STAT. ANN. § 9711(d)(6) (West 1998 & Supp. 2001); South Carolina, S.C. CODE ANN. § 16-3-20(C)(a)(1) (Law. Co-op. Supp. 2001); Tennessee, TENN. CODE. ANN. § 39-13-204(i)(7) (1997 & Supp. 2001); Utah, UTAH CODE ANN. § 76-5-202(1)(d) (1999 & Supp. 2001); Wyoming, WYO. STAT. ANN. § 6-2-102(h)(xii) (Michie 2001) (emphasis added). The Model Penal Code formulation of felony-murder as an aggravating circumstance employs the phrase "*while* . . . engaged . . . in the commission of." MODEL PENAL CODE § 210.6(3)(e) (emphasis added).

The following states use "in commission of": Mississippi, MISS. CODE ANN. § 97-3-19(2)(e) (1999 & Supp. 2001); New Jersey, N.J. STAT. ANN. § 2C:11-3(c)(3)(g) (West 1995 & Supp. 2001); New Mexico, N.M. STAT. ANN. § 31-20-A-5(B) (Michie 2000).

The following states use "during commission" or "during the course of committing": Connecticut, CONN. GEN. STAT. ANN. § 53a-46a(i)(1) (West 2001); Massachusetts, MASS. GEN. LAWS ANN. ch. 279, § 69(a)(10) (West 1992); Montana, MONT. CODE ANN. § 46-18-303(1)(a)(vi) (2001); Idaho, IDAHO CODE § 19-2515(h)(7) (1997 & Supp. 2001); and Louisiana, LA. CODE CRIM. PROC. ANN. art. 905.4(A)(1) (West 1997).

[60] Thomas M. Fleming, *Sufficiency of Evidence, For Death Penalty Purposes, to Establish Statutory Aggravating Circumstances That Murder Was Committed in the Course of Committing, Attempting, or Fleeing From Other Offenses, and the Like –Post* Gregg *Cases*, 67 A.L.R. 4th 887, 891–92 (1989) (noting that:

> [Felony-murder aggravating circumstance] provisions are generally aimed at a category of homicides thought normally to involve a degree of planning and deliberation, which for that reason might be particularly amenable to deterrence through the provision of an especially severe penalty, and may also be intended to protect police officers, witnesses, and innocent bystanders).

Id.

[61] Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) ("To pass constitutional muster, a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.") (citing Zant v. Stephens, 462 U.S. 862, 877 (1983)).

[62] *See* Rosen, *supra* note 43, at 1109–10, 1124. In *Enmund v. Florida*, the Court held the death penalty unconstitutional when it was imposed on an accomplice in a felony-murder who did not himself kill, attempt to kill, intend to kill or intend that lethal force be used. 458 U.S. 782, 798–801 (1982). There, the Court noted that it had "employed a similar approach in

narrowing must be both quantitative (fewer in number) and qualitative (selecting the more culpable and winnowing out the less culpable).[63] One method of accomplishing this constitutional mandate is the use of aggravating circumstances.[64]

A defendant in Ohio can be convicted of aggravated murder if he purposely causes a death while committing or attempting to commit an enumerated felony.[65] The same consideration (the fact that the death occurred while committing or attempting to commit an enumerated felony) can be used a second time to make him death eligible.[66] Where is the narrowing required of aggravating circumstances? The field is theoretically narrowed because the list of underlying felonies that will result in a conviction for aggravated murder is longer than the list of underlying felonies that will qualify a defendant for death.[67] The list of underlying felonies is reduced from nine to five.[68] The felony-murder death penalty specification provision also requires a showing that the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, that the aggravated murder was committed with prior calculation and design.[69]

Godfrey v. Georgia, 446 U.S. 420, 433, (1980), reversing a death sentence based on the existence of an aggravating circumstance because the defendant's crime did not reflect 'a consciousness materially more 'depraved' that that of any person guilty of murder.'" *Enmund*, 458 U.S. at 800–801.

[63] *See* David McCord, *State Death Sentencing for Felony Murder Accomplices Under the* Enmund *and* Tison *Standards*, 32 ARIZ. ST. L.J. 843, 846 (2000) (noting that death eligibility requires a rational criterion by which some murders can be deemed worse than most).

[64] *See* Zant v. Stephens, 462 U.S. 862, 877 (1983); State v. Murphy, 747 N.E.2d 765, 792 (Ohio 2001); *see also* State v. O'Neal, 721 N.E.2d 73, 91–92 (Ohio 2000) (Pfeifer, J., dissenting); McCord, *supra* note 63, at 846 (noting that most states have satisfied the narrowing requirement by adopting aggravating factors); Rosen, *supra* note 43, at 1122.

[65] OHIO REV. CODE ANN. § 2903.01(B) (West 1997).

[66] *See id.* § 2929.04(A)(7).

[67] Tuilaepa v. California, 512 U.S. 967, 972 (1994) ("[T]he [aggravating circumstance] [resulting in death-eligibility] may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder.").

[68] The underlying felonies listed in the aggravated felony-murder statute, section 2903.01(B), include kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary and escape. The felony-murder death penalty specification statute, section 2929.04(A)(7), retains kidnapping, rape, aggravated arson, aggravated robbery, and aggravated burglary, but drops escape and the simple forms of arson, robbery and burglary. The list is reduced from nine to five. It is questionable whether dropping the simple forms of arson, robbery and burglary while retaining the aggravated forms of the same crimes results in an appreciable quantitative reduction in death eligible defendants.

[69] Section 2929.04(A)(7) has been held to be sufficiently narrowing. *See* Scott v. Mitchell, 209 F.3d 854, 884–85 (6th Cir. 2000); Smith v. Anderson, 104 F. Supp. 2d 773, 844–45 (S.D. Ohio 2000); Henderson v. Collins, 101 F. Supp. 2d 866, 925–26 (S.D. Ohio 1999); State v. Jackson, 565 N.E. 2d 549, 562 (Ohio 1991); State v. Henderson, 528 N.E.2d 1237, syl. ¶ 2 (Ohio 1988); State v. Wiles, 571 N.E.2d 97, 122 (Ohio 1991); State v. Jenkins, 473 N.E.2d 264,

III. THE AFTERTHOUGHT FELONY: OHIO LAW BEFORE *STATE V. WILLIAMS*

Prior to *Williams* and its progeny, Ohio law was consistent with the majority rule in holding that there can be no felony-murder where the felony occurs as an afterthought following the killing.[70] The Ohio Supreme Court did not expressly overturn existing Ohio case law to make room for its decision in *Williams*, but rather attempted to reconcile *Williams* with previous decisions.[71] A review of Ohio case law leading up to *Williams*, however, reveals that *Williams* represents a marked expansion of the felony-murder rule in Ohio.

In 1906, the Ohio Supreme Court considered the death sentence of a defendant who shot and killed a police officer while fleeing after a burglary in

---

280 (Ohio 1984), *reh'g denied*, 473 U.S. 927 (1985), *cert. denied*, 472 U.S. 1032 (1985). In *Jenkins*, the court stated:

> It is noteworthy that R.C. 2903.01(B) and 2929.04(A)(7) are not identical. First, crimes such as robbery, arson and burglary, contained under R.C. 2903.01(B), are noticeably absent from R.C. 2929.04(A)(7). More importantly, while a conviction under R.C. 2903.01(B) cannot be sustained unless the defendant is found to have intended to cause the death of another, the state, in order to prevail upon an aggravating circumstance under R.C. 2929.04(A)(7), must additionally prove that the offender was the principal offender in the commission of the aggravated murder or, if the offender was not the principal offender, that the aggravated murder was committed with prior calculation and design.

Jenkins, 473 N.E.2d at 280 n.17. In *Henderson*, the court concluded that Ohio's capital sentencing scheme sufficiently narrows the class of persons eligible for the death penalty by its requirement that the jury determine at the guilt phase whether the crime falls into a specific category justifying capital punishment. *Henderson*, 528 N.E.2d at 1243.

[70] *See* Metheny v. Maryland, 755 A.2d 1088, 1117–18 (Md. Ct. App. 2000):

> [T]he majority view in this country is the more narrow view of felony-murder and thus, there can be no felony-murder where the felony occurs as an afterthought following the killing (citations omitted). This majority view holds that in order to establish felony-murder, the intent to commit the felony must exist prior to or concurrent with the commission of the act causing the death. The minority view is that felony-murder may be established when the intent to commit the underlying felony arises after the killing if there is a continuity of action or if the killing is part of the same occurrence or episode as the felony.

Id. For a partial listing and discussion of the jurisdictions employing the majority and minority views, see *id.* at 1112–19; State v. Buggs, 995 S.W.2d 102, 107 (Tenn. 1999). For a more complete listing of jurisdictions employing the majority and minority views, see *infra* note 20.

[71] *Williams*, 660 N.E.2d at 733 ("[W]e find that . . . Ohio case law [does not require] . . . the intent to commit a felony to precede the murder in order to find a defendant guilty of a felony-murder specification. In doing so we reject the court of appeals' interpretation of R.C. 2903.01(B) [the aggravated felony-murder statute] and 2929.04(A)(7) [the felony-murder death penalty specification statute].").

Conrad v. State.[72] The defendant argued that the underlying felony was completed and, therefore, the death did not occur during the commission of the felony.[73] The court upheld the sentence, but only because the defendant shot the police officer in order to perpetrate the underlying felony.

> [W]hen a burglary has been planned, in order to carry it out, or, in other words, to perpetrate it, the burglar must go to the building; he must break and enter it; he may effect his purpose or attempt it, and he must come away; for the very nature of the transaction implies that the burglar will not remain in the building.[74]

The court reasoned that the death was closely connected to successfully accomplishing the underlying felony. Here, the killing was part of the attempt to get away and getting away was no doubt part of the planned burglary. In other words, the underlying felony and the death were directly related.

> Where one starts to carry out the purpose to commit a rape, arson, robbery, or burglary, and kills another under circumstances so closely connected with the crime which he has undertaken as to be a part of the res gestae thereof, he is guilty of murder in the first degree . . . whether the crime which he originally undertook has been technically completed or not.[75]

The Ohio Supreme Court considered the issue again in 1922 in *State v. Habig*.[76] While fleeing the scene of a robbery, Habig and his two companions were confronted by a police officer.[77] The robbers refused to surrender and one of them shot and killed the officer.[78] Despite the fact that, before the shooting of the police officer, the underlying felony had progressed to the point that Habig could be successfully prosecuted for the completed offense of robbery, the court concluded that the homicide was committed in perpetrating a robbery.[79] The court reasoned that the shooting was immediately connected with the underlying felony and that Habig was, at the time of the shooting, still engaged in the felonious

---

[72] Conrad v. State, 78 N.E. 957 (Ohio 1906). This case was decided under R.S. 6808 which employed in its felony-murder rule the phrase "in the perpetration" of an enumerated felony. *Id.* at 958. The Ohio Supreme Court, however, cited *Conrad* as relevant authority in construing Ohio's current felony-murder statutes. State v. Jester, 512 N.E.2d 962, 968 (Ohio 1987).

[73] *Conrad*, 78 N.E. at 958.

[74] *Id*. at 959–60.

[75] *Id*. at 957.

[76] State v. Habig, 140 N.E. 195, 198–99 (Ohio 1922). Like *Conrad*, this case was decided under R.S. 6808 which employed in its felony-murder rule the phrase "in the perpetration" of an enumerated felony. The Ohio Supreme Court has cited *Habig* as relevant authority in construing Ohio's current felony-murder statutes. *Jester*, 512 N.E.2d at 968.

[77] *Habig*, 140 N.E. at 196.

[78] *Id*.

[79] *Id*. at 197–98.

purpose—that of carrying away the spoils of the robbery.[80]

> "The killing is committed in the perpetration or attempting to perpetrate one of the named felonies if it occurs at any time while the perpetrator is engaged in any acts immediately connected with such felony, even though the felony may have been already completed." In the case at bar, while the crime of robbery had sufficiently progressed to support a conviction against Habig for that crime, he was nevertheless still engaged in his felonious purpose, that of carrying away the proceeds of his crime, and there had been no division of the spoils, neither had the conspirators reached a place of seeming security, nor had their continuous flight come to an end. The alarm was so quickly sounded, the pursuit so immediately begun, and so continuously pursued to the point where the homicide was committed, that the conclusion must be reached that the homicide was committed by Habig while perpetrating the robbery, and as a part of the res gestae.[81]

In 1977, the Ohio Supreme Court decided the case of *State v. Cooper*.[82] Cooper killed a twelve-year-old girl after kidnapping her and attempting to rape her.[83] Cooper contended that the prosecution failed to prove that the murder occurred in the commission of attempted rape because the attempted rape took place in his automobile located approximately 1,200 feet from the scene of the murder.[84] The Ohio Supreme Court rejected this argument, citing *Conrad*.[85]

The logic of *Conrad* would certainly apply in *Cooper*. The circumstances would warrant the conclusion that the killing of the girl immediately after the attempted rape was done in order to get away with the crime of attempted rape. In other words, the underlying felony and the death were directly related. The court noted: "R.C. 2903.01(B) provides, in part: 'No person shall purposely cause the death of another while committing or attempting to commit . . . rape. . . . The term 'while' . . . indicates that the killing must be directly associated with the attempted rape as part of one continuous occurrence, a situation present in the instant cause."[86]

In 1987, the Ohio Supreme Court decided *State v. Jester*.[87] In *Jester*, the defendant entered a bank, fatally shot a bank guard who was using the telephone, leaped over the counter, and took money from a teller's drawer.[88] Jester argued that "[t]he act which caused the death of the bank guard was completed before the commission or attempted commission of the aggravated robbery, because the

---

[80] *Id*. at 198–99.
[81] *Id.* (quoting 1 MCCLAIN ON CRIMINAL LAW 327(1897)).
[82] State v. Cooper, 370 N.E.2d 725 (Ohio 1977).
[83] *Id*. at 727–29.
[84] *Id*. at 736.
[85] *Id*.
[86] *Id*.
[87] 512 N.E.2d 962 (Ohio 1987).
[88] *Id*. at 964.

evidence was not sufficient to establish the offense of aggravated murder while attempting to commit aggravated robbery."[89]

In rejecting Jester's argument, the court pointed out that the shooting of the guard was connected to the robbery rather than an independent crime.[90] The shooting of the guard was actually part of the robbery itself. Had Jester stopped at the moment he shot the officer, he could still be prosecuted for attempted aggravated robbery because the shooting was a substantial step in the commission of aggravated robbery. In the court's own words:

> According to appellant's own facts, appellant shot the guard because he believed the guard was calling the police. The shooting of the guard was in furtherance of his act of robbery or attempted robbery. R.C. 2923.02(A) provides that no person shall engage in conduct which, if successful, would constitute or result in the offense. In *State v. Woods* (1976), 48 Ohio St.2d 127, 2 O.O.3d 289, 357 N.E.2d 1059, this court, in paragraph one of the syllabus, held that "[a] 'criminal attempt' is when one purposely does or omits to do anything which is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime. To constitute a substantial step, the conduct must be strongly corroborative of the actor's criminal purpose." Here, appellant took a substantial step in the course of conduct planned to culminate in an aggravated robbery by killing the guard, a person capable of stopping him. His conduct was strongly corroborative of his criminal purpose. Ohio has also held that where one starts to carry out the purpose to commit a robbery and kills another under circumstances closely connected with the crime undertaken, the killing is part of the *res gestae* of the robbery. *Conrad v. State* (1906), 75 Ohio St. 52, 78 N.E. 957; *State v. Habig* (1922), 106 Ohio St. 151, 140 N.E. 195. See, also, Annotation, What Constitutes Termination of Felony for Purpose of Felony-Murder Rule, 58 A.L.R.3d 851 (1947). Here, appellant was in the bank with the express purpose of committing aggravated robbery. Inasmuch as the appellant shot the bank guard because he believed the guard was summoning the police, the act of shooting the guard was closely connected with the crime of aggravated robbery.[91]

The court made it quite clear that the aggravated robbery was in progress upon the killing of the bank guard and that the purposeful killing of the bank guard was part of the aggravated robbery.[92] The aggravated robbery and the purposeful killing were directly related, and the application of the aggravated felony-murder rule was justified.

In 1989, the Ohio Supreme Court decided *State v. Cooey*.[93] In *Cooey*, two women driving on the interstate stopped after their car was struck by a chunk of

---

[89] *Id*. at 968.
[90] *Id.*
[91] *Id.*
[92] *Id*.
[93] 544 N.E.2d 895 (Ohio 1989).

concrete dropped from an overpass by Cooey and his two friends.[94] Unaware that it was Cooey and his friends that threw the chunk of concrete at their car, the two women accepted the offer of Cooey and his friends to drive the women to a pay phone.[95] While at a nearby shopping mall, one of Cooey's friends noticed money in one of the women's purse.[96] They decided to rob the women, whereupon a knife was drawn and the women relinquished their purses.[97] The women were then driven to an isolated area and raped.[98] At some point, Cooey referred to his friend by name in front of the women, and they decided they would have to kill the women.[99] The women were beaten and strangled to death.[100]

Cooey argued that his felony-murder convictions under R.C. 2903.01(B) must be reversed because the state failed to prove that the murders were committed simultaneously with the rapes and kidnappings.[101] Rejecting this construction of the statutory language, the court stated:

> Construing the same provision in *State v. Cooper* (1977), 52 Ohio St.2d 163 . . . we said: "The term 'while' does not indicate . . . that the killing must occur at the same instant as the attempted rape, or that the killing must have been caused by the attempt, but, rather, indicates that the killing must be directly associated with the attempted rape as part of one continuous occurrence, a situation present in the instant cause . . . ." *Id.* at 179–80 . . . The evidence here showed that the murders were associated with the kidnappings, robbery, and rapes "as part of one continuous occurrence . . . ."[102]

It was apparent that the defendants killed the victims in order to escape punishment for robbery and rape. In that way, the underlying felony and the purposeful killing of the victims were directly and causally connected.

State v. Smith[103] was decided in 1991. Smith met the victim at a bar and

---

[94] *Id*. at 901.
[95] *Id*.
[96] *Id*.
[97] *Id*.
[98] *Id*.
[99] *Id.* at 901–02.
[100] *Id*. at 902.
[101] *Id*. at 903.
[102] *Id*.
[103] 574 N.E.2d 510 (Ohio 1991). *Smith* dealt with whether the evidence was sufficient to sustain a conviction for the underlying felonies of rape and aggravated robbery. Smith argued that the prosecution failed to prove that the victim was still alive when he had sex with her—in other words, that his actions did not amount to rape but, rather, another crime, such as abuse of a corpse. *Id.* at 516. The court referred to evidence in the record that demonstrated that the victim was alive at the time defendant had sex with her and thus concluded that it was rape. *Id.* Smith also argued that the victim was already dead before he decided to take her property—in other words, that the theft of the property was not robbery. *Id.* The court referred to evidence in the record that demonstrated that appellant intended to take her property before the stabbing. *Id.* The critical issue is the timing of the intent, not the timing of the carrying away.

drove her home.[104] He claimed that, while he was there, someone arrived who he thought was the victim's boyfriend, so he left quickly, apparently leaving behind $2,500 worth of cocaine.[105] Smith claimed that when he returned, the cocaine was gone, and, as "restitution," the victim agreed to have sex with him.[106] Afterwards, Smith demanded money and the two argued, whereupon Smith stabbed the victim in the stomach and neck.[107] Smith claimed that at this point, he decided to have sex with the victim again because "she was still breathing then."[108] Smith proceeded to stab the victim in the chest after he raped her while she was still alive.[109] Smith then stole the victim's two televisions and a stereo.[110]

The dispute between Smith and the victim that culminated in the stabbing concerned Smith's demand for money and property.[111] The intent to steal preceded the stabbing.[112] The theft occurred immediately after the stabbing.[113] The court had no difficulty concluding that Smith purposely caused the death of another while committing aggravated robbery.[114]

Smith stabbed the victim immediately before and after he raped her—the fatal wound being inflicted after the rape.[115] The court had no difficulty concluding that Smith purposely caused the death of another while committing rape.[116] In the language of *Cooey*, the purposeful killing and the aggravated robbery and rape were "associated . . . as part of a continuous occurrence. . . ."[117]

Finally, the Ohio Supreme Court decided *State v. Rojas*[118] in 1992. The

---

> [T]he victim of a robbery, killed just prior to the robber's carrying off her property, is nonetheless the victim of an aggravated robbery. The victim need not be alive at the time of asportation. A robber cannot avoid the effect of the felony-murder rule by first killing a victim, watching her die, and then stealing her property after the death.

Id.

The case is included in this section because the Ohio Supreme Court relied on it in subsequent cases on the issue of whether the intent to commit the underlying felony can come after the killing, as a complete afterthought. For a discussion of how the *Williams* decision has changed the court's analysis concerning the evidence sufficient to support a conviction for aggravated robbery, see *infra* note 254 and accompanying text.

[104] *Smith*, 574 N.E.2d at 513.
[105] *Id.*
[106] *Id.*
[107] *Id.* at 513–14.
[108] *Id.* at 514.
[109] *Id.* at 516.
[110] *Id.* at 514.
[111] *Id.* at 516.
[112] *Id.*
[113] *Id.* at 514.
[114] *Id.* at 517.
[115] *Id.* at 514, 516.
[116] *Id.* at 517.
[117] *Id.* (quoting *Cooey*, 544 N.E.2d 895, 903 (Ohio 1984)).
[118] State v. Rojas, 592 N.E.2d 1376 (Ohio 1992).

victim had befriended Rojas and attempted to help him deal with his drug and alcohol problems.[119] Apparently, Rojas wanted the victim to be his girlfriend and, when she spurned him, Rojas decided to kill her.[120] Rojas hid outside the victim's apartment, forced her back into the apartment when she was leaving and stabbed her in the back.[121] After the stabbing, and before the victim died, Rojas raped her twice.[122] Rojas stated that he stayed in the apartment for five and one-half hours, during which time he stole twenty-five dollars from the victim's purse.[123]

Rojas was convicted of four substantive offenses—aggravated burglary, rape, aggravated robbery, and aggravated murder with prior calculation and design.[124] Rojas was also convicted of three felony-murder death penalty specifications for aggravated murder while committing aggravated burglary, rape, and aggravated robbery.[125] Rojas argued that the evidence was insufficient to sustain convictions for aggravated burglary, rape, and aggravated robbery, as well as the felony-murder death penalty specifications alleging aggravated murder while committing aggravated burglary, rape, and aggravated robbery.[126]

The court easily dispensed with the arguments concerning the convictions for aggravated burglary and rape, referring to the compelling evidence (including a confession) establishing that Rojas unlawfully entered the victim's apartment where he raped and killed her.[127] The more difficult issue concerned aggravated robbery. Rojas argued that because he took the victim's property hours after he killed her, he was not guilty of aggravated robbery.[128] Consequently, Rojas argued that if he did not commit aggravated robbery, aggravated robbery could not serve as a felony-murder death penalty specification.[129] The Ohio Supreme Court referred to the evidence from which "the trial court reasonably could have found that the theft, or the intent to steal, occurred at the outset or during the one to three hours that [the victim] lived after being wounded."[130] The court went on to state, "If Rojas intended to steal [the victim's] property while she was alive, the fact that he carried it away after she died is not crucial."[131]

After establishing that the facts supported the convictions for aggravated burglary, rape, and aggravated robbery, the court turned its attention to the issue of whether the aggravated murder occurred "while" Rojas was committing these

---

[119] *Id.* at 1379.
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.* at 1380.
[125] *Id.*
[126] *Id.* at 1384–85.
[127] *Id.*
[128] *Id.* at 1384.
[129] *Id.* at 1384–85.
[130] *Id.*
[131] *Id.*

underlying offenses.[132] The court, citing *Smith*, *Cooey*, and *Cooper*, relied on its prior construction of the "comparable language" in Ohio Revised Code section 2903.01(B) (the aggravated felony-murder provision) to define the term "while" in section 2929.04(A)(7) (the felony-murder death penalty specification).[133] The court concluded that Rojas killed the victim while he was committing the underlying offenses.[134]

It is fairly obvious that the court stretched to find facts sufficient to sustain the conviction for aggravated robbery and to justify the application of the corresponding felony-murder death penalty specification. The court apparently reached for these facts because the law would not support a conviction for aggravated robbery and, therefore, the related felony-murder death penalty specification if Rojas' intent to steal came after the victim's death.[135]

A review of the holdings of relevant Ohio Supreme Court cases in the eighty-six years from *Conrad* to *Rojas* reveals a rule in Ohio that was consistent with the majority approach limiting the scope of the felony-murder rule with the res gestae doctrine.[136] The felony-murder rule applied only if the evidence (direct or circumstantial) revealed a direct, causal connection between the death and the underlying felony.[137] This connection did not have to be causal in the sense that the underlying felony was the instrument of death, but the connection did have to be causal in the sense that there must have been a nexus between them—the killing flowing out of and directly connected to the commission of the underlying felony.[138] The killing needs to have been a foreseeable result of the predicate felony.[139] This interpretation was consistent with the underlying purpose of the felony-murder rule—deterring careless or purposeful deaths during the commission of dangerous felonies. Then came *Williams*.[140]

IV. *STATE V. WILLIAMS*

A. *Introduction*

Ohio's aggravated felony-murder rule and its companion death penalty specification were expanded beginning in 1996.[141] This was accomplished not by

---

[132] *Id.* at 1385.
[133] *Id.*
[134] *Id.*
[135] *See infra* note 254 and accompanying text.
[136] *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 637 n.100 (2d ed. 1986) (noting in 1986 that "the prevailing view today is that there is no felony murder [sic] where the felony was only an afterthought following the killing"); *supra* notes 20 & 70.
[137] LAFAVE, *supra* note 1, at 682–86.
[138] *Id.*
[139] DRESSLER, *supra* note 7, at 523–24; LAFAVE, *supra* note 1, at 685–86;.
[140] State v. Williams, 660 N.E. 2d 724 (Ohio 1996).
[141] *Id.*

legislative amendment, but by judicial reinterpretation.[142] A review of *Williams* in the Ohio Court of Appeals and the Ohio Supreme Court reveals that the Court of Appeals' interpretation was consistent with precedent whereas the Ohio Supreme Court failed in its attempt to reconcile its past decisions with a new interpretation of the relevant statutes.[143] The Ohio Supreme Court's decision does not explain old law; it creates new law.

B. State v. Williams *in the Court of Appeals*

Andre R. Williams and an accomplice assaulted and robbed George and Katherine Melnick after forcibly entering their home.[144] Williams and his accomplice beat the couple, killing Mr. Melnick and seriously injuring Mrs. Melnick.[145] Before leaving the home, Williams attempted to rape Mrs. Melnick.[146]

Williams was tried on three counts of aggravated felony-murder.[147] The state alleged that Williams had purposely caused the death of George Melnick while committing or attempting to commit one of three underlying felonies—aggravated burglary, aggravated robbery, and rape.[148] Each count also alleged four death penalty specifications, including the felony-murder specification that the death of George Melnick occurred while Williams was committing or attempting to commit rape.[149] Williams was convicted on all three counts of aggravated felony-murder and all four death penalty specifications accompanying each count.[150]

Prior to the commencement of the penalty phase, two of the three aggravated felony-murder counts were dismissed pursuant to the State's motion to dismiss, including the conviction for aggravated felony-murder predicated on the underlying felony of rape.[151] Therefore, during the penalty phase, the jury considered only one count—aggravated felony-murder based on the underlying felony of aggravated burglary with four accompanying death penalty

---

[142] *Id.*

[143] *Williams*, 660 N.E.2d at 725; State v. Williams, No. 89-T-4210, 1995 WL 237092, at *1 (Ohio Ct. App. Mar. 24, 1995) (unreported).

[144] *Williams*, 660 N.E.2d at 727.

[145] *Id*. at 727–28.

[146] *Id*. at 728.

[147] *Id.* at 729.

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.* Since all three counts of aggravated murder involved the same victim, the counts were necessarily merged into a single count prior to commencement of the penalty phase. State v. Huertas, 553 N.E.2d 1058, 1066 (Ohio 1990); State v. Jones, 739 N.E.2d 300, 317 (Ohio 2000).

specifications.[152] At the conclusion of the penalty phase, the trial court, following the jury's recommendation, sentenced Williams to death.[153]

Williams argued in the Eleventh District Court of Appeals that "[i]t was plain error to submit attempted rape to the jury as an aggravating circumstance under 2929.04(A)(7)."[154] The court of appeals framed the issue as follows: "The issue posited for this court's review . . . is whether . . . the *subsequent and incidental attempted rape* of an individual who was not the murder victim may serve as a valid aggravating circumstance upon which to predicate the death sentence pursuant to R.C. 2929.04(A)(7)."[155]

The court first dispensed with any issue concerning the fact that the victim of the underlying felony (Mrs. Melnick) and the murder victim (Mr. Melnick) were not the same person.[156] The court concluded that "to sustain a death sentence under [Ohio Revised Code section] 2929.04(A)(7), it is not necessary that the underlying felony be committed against the murder victim."[157] The court then turned its attention to the res gestae issue.

What does it mean for the death to occur *while in the commission or attempted commission* of an enumerated felony? After citing relevant authority from a number of sister states,[158] the court interpreted the Ohio Supreme Court's ambiguous holding in *Rojas*:

---

[152] *Williams*, 660 N.E.2d at 729.

[153] *Id.*

[154] State v. Williams, No. 89-T-4210, 1995 WL 237092, at *44 (Ohio Ct. App. Mar. 24, 1995) (unreported). It is interesting to note how the issue came before the court of appeals and ultimately to the Ohio Supreme Court. Williams had not raised the issue of whether, under these facts, attempted rape should have been presented to the jury as an aggravating circumstance. During oral argument, the court of appeals raised the issue sua sponte and granted Williams leave to file a supplemental brief. *Id.*; *see also Merit Brief of Appellee/Cross-Appellant*, The 11th Dist. Court of Appeals, Ohio, filed Aug. 15, 1995, p. 43 (on file with the author). The court of appeals ruled that rape was not an aggravating circumstance under these facts. *Williams*, 1995 WL 237092, at *50. After raising the issue and ruling in Williams' favor on the issue, however, the court concluded that it would not alter the outcome. "[A]s there are three remaining valid aggravating circumstances in this case, our independent reweighing in the penalty phase will cure any error by the jury in considering the improper specification." *Id*. It is apparent that the court of appeals wanted to reach the issue in order to demark the limits of the felony-murder rule.

[155] *Williams*, 1995 WL 237092, at *44 (emphasis added).

[156] *Id*. at *44–45.

[157] *Id*. at *45.

[158] *Id*. at *48–49 (citing Commonwealth v. Legg, 417 A.2d 1152, 1154 (Pa. 1980)) (felony-murder doctrine inapplicable where "an actor kills prior to formulating the intent to commit the underlying felony"); *see* Young v. Zant, 506 F. Supp. 274, 280 (M.D. Ga. 1980) (felony murder not applicable where the evidence indicated that the accused did not contemplate committing the theft offense until after murder had been committed); People v. Green, 609 P.2d 468, 501 n.44 (Cal. 1980) ("[T]he defendant's intent to rob will not support a conviction of felony murder [sic] if it arose after the infliction of the fatal wound. . . . [T]he evidence must establish that the defendant harbored the felonious intent either prior to or during

> In *Rojas*, we believe the Supreme Court of Ohio, albeit rather cursorily, established that for purposes of R.C. 2903.01(B) [the aggravated felony-murder provision] and R.C. 2929.04(A)(7) [the felony-murder death penalty specification provision], it is necessary that evidence be presented from which a fact finder could reasonably conclude that the defendant formed his intent to commit the underlying felony prior to or during the commission of the acts which resulted in the murder victim's death.[159]

The court concluded that Williams formed the intent to rape Mrs. Melnick as an afterthought:

> The difficulty in inferring appellant's intent to rape Katherine Melnick at the time he savagely beat on George Melnick is that there was substantial evidence suggesting that [Williams] and [his accomplice] had formed an intent to commit aggravated burglary and aggravated robbery prior to the assault on George Melnick. When there exists only one felonious act occurring immediately subsequent to a murder, it is more reasonable to presume that the actor *intended* to commit the felony at the time of the murder. However, when a pre-existing intent to commit one felony (*e.g.* robbery) is clearly supported by the evidence, it seems less reasonable to conclude that, by the mere fact that another unrelated felony (*e.g.* rape) is also committed subsequent to the murderous assault, the actor also intended to commit that felony at the time of the murder. In the instant case, there is simply no evidence to reasonably support the inference that appellant had formed an intent to rape Katherine Melnick at the time of his assault on George Melnick.[160]

Because the law, as understood by the court of appeals, required intent to commit the underlying felony before or concurrent with the purposeful killing, and because the attempted rape of Mrs. Melnick was subsequent and incidental to the purposeful killing of Mr. Melnick, the court concluded that "it was improper to submit to the jury, in the penalty phase, the aggravating circumstance that appellant committed aggravated murder while attempting to commit rape."[161]

C. State v. Williams *in the Ohio Supreme Court*

Because the aggravated felony-murder conviction predicated on rape had been dismissed at the request of the prosecution, the issue on appeal was not

---

the commission of the acts which resulted in the victim's death. . . . " (quoting People v. Anderson, 447 P.2d 942, 953 (Cal. 1968)); People v. Richardson, 528 N.E.2d 612, 626–27 (Ill. 1988) (implicitly holding that evidence of an intent to commit the underlying felony is required to subject a defendant to the death penalty); People v. Goddard, 352 N.W.2d 367, 371 (Mich. Ct. App. 1984) ("Defendant must intend to commit the felony at the time the killing occurs.").

[159] *Williams*, 1995 WL 237092, at *49.

[160] *Id.* at *49.

[161] *Id.* at *50.

whether the attempted rape of Mrs. Melnick would support an aggravated felony-murder conviction pursuant to the aggravated felony-murder provision (Ohio Revised Code section 2903.01(B)). Rather, the issue was whether the attempted rape could serve as a felony-murder death penalty specification (Ohio Revised Code section 2929.04(A)(7)).[162] Nevertheless, the Ohio Supreme Court included the felony-murder provision in its pronouncements, thereby implicating both provisions.[163] Subsequent cases make clear that the court intended the *Williams* holding to apply to the felony-murder provision as well as the felony-murder death penalty specification.[164]

In its cross-appeal, the state contended that the court of appeals erroneously interpreted Ohio case law—in particular *Rojas*.[165] The Ohio Supreme Court agreed, finding that "neither the felony-murder statute nor Ohio case law requires the intent to commit a felony to precede the murder in order to find a defendant guilty of a felony-murder [death penalty] specification."[166] The court relied on language from *Cooper*, *Cooey*, *Smith*, and *Rojas* in a string of quotes that, on their face, appear to make this conclusion inevitable. These quotes, however, were taken unfairly out of context.

The Ohio Supreme Court quoted the following language from *Cooper* and *Cooey*:

> This court has had occasion to explain the meaning of the word "while" with respect to R.C. 2903.01(B), stating:
>
> "'The term "while" does not indicate . . . that the killing must occur at the same instant as the attempted rape, or that the killing must have been caused by the attempt, but, rather, indicates that the killing must be directly associated with the attempted rape as part of one continuous occurrence. . . .' The evidence here showed that the murders were associated with the [enumerated felonies]." *State v. Cooey* (1989), 46 Ohio St.3d 20, 23, 544 N.E.2d 895, 903, quoting *State v. Cooper* (1977), 52 Ohio St.2d 163, 179–80, 6 O.O.3d 377, 386, 370 N.E.2d 725,

---

[162] *Id.* at *44.

[163] *Williams*, 660 N.E.2d at 733. The court wrote:

> [W]e find that neither the felony-murder statute nor Ohio case law requires the intent to commit a felony to precede the murder in order to find a defendant guilty of a felony-murder [death penalty] specification. In doing so, we reject the court of appeals' interpretation of R.C. 2903.01(B) [the aggravated felony-murder provision] and 2929.04(A)(7) [the felony-murder death-specification provision.

Id.

[164] *See infra* Part IV.D.

[165] *Williams*, 660 N.E.2d at 732.

[166] *Id.* at 733.

736 [sic].[167]

The court then applied this language to the facts in *Williams*:

> [T]he murder of Mr. Melnick was "associated" with the attempted rape of Mrs. Melnick "as part of one continuous occurrence." As such, this case satisfied the *Cooey* test. . . . Thus, we find that neither the felony-murder statute nor Ohio case law requires the intent to commit a felony to precede the murder in order to find a defendant guilty of a felony-murder [death penalty] specification. In doing so, we reject the court of appeals' interpretation of R.C. 2903.01(B) [the felony-murder provision of the aggravated murder statute] and 2929.04(A)(7) [the felony-murder death-specification provision].[168]

---

[167] *Id*. In interpreting the language of the felony-murder death penalty specification provision, the Ohio Supreme Court relied on its interpretation of parallel language in the aggravated felony-murder provision. *Id.* The Ohio Supreme Court has consistently used its interpretation of the aggravated felony-murder provision in defining the "comparable language" of the felony-murder death penalty specification. *See, e.g.*, *Williams*, 660 N.E.2d at 733; State v. Rojas, 592 N.E.2d 1376, 1385 (Ohio 1992). Conversely, the Ohio Supreme Court has used its interpretation of the felony-murder death penalty specification in interpreting the aggravated felony-murder provision. State v. McNeill, 700 N.E.2d 596, 602 (Ohio 1998) (citing *Williams* in support of its interpretation of the aggravated felony-murder provision).

Other states also use their felony-murder rule jurisprudence in interpreting their felony-murder death penalty specification, in large part because of the similarity in language that often exists between the two provisions. The Court of Appeals of Maryland noted that "[t]he strongest indicator of an analogy between felony-murder and the [felony-murder] aggravators is the similarity in language between [the provisions]." Metheny v. State, 755 A.2d 1088, 1114 (Md. 2000) Similarly, in *People v. Green*, 609 P.2d 468 (Cal. 1980), the issue before the court was whether murder had been committed "during the commission of" a robbery in connection with California's felony-murder death penalty specification. *Id*. at 468. The court, however, relied on the analysis found in California cases interpreting whether murder had been committed "during the commission of" a felony in connection with the felony-murder statute. *Id*. at 501 n.44.

[168] *Williams*, 660 N.E.2d at 733. In construing its felony-murder death penalty specification provision (which uses the phrase "in the course of"), Illinois relies on a concept analogous to Ohio's "part of one continuous occurrence" approach. In Illinois, "a defendant is eligible for the death penalty if he commits murder and one of the specifically enumerated felonies either simultaneously or as *part of the same criminal episode*." People v. Thomas, 561 N.E.2d 57, 71–72 (Ill. 1990) (emphasis added). Like Ohio in *Williams*, the Illinois Supreme Court held that "[i]t is not imperative that the State prove beyond a reasonable doubt that defendant formed the criminal intent to commit [the enumerated felonies] before committing murder. It is sufficient that the State proved the elements of the crimes and the accompanying felonies were part of the same criminal episode." *Id.* at 71. Ironically, however, the *Thomas* court might have reached the opposite conclusion had it been construing the Ohio statute. The appellant in *Thomas* urged the Illinois court to adopt the reasoning in *People v. Green*, 609 P.2d 468 (Cal. 1980), and *People v. Hall*, 718 P.2d 99 (Cal. 1986). In *Green*, the court noted that "[t]he Legislature's goal is not achieved . . . when the defendant's intent is not to steal but to kill

The court's reliance on *Cooper* and *Cooey* is misplaced. In *Cooper* and *Cooey*, the killings were done to escape detection and punishment for the underlying felonies.[169] In that very specific way, the killings were "directly associated" with the underlying felonies and, therefore, "part of a continuous occurrence."[170] The two crimes were connected, not only by time and place, but also by motivation and, therefore, by foreseeability. The defendants were motivated to kill by a desire to get away with kidnapping and rape (*Cooper*) and kidnappings, robberies, and rapes (*Cooey*). The same cannot be said of defendant Williams. The killing of Mr. Melnick was not done to escape detection and punishment for the attempted rape of Mrs. Melnick. Mr. Melnick was already dead when Williams formed the intent to rape Mrs. Melnick. In other words, the underlying felony was an afterthought not associated with the killing except by the (previously) inadequate coincidence of time and place.

The Ohio Supreme Court in *Williams* also cited *Smith* as relevant authority for the proposition that the accused should not be able to escape the felony-murder rule by claiming that the underlying felony was merely an afterthought.[171]

---

and the robbery is merely incidental to the murder." *Green*, 609 P.2d at 505. The *Thomas* court rejected this approach, in part, because of the differences in statutory language:

> [T]he language of the California statute is different from that of the Illinois statute. The California statute permits the imposition of the death penalty when the jury finds that the defendant committed murder "during the commission or attempted commission of" one of several enumerated felonies. . . . We think that this language contemplates a shorter time frame than does the "in the course of" language found in the Illinois statute (Ill.Rev.Stat.1985, ch. 38, par. 9-1). That is, we think that the Illinois statute recognizes that the crime of murder is not necessarily complete when the victim's heart stops beating, but rather the crime continues throughout the time that the perpetrator conceals the crime and flees the scene. Therefore, the crimes of arson, aggravated arson and murder in this case sufficiently overlapped to support the jury's finding that the murder occurred in the course of the other felonies.

Thomas, 561 N.E.2d at 71. The "during the commission or attempted commission of" language in the former California provision is indistinguishable from the "while . . . committing [or] attempting to commit" language in Ohio's felony-murder death penalty specification provision. CAL. PENAL CODE § 190.2(c)(3) (Deering 1985) (repealed); OHIO REV. CODE ANN. § 2929.04(A)(7) (West 1997). The current California felony-murder aggravating circumstance provision uses the phrase "while . . . engaged in . . . the commission [or] attempted commission of . . . [an enumerated felony]" —a formulation that is even closer to the Ohio version. CAL. PENAL CODE § 190.2(a)(17) (West 2001).

[169] In *Cooper*, the defendant abducted the victim in order to engage in sexual activity and then killed her immediately after he attempted to rape her. State v. Cooper, 370 N.E.2d 725, 736 (Ohio 1977). The clear implication is that he killed her in order to escape detection and punishment for the attempted rape. Cooey and his accomplice kidnapped, robbed, and raped two women. State v. Cooey, 544 N.E.2d 895, 901 (Ohio 1989). It was not until Cooey referred to his accomplice by name in front of the women that they decided to kill them. *Id.* at 901–02.

[170] *Cooper*, 370 N.E.2d at 736; *Cooey*, 544 N.E.2d 903.

[171] *Williams*, 660 N.E.2d at 732 (citing State v. Smith, 61 Ohio St.3d 284, 290 (1991)).

The court's reliance on *Smith* is misplaced. The *Smith* case concerned the sufficiency of evidence to sustain a conviction for the underlying felonies of rape and aggravated robbery.[172] Smith argued that the prosecution failed to prove that the victim was still alive when he had sex with her—in other words, that his actions did not amount to rape but, rather, another crime such as abuse of a corpse.[173] The court referred to evidence in the record that demonstrated that the victim was alive at the time he had sex with her, concluding that it was rape.[174] Smith also argued that the victim was already dead before he decided to take her property—in other words, that the theft of her property was not robbery.[175] The court referred to evidence in the record that demonstrated that Smith intended to take her property before the stabbing.[176] The evidence was less clear on whether Smith began to remove the victim's property before or after the victim died. The court found that the critical issue is the timing of the intent to take the property, not the timing of the carrying away of the property:

> [T]he victim of a robbery, killed just prior to the robber's carrying off her property, is nonetheless the victim of an aggravated robbery. The victim need not be alive at the time of asportation. A robber cannot avoid the effect of the felony-murder rule by first killing a victim, watching her die, and then stealing her property after the death.[177]

Smith is only marginally relevant. It does not deal with the critical issue of whether the felony-murder rule would apply if the intent to commit the underlying felony came after the killing.

In *Williams*, the Ohio Supreme Court relied most heavily on *Rojas* for the proposition that the felony-murder rule applies even if the intent to commit the underlying felony did not precede the killing.[178] Ironically, the court of appeals relied most heavily on *Rojas* for the opposite proposition.[179] The Ohio Supreme Court noted in *Williams*: "Rojas did not rob his victim until hours after he had stabbed her and *the case reflects that he did not stab her in order to rob her*."[180]

This rendition of the facts represents a characterization the court was unwilling to make at the time *Rojas* was decided. In the *Rojas* opinion, the Ohio Supreme Court stated:

---

[172] *Smith*, 61 Ohio St. 3d at 290.

[173] *Id.* at 516–17.

[174] *Id.* at 516.

[175] *Id.*

[176] *Id.* at 516–17.

[177] *Id.* at 516.

[178] State v. Williams, 660 N.E.2d 724, 732 (Ohio 1996).

[179] State v. Williams, No. 89-T-4210, 1995 WL 237092, at *49 (Ohio Ct. App. Mar. 24, 1995) (unreported).

[180] *Williams*, 660 N.E.2d at 732 (emphasis added).

> *In this case, the trial court reasonably could have found that the theft, or the intent to steal, occurred at the outset*. . . . Although Rojas claims that no evidence shows that he stabbed [the victim] with the intent of robbing her, he did steal from her. His intent to rob can be inferred from the fact that he did so. . . . If Rojas intended to steal [the victim's] property while she was alive, the fact that he carried it away after she died is not crucial.[181]

Why did the court struggle to find evidence of prior intent to rob at the time *Rojas* was decided only to announce later that prior intent to rob is not required? The answer is simple. At the time *Rojas* was decided, the issue before the court was whether the evidence was sufficient to sustain a conviction for the underlying felony of aggravated robbery.[182] The court, at least at that time, apparently understood the law to require that the intent to rob preexisted or coexisted with the infliction of physical harm in order to sustain a conviction for aggravated robbery.[183] Anxious to sustain the conviction for aggravated murder based on aggravated robbery and the corresponding felony-murder death penalty specification, the court found the prior intent it needed. On the other hand, at the time the court was deciding *Williams*, the court was looking to support the proposition that Ohio law does not require prior intent to commit the underlying felony in order to use the felony as a predicate for the felony-murder death penalty specification.[184] The Ohio Supreme Court reconstructed *Rojas* and used it for the needed support.[185] This time the court concluded that no evidence of a prior intent to rob at the time of the stabbing was required.[186] *Rojas* now supports the court's holding in *Williams*, but only after the court revisited, revised, and repackaged the case.

The Eleventh District Court of Appeals of Ohio is not alone in its analysis of *Smith* and *Rojas*. In a post-*Williams* decision captioned *State v. Twyford*, the Seventh District Court of Appeals of Ohio tried to make sense of *Williams* in light of *Smith* and *Rojas*.[187] Twyford was convicted of, among other things, aggravated robbery, aggravated felony-murder (based on aggravated robbery) and a felony-murder death specification (based on aggravated robbery).[188] Twyford took the

---

[181] State v. Rojas, 592 N.E.2d 1376,1384 (Ohio 1992) (emphasis added). The court in *Williams* did not go so far as to say that Rojas did not intend to rob the victim at the time he stabbed her. Such a statement would have contradicted its opinion in *Rojas*. The court avoids the contradiction with the more cautious statement: "he did not stab her in order to rob her." *Williams*, 660 N.E.2d at 732.

[182] *Rojas*, 592 N.E.2d at 1384.

[183] For a discussion of how the *Williams* decision has changed the court's analysis concerning the evidence sufficient to support a conviction for aggravated robbery, see *infra* note 254 and accompanying text.

[184] *See Williams*, 660 N.E.2d at 732.

[185] *See id.*

[186] *Id.*

[187] State v. Twyford, No. 93-J-13, 1998 WL 671382 (Ohio Ct. App. Sept. 25, 1998).

[188] *Id.* at *3–*5.

victim's wallet after the victim was dead in what was clearly an afterthought intended to inhibit the identification of the victim.[189] Twyford argued that since the intent to steal came after the death, the evidence was insufficient to sustain a conviction for aggravated robbery (and presumably the related aggravated felony-murder conviction and felony-murder death specification).[190] The court struggled to reconcile *Smith* and *Rojas* with *Williams*:

> The question of whether the intent to steal must coincide with the infliction of the physical harm has recently been considered by the Supreme Court of Ohio in a series of three cases [referring to *Smith*, *Rojas*, and *Williams*]. . . . In *Smith* and *Rojas*, the Supreme Court never expressly stated that the intent to steal must coincide with the infliction of the physical harm before a defendant can be convicted of aggravated robbery or felony murder. However, *the fact that the court in both cases found it necessary to analyze the specific evidence [of prior or concurrent intent] supports the inference that the intent and the infliction had to coincide*. Thus, at first glance, *Smith* and *Rojas* appear to support appellant's argument in the instant case. In *State v. Williams* . . . though, the Supreme Court had the opportunity to expound upon its holding in *Rojas*.[191]

The court went on to hold, consistent with *Williams* and *Rojas* as revisited in *Williams*, that "a conviction for aggravated robbery can be upheld even when the physical harm was not inflicted in order to facilitate the robbery; i.e., it is only necessary to show that both elements existed during the course of one continuous event."[192] The court upheld the aggravated felony-murder conviction, noting that "[t]his analysis would also apply to a felony-murder charge which alleged that the murder took place during the commission of the aggravated robbery."[193]

D. *The Aftermath of* Williams

The relevant cases since *Williams* make it clear that the change announced in *Williams* is not limited to the felony-murder death penalty specification provision, but also applies to the aggravated felony-murder provision. *State v. McNeill*[194] implicated both provisions, but the court's analysis focused on the aggravated felony-murder provision.[195] McNeill agreed to sell the victim crack cocaine.[196] McNeill got into the victim's automobile and the victim drove to McNeill's home

---

[189] *Id*. at *27, *30.

[190] *Id*. at *27.

[191] *Id*. at *27–*28 (emphasis added).

[192] *Id.* at *28.

[193] *Id.* The Ohio Supreme Court affirmed the judgment of the court of appeals. State v. Twyford, 763 N.E.2d 122, 139 (Ohio 2002).

[194] 700 N.E.2d 596 (Ohio 1998).

[195] *See id.* at 602.

[196] *Id.* at 601.

for the purpose of obtaining the drug.[197] When they arrived, the victim stopped the car, and McNeill produced a pistol and attempted to rob the victim.[198] The victim ordered McNeill out of the car.[199] As McNeill exited the vehicle, he took the victim's car keys from the ignition.[200] After an argument, McNeill walked away.[201] While the victim tried to start the car using locksmith tools, McNeill returned and fatally shot the victim in the head.[202]

McNeill argued that he was not guilty of aggravated felony-murder and that the felony-murder death specification was inapplicable because the state failed to prove he killed the victim while attempting to commit aggravated robbery.[203] McNeill argued that the attempted aggravated robbery ended the moment he walked away from the victim's car and that the later killing was a new and separate crime that did not occur while he was attempting to rob the victim.[204] McNeill argued that robbery was not the motive for the killing, as shown by the fact he did not take the victim's money after the shooting; rather, McNeill claimed he shot the victim because he felt humiliated.[205] Rejecting McNeill's argument, the court stated:

> The term "while" in R.C. 2903.01(B), Ohio's [aggravated] felony-murder statute, neither requires that the killing occur at the same instant as the predicate felony, nor requires that the killing be caused by the predicate felony. Rather, the killing must be directly associated with the predicate felony as part of one continuous occurrence. *State v. Cooey* (1989), 46 Ohio St.3d 20, 23, 544 N.E.2d 895, 903. [3] Because the killing and predicate felony need not be simultaneous in order to constitute a felony-murder, the technical completion of one before the commission of the other does not remove a murder from the ambit of R.C. 2903.01(B). *See, e.g.*, *State v. Smith* (1991), 61 Ohio St.3d 284, 290, 574 N.E.2d 510, 516. "[T]he question whether [the defendant] killed before he stole or stole [or attempted to steal] before he killed is of no consequence." *State v. Palmer* (1997), 80 Ohio St.3d 543, 571, 687 N.E.2d 685, 709. . . . R.C. 2903.01(B) does not require that the felony be the motive for the killing. *See State v. Williams* (1996), 74 Ohio St.3d 569, 576–578, 660 N.E.2d 724, 732–733.[206]

The result in *McNeill* is not inconsistent with the traditional res gestae limitation, but the court's analysis is troubling. The court could have analyzed the case this way: *The intent to commit the robbery clearly preceded the killing. The*

---

[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] *Id.* at 602.
[204] *Id.*
[205] *Id.*
[206] *Id.*

killing was directly and causally connected to the robbery because it was motivated by the victim's refusal to cooperate. The fact that McNeill did not rob the victim after the shooting does not change the fact that McNeill threatened the victim with a pistol while demanding money and then, within a few minutes of the victim's resistance, made good on his threat. The court, however, did not analyze the case in this fashion. The court assumed as true McNeill's suggestion that the shooting was motivated by something other than the attempted aggravated robbery but held that neither the order of the underlying felony and the purposeful killing nor the motivation for the killing are relevant.[207]

The court did, however, purport to analyze the case in terms of a causal connection between the predicate felony and the killing.[208] After disposing of the time and place components, the court said, "Third, and most significant, the murder would not and could not have occurred but for the attempted robbery. Had McNeill not taken [the victim's] keys in attempting the robbery, [the victim] could (and presumably would) have driven away."[209] While it is initially comforting that the court mentioned the concept of causation, the causal connection required by the court here is the broadest form of cause-in-fact, which arguably is present in every case. What the court is saying is that the attempted robbery detained the victim. If the victim had been able to leave, he would not have been present a few minutes later to be shot. Therefore, the attempted robbery was the cause-in-fact of the murder. Causation this broad can be used to connect virtually any purposeful killing with an enumerated felony that occurs in temporal proximity. More to the point, the court once again cites with approval its decision in *Williams*.[210]

In *State v. Biros*[211] the court reiterated its position in *Williams* but added: "In *our* decision in *Williams*, we specifically rejected any notion that R.C. 2903.01(B) and 2929.04(A)(7) require proof that the offender formed the intent to commit the pertinent underlying felony before *or during* the commission of the acts which resulted in the murder victim's death."[212] By adding the words "or during," the court emphasizes that the intent to commit the underlying felony can come after the killing.

The combination of *Williams* and *Biros* demonstrates conclusively that causation is not a requirement in Ohio. It cannot plausibly be argued that an

---

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] 678 N.E.2d 891 (Ohio 1997). After killing the victim, Biros dragged her body from the scene. According to Biros, as he dragged the body, the victim's diamond ring cut into his hand. He removed the ring from her finger and put it in his pocket. *Id.* at 900. Biros was convicted of aggravated felony-murder with death penalty specifications. Aggravated robbery served as one of the underlying felonies. *Id.* at 901.

[212] *Id.* at 911 (third emphasis added) (footnote omitted).

enumerated felony was the cause-in-fact of a murder when the intent to commit the enumerated felony came after the murder. The very nature of cause and effect requires that the cause come first in time. The court has consistently ruled since *Williams* that the application of the aggravated felony-murder rule and felony-murder death penalty specification does not require that the intent to commit the underlying felony precede or coexist with the purposeful killing, but can arise after the killing.[213]

V. *WILLIAMS* AND ITS PROGENY REPRESENT AN UNWARRANTED EXPANSION OF THE FELONY-MURDER RULE AND THE FELONY-MURDER AGGRAVATING CIRCUMSTANCE

A. *Introduction*

The Ohio Supreme Court's relevant decisions beginning with *Williams* represent an unwarranted expansion of the aggravated felony-murder rule and felony-murder as an aggravating circumstance for several reasons. These decisions butcher the plain language of the statutes, render Ohio's felony-murder rule inconsistent with the underlying purpose of the rule, ignore traditional safeguards needed to ameliorate the harshness of the rule, and destroy the constitutionally mandated limiting function of felony-murder as an aggravating circumstance.

B. *The Plain, Ordinary, and Unambiguous Language of the Statutes*

In interpreting statutory language, courts are guided by rules of construction. Ohio Revised Code section 1.42 provides: "Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether

---

[213] State v. Twyford, 763 N.E.2d 122, 139 (Ohio 2002); State v. Carter, 734 N.E.2d 345, 353–54 (Ohio 2000); State v. McNeill, 700 N.E.2d 596, 602 (Ohio 1998); *Biros*, 678 N.E.2d at 891. In *Carter*, the defendant raped and murdered his adoptive grandmother after she insisted that defendant leave her residence. *Carter*, 734 N.E.2d at 347–50. After the victim died, Carter took $150 from her purse and fled. *Id.* at 350. He was convicted of, among other things, aggravated felony-murder (purposeful killing while in the commission of aggravated robbery) with two felony-murder death penalty specifications: aggravated murder while in the commission of aggravated robbery and rape. *Id.* Carter was sentenced to death. *Id.* at 347. He argued that aggravated robbery could not serve as the underlying felony for the aggravated murder conviction or the felony-murder death penalty specification because he did not form the intent to take the money until after the victim was dead and, even then, not until he realized he needed the money. *Id.* at 352–53. He supported his argument by noting that he took only $150 from the victim's purse, even though the purse contained approximately $450. *Id.* at 353. The court rejected his argument citing *Biros* and *Williams*. *Id.* at 353–54.

by legislative definition or otherwise, shall be construed accordingly."[214] This principle of statutory construction has been described as "the rule of reasonable, sensible, and fair construction, according to the expressed legislative intent, having due regard to the plain, ordinary, and natural meaning and scope of the language employed in the act."[215] Courts are also guided by Ohio Revised Code section 2901.04 (A): "[S]ections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused."[216]

The Ohio Supreme Court reconciled these two principles:

> [C]riminal statutes must be strictly construed against the state and liberally construed in favor of the accused. R.C. 2901.04(A). "Nevertheless, courts do not have the authority to ignore the plain and unambiguous language of a statute under the guise of either statutory interpretation or liberal construction; in such situation, the courts must give effect to the words utilized."[217]

When construing penal statutes, to the extent the language is clear, the plain, ordinary, and natural meaning of terms should be employed. To the extent that the statutory language is ambiguous, the interpretation favorable to the accused must prevail. With these rules of statutory construction in mind, the Ohio Supreme Court's statutory interpretation in *Williams* must be regarded as insupportable.

The aggravated felony-murder rule provides in pertinent part: "No person shall purposely cause the death of another . . . while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit [one or more of nine enumerated felonies]."[218] The felony-murder aggravating circumstance provision restates this language to make the offense death-eligible if it involved one or more of five of the original nine enumerated felonies.[219]

These two statutes identify four possible scenarios for the application of the felony-murder rule and felony-murder aggravating circumstance provision. The statutes apply if the accused purposely causes the death of another (1) while committing an enumerated felony; (2) while attempting to commit an enumerated felony; (3) while fleeing immediately after committing an enumerated felony; or (4) while fleeing immediately after attempting to commit an enumerated felony. The absurdity of the *Williams* decision is apparent if we examine the plain, ordinary, and natural meaning of the language defining each of these scenarios.

---

[214] OHIO REV. CODE ANN. § 1.42 (West 1997).

[215] State v. Brown, 170 N.E.2d 854, 857 (Ohio Ct. App. 1960) (quoting 37 O. JUR. § 422 (1928)).

[216] OHIO REV. CODE ANN. § 2901.04(A) (West 1997).

[217] State v. Snowder, 720 N.E.2d 909, 910–11 (Ohio 1999) (quoting Morgan v. Ohio Adult Parole Auth., 626 N.E.2d 939, 942 (Ohio 1994)).

[218] OHIO REV. CODE ANN. § 2903.01(B) (West 1997).

[219] *Id.* at § 2929.04(A)(7).

"While" is defined as "during the time that."[220] Therefore, the first scenario, "while committing [an enumerated felony]," must require that, at the time of the killing, the felony be in progress. In other words, the killing must occur during the time that the enumerated felony is being committed.

"Attempt" requires an intent to do an act or bring about a certain result and an act in furtherance of that intent beyond mere preparation.[221] Therefore, the second scenario, "while . . . attempting to commit [an enumerated felony]," involves an intent to commit the felony at the time the killing occurs.

The third scenario, "while fleeing immediately after committing [an enumerated felony]," means the felony has already occurred by the time of the killing—thus the use of the phrase "after committing." Similarly, the fourth scenario, "while fleeing immediately after . . . attempting to commit" an enumerated felony, means the attempt to commit the felony has already occurred.

Each of these four scenarios requires, at a minimum, that the intent to commit the underlying felony existed before or at the time of the killing.[222] Notwithstanding the plain, ordinary, and unambiguous language of the statutes, the Ohio Supreme Court in *Williams* and *Biros* "specifically rejected any notion that R.C. 2903.01(B) [the aggravated felony-murder rule] and 2929.04(A)(7) [the felony-murder aggravating circumstance provision] require proof that the offender formed the intent to commit the pertinent underlying felony before or during the commission of the acts which resulted in the murder victim's death."[223]

---

[220] 20 THE OXFORD ENGLISH DICTIONARY, 231–33 (2d ed. 1989); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 2604 (1993).

[221] *See* OHIO REV. CODE ANN. § 2923.02(A) (West 1997) (stating that "attempt" requires an intent to engage in conduct that, if successful, would constitute or result in the offense); State v. Jester, 512 N.E.2d 962, 968 (Ohio 1987) (stating that "attempt" requires criminal purpose and a substantial step in a course of conduct planned to culminate in the crime); State v. Woods, 357 N.E.2d 1059, 1061 syl. ¶1 (Ohio 1976) (same); DRESSLER, *supra* note 7, at 374 (stating that common law "substantial step" goes beyond mere preparation); LAFAVE, *supra* note 1, at 535.

[222] Other states have relied on the plain, ordinary, and natural meaning of terms in rejecting the use of an afterthought felony as a basis for a felony-murder death penalty specification. Interpreting the identical phrase "while committing or attempting to commit" in connection with Maryland's felony-murder death penalty specification, the Court of Appeals of Maryland stated:

> We conclude, as a matter of statutory interpretation, that the General Assembly's use of the phrase "while committing or attempting to commit" one of the aggravators in § 413(d)(10) [Maryland's felony-murder death penalty specification] conveys a legislative intent that a murder, in order to qualify for punishment by death, must have been connected to the aggravating crime by more than mere coincidence, therefore *eliminating from death penalty consideration a robbery committed as an afterthought*. Use of the conjunction "while" in tandem with the present participles "committing" and "attempting" denotes more than the aggravating crime occurring at the same time as the counterpart murder.

Metheny v. State, 755 A.2d 1088, 1111 (Md. 2000) (emphasis added).

[223] State v. Biros, 678 N.E.2d 891, 911 (Ohio 1997) (citing State v. Williams, 660 N.E.2d 724, 732–33 (Ohio 1996)).

The Ohio State Bar Association has noted the illogical statutory interpretation found in *Williams*. On November 8, 1997, the Criminal Justice Committee of the Ohio State Bar Association (OSBA) delivered a report to the Council of Delegates of the Association calling for a review of existing death penalty judgments and recommending changes in the system to ensure fair and reliable judgments.[224] The report was adopted by the Council of Delegates of the OSBA and represents the views of that body. Among the major problems cited in the report is the *Williams* decision "fundamentally altering the 'while committing a felony' requirement in aggravated murder cases."[225] The focus of the OSBA's criticism on this point is that the Ohio Supreme Court ignored the plain language of the statutes, thereby arbitrarily and unforeseeably expanding the scope of the capital murder statutes to reach offenders and circumstances not intended by the legislature for capital treatment.[226]

The OSBA recommended a legislative cure, that "[t]he felony murder specification . . . be eliminated. . . ."[227] As an alternative, the Bar Association called for a legislative definition of the word "while" that, in this context, means "the killing occurred *during the time in which* the underlying felony was being committed, attempted, or the offender was fleeing the scene after committing or attempting to commit the underlying felony."[228] The problem with the alternate solution, of course, is that the word "while" means "during . . . the time [in which]."[229] The same Ohio Supreme Court that ignored the plain language of the existing statutes would be interpreting the plain language of this new proposed legislative definition. Statutory language rejecting the court's unwarranted interpretation and describing the legislative intent in greater detail, however, should limit the court's ability to legislate from the bench.

C. *The Misuse of the Res Gestae Limitation*

As stated earlier,[230] the res gestae limitation has three components—time, place, and causation.[231] The time and place components establish a parameter beginning with the first substantial act constituting an attempt to commit the enumerated felony and ending when the felon has reached a place of temporary safety.[232] If the killing occurs within this parameter, the time and place

[224] THE OHIO STATE BAR ASSOCIATION, REPORT OF THE CRIMINAL JUSTICE COMMITTEE TO THE OSBA COUNCIL OF DELEGATES, Nov. 8, 1997, at 4 (on file with author).

[225] *Id.* at 23.

[226] *Id.* at 23–24.

[227] *Id.* at 24.

[228] *Id.* (emphasis added).

[229] 20 THE OXFORD ENGLISH DICTIONARY 231–33 (2d ed. 1991); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 2604 (1981).

[230] *See supra* Part II.B.2.

[231] *See* DRESSLER, *supra* note 7, at 522; LAFAVE, *supra* note 1, at 682–85.

[232] *See* DRESSLER, *supra* note 7, at 523; LAFAVE, *supra* note 1, at 682–85.

component of the res gestae limitation will not bar the application of the felony-murder rule. For example, if a death occurs during the getaway, the defendant cannot successfully escape application of the felony-murder rule by claiming that the death occurred after the felony.[233] The getaway is one of the things done to commit the felony.[234] It is part of the chain of events or continuing transaction or continuous course of conduct involved in accomplishing or attempting to accomplish the felony.

Causation is a separate component of the res gestae limitation requiring an additional connection between the killing and the underlying felony.[235] Even if the killing occurred during a certain time frame and in relatively close geographic proximity to the underlying felony, there must be a causal connection between the killing and the underlying felony.[236] If no causal connection exists, the causation component of the res gestae limitation will deny the application of the felony-murder rule.[237]

The Ohio Supreme Court glossed over the res gestae limitation with the phrase "continuous course of conduct" and reduced it to a one-dimensional concept involving only time.[238] The res gestae limitation is further eroded by the court's overly broad interpretation of the temporal component. The temporal component in Ohio now means only that the killing and the enumerated felony occurred close in time.[239] It does not require that the killing and the intent to commit the underlying felony exist at the same time, nor does it require the killing and the intent to commit the underlying felony occur in any particular order. The sole requirement is that the interval of time between them is not too great. How long is too long? It is impossible to say how much time would have to pass before the court would refuse to sanction the application of the aggravated felony-murder rule or the felony-murder death penalty specification. We know from a reevaluation of *Rojas* in light of *Williams* that five and one-half hours is not too long.[240] The language "as part of one continuous occurrence," appears to be nothing more than a catch phrase without meaningful parameters.

The rule, as created in *Williams* and bolstered in *Biros* and *McNeill*, ignores the safeguards designed to ameliorate the harshness of the felony-murder rule. Specifically, by including only an expanded version of the temporal component, the res gestae limitation no longer limits the application of the felony-murder rule to killings that are causally connected to the enumerated felony. The new rule

---

[233] *See* Conrad v. State, 78 N.E. 957, 959–60 (Ohio 1906); DRESSLER, *supra* note 7, at 523; LAFAVE, *supra* note 1, at 682–85.

[234] *Conrad*, 78 N.E. at 959–60.

[235] *See* DRESSLER, *supra* note 7, at 523; LAFAVE, *supra* note 1, at 682–85.

[236] *See* DRESSLER, *supra* note 7, at 523; LAFAVE, *supra* note 1, at 682–85.

[237] *See* DRESSLER, *supra* note 7, at 523; LAFAVE, *supra* note 1, at 682–85.

[238] State v. Williams, 660 N.E.2d 724, 733 (Ohio 1996).

[239] State v. Biros, 678 N.E.2d 891, 911–12 (Ohio 1997).

[240] State v. Rojas, 592 N.E.2d 1376, 1379 (Ohio 1992).

converts murder to aggravated murder, a fifteen-years-to-life sentence to a life sentence, and a life sentence to a death sentence by combining two crimes related only by the coincidence of temporal proximity.

D. *Deterrence: The Forgotten Justification for the Felony-Murder Rule*

The felony-murder rule has been described as "misguided in principle, unnecessary in practice, and inappropriate in symbolism."[241] The rule has been attacked for centuries as an anomaly in our law that is inconsistent with accepted principles equating punishment with moral failings.[242] Deterrence, the primary justification for the rule, is pitted against an avalanche of constant criticism of the rule.[243] If the deterrence argument fails, the felony-murder rule is unwarranted.

The deterrence justification is that the felony-murder rule is designed to cause felons to be more careful while committing dangerous felonies so as to avoid killing someone.[244] If the victim is already dead when the intent to commit the felony is formed, the felony-murder rule cannot possibly serve its intended purpose.[245] The time for deterrence has passed. Given the underlying justification for the felony-murder rule, logic dictates that the intent to commit the underlying felony must preexist or, at a minimum, coexist with the death-causing act we seek to deter.

A minority position attempts to justify the felony-murder rule as designed to

[241] Tomkovicz, *supra* note 39, at 1430 n.8.

[242] *See* James J. Hippard Sr., *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 HOUS. L. REV. 1039, 1057 (1973) (arguing that the doctrine of mens rea should not include strict liability crimes, as each person deserves to be free of criminal liability if not personally culpable); Jeanne Hall Seibold, Note, *The Felony Murder Rule: In Search of a Viable Doctrine*, 23 CATH. LAW. 133, 134 n.1 (1978) (documenting criticism of the felony-murder rule from seventeenth century England to its modern critics in America); Tomkovicz, *supra* note 39, at 1433–41 (discussing the tension between the felony-murder notions of culpability).

[243] Tomkovicz, *supra* note 39, at 1450 ("The need to rationalize the felony-murder rule in deterrent terms arises only because of the rule's conflict with accepted culpability principles.").

[244] *See supra* Part II.B.1, notes 32–40 and accompanying text.

[245] Some courts have approached this problem by focusing on the fictional transference of malice they see as the basis of the felony-murder rule. *See* State v. Cheatham, 6 P.3d 815, 821 (Idaho 2000); State v. Buggs, 995 S.W.2d 102, 107 (Tenn. 1999). The malice required to call a killing murder is supplied by the intent to commit the underlying felony. The malice is transferred from the intent to commit the underlying felony to the homicide. As a result of this legal fiction, the homicide is deemed committed with malice. *Cheatham*, 6 P.3d at 821; *Buggs*, 995 S.W.2d at 107. If at the time of the killing there was no intent to commit the felony, there is no malice to transfer. Under this approach, there would be no basis for the application of the felony-murder rule. *Cheatham*, 6 P.3d at 821; *Buggs*, 995 S.W.2d at 107.

deter the commission of dangerous felonies.[246] The goal is still to prevent killings, but the goal is theoretically accomplished by deterring would-be felons from engaging in dangerous felonies in the first instance.[247] The idea is that the threat of a murder conviction for a death that occurs in the commission of a felony will deter the risk averse from participating in the criminal enterprise.[248] But if the victim is already dead before the intent to commit an enumerated felony is formed, the "risk" that the victim will be killed during the subsequent felony does not exist.[249]

By extending the felony-murder rule to situations where the killing precedes the intent to commit the underlying felony, the Ohio Supreme Court has ignored the underlying justification for the felony-murder rule—preventing killings. If the victim is dead before the intent to commit an enumerated felony is formed, there is nothing left to deter except the enumerated felony itself. The goal of preventing the death of the victim is not possible. Application of the felony-murder rule in these situations would have to be justified in terms of preventing the commission of subsequent felonies in close temporal proximity to a purposeful killing. This means that the Ohio Supreme Court concluded in *Williams* that the legislature intended to impose capital punishment for committing felonies such as aggravated burglary.

E. *The Narrowing Requirement*

The Eighth Amendment to the United States Constitution requires that the

---

[246] Roth & Sundby, *supra* note 35, at 451 n.28 (noting that the position that the felony-murder rule is designed to deter the commission of dangerous felonies is a minority view); Tomkovicz, *supra* note 39, at 1448–49.

[247] Tomkovicz, *supra* note 39, at 1448–50 (noting that "[t]he [felony-murder] doctrine is allegedly designed to save lives").

[248] *Id.* at 1449.

[249] Commonwealth v. Legg, 417 A.2d 1152, 1154 (Pa. 1980). The court explained:

> [W]here an actor kills prior to formulating the intent to commit the underlying felony, we cannot say the actor knew or should have known death might occur from involvement in a dangerous felony because no involvement in a dangerous felony exists since the intent to commit the felony is not yet formulated. . . . [T]he greater deterrent is not necessary, and the [felony-murder] rule has no application.

Id. This lack of deterrent benefit distinguishes these cases from the other forms of aggravated murder the Ohio legislature has recently created, which with existing specifications in Ohio Revised Code section 2929.04(A), allow death-eligibility. *See supra* note 17. In imposing aggravated murder and death-eligibility on the offender who purposely kills a child or a police officer, society hopes to protect these persons from actual or potential harm. Similarly, by imposing a more severe punishment on those who purposely cause a death while under detention or in a break from detention, society hopes to reduce the risk that they will cause harm. But that deterrent benefit is lacking in the "felony-as-an-afterthought" situation. The harm has already occurred.

statutory criteria for imposing the death penalty substantially narrow the class of persons eligible for the death penalty from the class of persons convicted of a capital offense and reasonably justify the death sentence.[250] Most states, including Ohio, use aggravating factors to satisfy this constitutional mandate.[251]

The overarching goal is to ensure that those who are selected for execution are in some way more deserving of death than those first-degree murderers not selected for execution.[252] The justification for felony-murder as an aggravating factor is that the person who purposely kills in order to accomplish kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary may be viewed as more deserving of death than the person who kills for reasons unrelated to committing one of these felonies. Although this notion is arguably wrong, it is at least plausible.

Consider the person who has no intention of committing one of the enumerated felonies until after the purposeful killing. Is this person more deserving of death than a murderer who does not commit an additional felony? Suppose the defendant purposely kills the victim under circumstances that all can agree would amount to murder—subjecting the defendant to a term of imprisonment of fifteen-years-to-life.[253] After the killing, the defendant becomes frightened and, in his panicked state of mind, decides to take the victim's automobile to get away. After *Williams*, the state could call the theft of the automobile "aggravated robbery" despite the fact that the intent to steal occurred after the death of the victim.[254] The murder charge would be elevated to

---

[250] Lowenfield v. Phelps, 484 U.S. 231, 244 (1988); Zant v. Stephens, 462 U.S. 862, 877 (1983) (holding that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder"). According to the Court, the death penalty can be justified when it is serving a state's goals of deterrence or retribution. Enmund v. Florida, 458 U.S. 782, 798 (1982). The Court explained:

> In *Gregg v. Georgia* the opinion announcing the judgment observed that '[t]he death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.' 428 U.S. 153, 183 (1976)) (footnote omitted). Unless the death penalty when applied to those in Enmund's position measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment.

Id.

[251] State v. Murphy, 747 N.E.2d 765, 792 (Ohio 2001); State v. O'Neal, 721 N.E.2d 73, 91–92 (Ohio 2000) (Pfeifer, J., dissenting); McCord, *supra* note 63, at 846 (noting that most states have satisfied the narrowing requirement by adopting aggravating factors); Rosen, *supra* note 43, at 1122.

[252] *Lowenfield*, 484 U.S. at 244; *Zant*, 462 U.S. at 877; Rosen, *supra* note 43, at 1109–10.

[253] OHIO REV. CODE ANN. §§ 2903.02, 2929.02(B) (West 1997).

[254] Ohio Revised Code § 2911.01 defines aggravated robbery in pertinent part:

aggravated murder by virtue of the felony-murder rule.[255] Because the defendant was the principal offender in the commission of what is now considered aggravated murder, the state could also specify felony-murder as an aggravating circumstance subjecting the defendant to capital punishment.[256]

It cannot be persuasively argued that the defendant who flees in the victim's automobile is more deserving of death than the defendant who did not flee or who fled by non-felonious means. The defendant who flees in the victim's automobile

---

> (A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:
>
> (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;
>
> (2) Have a dangerous ordinance on or about the offender's person or under the offender's control;
>
> (3) Inflict, or attempt to inflict, serious physical harm on another.

Id. at § 2911.01(A). As regards aggravated robbery, the Legislative Service Commission states:

> This section is framed around the precept that the difference between simple theft and robbery should be that robbery contains an element of *actual or threatened personal harm to the victim*; and that the degree of actual or potential harm involved should determine the seriousness of a robbery. Thus, aggravated robbery includes not only robbery while armed, but also robbery in which an offender inflicts or attempts serious personal harm, whether he is armed or not, since in both cases there is a high degree of actual or potential harm to persons.

LEGISLATIVE SERVICE COMMISSION, NOTES TO THE COMPREHENSIVE CODE REVISIONS OF HOUSE BILL 511 IN AGGRAVATED ROBBERY 2911.01 (1973) (emphasis added). The aggravated robbery statute does not expressly require that the victim be alive at the time of the commission or attempted commission of the theft, but this requirement can be inferred from the fact that a deceased person is not susceptible to "actual or threatened harm." Before the *Williams* decision, the Ohio Supreme Court consistently looked for evidence of intent to commit the theft offense prior to the death of the victim in determining the sufficiency of the evidence to support a conviction of aggravated robbery in circumstances where there was both a purposeful killing and a theft offense. *See* State v. Lewis, 616 N.E.2d 921, 925 (Ohio 1993); State v. Rojas, 592 N.E.2d 1376, 1384 (Ohio 1992); State v. Smith, 574 N.E.2d 510, 516 (Ohio 1991). After the *Williams* decision, the court no longer required evidence of intent to commit a theft offense prior to the death of the victim to sustain a conviction of aggravated robbery. The intent to commit the theft offense can occur after the death of the victim and still qualify as aggravated robbery. *See* State v. Twyford, 763 N.E.2d 122, 139 (Ohio 2002); State v. Carter, 734 N.E.2d 345, 353–354 (Ohio 2000); State v. Biros, 678 N.E.2d 891, 916 (Ohio 1997); State v. Palmer, 678 N.E.2d 685, 708 (Ohio 1997). Presumably, taking something of value from a corpse (assuming the thief did not purposely cause the death) would be theft and not aggravated robbery. The disparate outcomes, however, would be difficult to reconcile.

[255] OHIO REV. CODE ANN. § 2903.01(B) (West 1997).

[256] *Id.* § 2929.02(A).

could be condemned to die, while the defendant who did not flee could be sentenced neither to death nor to life in prison, but to an indefinite term of imprisonment, potentially as short as fifteen years.[257] Therefore, the defendant who took the victim's automobile has gone from fifteen years to capital punishment.

Compare the death sentence received by the defendant who takes the automobile after the killing with the defendant who purposely kills for the specific purpose of committing the simple form of arson, robbery, or burglary. The defendant who kills for the purpose of committing one of these felonies (found in the aggravated felony-murder rule[258] but not included as a felony-murder aggravating circumstance[259]) would receive a sentence of life imprisonment with parole eligibility after twenty years.[260] It cannot be persuasively argued that the defendant who flees in the victim's automobile after the fact is more deserving of death than the defendant who kills in order to accomplish the preexisting felonious purpose.

The Ohio Supreme Court's expansion of the felony-murder death penalty specification destroys its usefulness as a constitutionally mandated limiting device.[261] It no longer identifies and selects for execution the most culpable, but, rather, potentially captures for capital punishment less culpable murderers.[262]

---

[257] *Id.* §§ 2903.02, 2929.02(B).

[258] *Id.* § 2903.01(B).

[259] *Id.* § 2929.04(A)(7).

[260] *Id.* § 2929.03(A).

[261] The California Supreme Court rejected the approach adopted by Ohio in *Williams*, citing the failure of such a construction to substantially narrow the class of persons eligible for the death penalty from the class of persons convicted of a capital offense. People v. Green, 609 P.2d 468, 505–06 (Cal. 1980).

> To permit a jury to choose who will live and who will die on the basis of whether in the course of committing a first degree murder the defendant happens to engage in ancillary conduct that technically constitutes robbery or one of the other listed felonies would be to revive "the risk of wholly arbitrary and capricious action" condemned by the high court plurality in *Gregg.* (citing Gregg v. Georgia, 428 U.S. 155, 189 (1976)).

Id.

[262] We cannot rely on appellate review to temper the effect of an expanded felony-murder doctrine. Courts should impose a life sentence instead of a death sentence if the character of the perpetrator and the circumstances of the crime do not clearly warrant imposition of the death penalty. Theoretically, to ensure that the sentencing courts properly exercise this discretion, reviewing courts are required by statute to conduct a proportionality review in which they "consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases." OHIO REV. CODE ANN. § 2929.05(A) (West 1997). But the Ohio Supreme Court has narrowly construed this language to limit review to similar cases in which the death penalty was imposed, rather than a broader interpretation that would encompass factually similar cases regardless of whether a death sentence was imposed. State v. Steffen, 509 N.E.2d 383, 386 (Ohio 1987). As Justice Pfeifer pointed out in *State v. Murphy*:

VI. THE PROOF PROBLEM

A. *Introduction*

The Ohio Supreme Court is evidently concerned about a rule requiring the state to prove that the intent to commit the underlying felony preceded or co-existed with the homicide.[263] The concern is that the state will be unable to prove the timing of the intent.[264] Won't many defendants falsely claim that the subsequent felony was an afterthought? Won't the state be impotent to prove otherwise? The Ohio Supreme Court's solution in *Williams* was to eliminate this proof problem by eliminating the requirement to prove the timing of the intent to commit the underlying felony.[265] This justification impliedly concedes that, ideally, we would like to exclude from felony-murder treatment those who had no intention of committing a felony at the time of the killing, but the risk is too great that the target group (those who intended to commit a felony before or at the time of the killing) will avoid adequate punishment due to a failure of proof. The *Williams* solution to the proof problem should be rejected for two reasons. First, the problem is overstated. Second, the solution has unacceptable consequences.

> When we compare a case in which the death penalty was imposed only to other cases in which the death penalty was imposed [as opposed to comparing a case in which the death penalty was imposed to the universe of all Ohio cases in which a person was killed during the course of a robbery], we continually lower the bar of proportionality. The lowest common denominator becomes the standard. This result is ethically indefensible. . . . Even though approximately two hundred males currently reside on death row, this court has never overturned a death sentence based on proportionality review.

State v. Murphy, 747 N.E.2d 765, 813–14 (Ohio 2001) (Pfeifer, J., dissenting). Not surprisingly, Ohio has one of the lowest reversal rates in the country. According to Professor James Liebman, the rate of reversal in capital cases in Ohio is twenty-two percent, compared to the national average of 40 percent. *See* JAMES S. LIEBMAN, RELIEF GRANTED BY STATE HIGHER COURTS ON CAPITAL DIRECT APPEAL 1973–1994 (1999) (copy on file with the author). For a good discussion of how and why proportionality review has failed, see Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After* Gregg*: Only "The Appearance of Justice?"* 87 J. CRIM. L. & CRIMINOLOGY 130 (1996).

[263] State v. Williams, 660 N.E.2d 724, 732 (Ohio 1996) ("Williams should not be able to escape the felony-murder rule by claiming the rape was merely an afterthought.").

[264] *Id.* Prior to 1980, Pennsylvania utilized a rule permitting the application of the felony-murder rule where the intent to commit the underlying felony comes after the homicide. The Supreme Court of Pennsylvania justified the rule citing "the difficulty in attempting to ascertain when the intent to rob was conceived in a given factual situation." Commonwealth v. Butcher, 304 A.2d 150, 152 (Pa. 1973).

[265] *Williams*, 660 N.E.2d at 733. For a related discussion attempting to justify the strict liability aspect of the traditional felony-murder rule as a useful device to minimize the utility of perjury, see David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359, 375–76 (1985).

B. *The Proof Problem is Overstated*

The proof problem presupposes that the state will be helpless against the perjured testimony of the accused and, therefore, the accused will receive an undeserved acquittal. This concern is overstated for two reasons. First, proof of intent would ordinarily develop naturally in the form of circumstantial evidence.[266] The accused will not avoid the felony-murder rule merely by claiming that the intent to commit the felony came after the killing if the inferences to be drawn from the circumstantial evidence do not support his claim. The *Williams* case provides a good example. The preexisting intent to rob Mr. and Mrs. Melnick was inferred from the circumstances. There is no other persuasive explanation for the break-in, the attack, and the immediate robbery, except that the robbery was planned from the outset. The proof developed naturally in the form of circumstantial evidence.[267] Where the homicide is causally connected to the commission of the underlying felony, rarely would the circumstantial evidence suggest otherwise.

Second, defendants who, in reality, violated the aggravated felony-murder statute but who escape its application because of a failure of proof, will nevertheless be punished, presumably as murderers,[268] in addition to being punished for the accompanying felony. Accordingly, the proof problem, to the extent that it is a problem, is not a matter of no punishment versus punishment but, rather, a matter of severe punishment versus extremely severe punishment.

C. *The* Williams *Solution Is Worse Than the Proof Problem*

Admittedly, the failure of proof will theoretically allow a person who intended to commit the underlying felony from the outset to escape the

---

[266] In 1980, the Supreme Court of Pennsylvania overturned previous decisions and held that the felony-murder doctrine is inapplicable where the actor kills prior to forming the intent to commit the underlying felony. In addressing the proof issue, the court noted that "in most instances . . . the intent to commit the felony when the act of killing occurred [can be] established by an inference arising from the circumstances or acts committed very shortly after the slaying." Commonwealth v. Legg, 417 A.2d 1152, 1155 (Pa. 1980).

[267] The same circumstantial evidence that established that the intent to rob Mr. and Mrs. Melnick preceded the killing of Mr. Melnick also tended to prove that the attempted rape of Mrs. Melnick was an afterthought. As the Court of Appeals noted, "[W]hen a pre-existing intent to commit one felony (e.g., robbery) is clearly supported by the evidence, it seems less reasonable to conclude that, by the mere fact that another unrelated felony (e.g., rape) is also committed subsequent to the murderous assault, the actor also intended to commit that felony at the time of the murder." State v. Williams, No. 89-T-4210, 1995 WL 237092, at *49 (Ohio Ct. App. March 24, 1995).

[268] "Murder" is defined as "purposely caus[ing] the death of another or the unlawful termination of another's pregnancy," and is punishable by "imprison[ment] for an indefinite term of fifteen years to life . . . ." OHIO REV. CODE ANN. § 2929.02(B) (West 1997).

application of the felony-murder rule if the circumstantial evidence does not permit the state to reveal the truth to the jury. In other words, requiring proof of the timing of the intent to commit the underlying felony may result in an underinclusion of deserving defendants. The proposed solution, however, makes the felony-murder rule overinclusive, capturing those who truly did not intend to commit a felony at the time of the killing.

The *Williams* solution overpunishes some to ensure that the others are adequately punished. Overpunishment is at least troubling, and arguably unacceptable, at any level. The more severe the punishment, the more disturbing the concept becomes. When imposing capital punishment or life imprisonment, overpunishment clearly should not be tolerated. The cure is worse than the disease.

VII. CONCLUSION

In a line of decisions beginning with *Williams*, the Ohio Supreme Court contradicts the statutory language it purports to interpret, ignores the underlying justification for the felony-murder doctrine, and undermines the constitutionally required narrowing function that aggravating circumstances are supposed to serve. Why would the Court create such bad law? Politics would be a seemingly cynical but plausible explanation.[269] The recent election season in Ohio reminded us that our justices are, in the end, also politicians.[270] As Professor Tomkovicz observed:

> The demand for "law and order" strikes an emotional chord in America. One can hardly be elected to public office without embracing the concept wholeheartedly . . . . The felony-murder rule is compatible with the law and order mentality . . . . [A]nyone bent on reforming [or limiting] the rule must fight the tide and be prepared to pay a political price. In the world of American politics, logical consistency and fairness to felons are not very potent weapons against the charge that one is soft on crime and hostile to law and order.[271]

[269] *See* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 760 (1995) (noting that "[d]ecisions in capital cases have increasingly become campaign fodder [in judicial elections and that] [t]he focus in these campaigns has been almost entirely on the gruesome facts of particular murders, not the reason for the judicial decisions").

[270] *See* Constance Sommer, *Ohio Supreme Court Race Gets Political: "A Very Bad Campaign"*, CORP. LEGAL TIMES, May 2000, at 72.

[271] Tomkovicz, *supra* note 39, at 1461, 1463; *see also* Seibold, *supra* note 242, at 136 (noting that the endurance of the felony-murder doctrine is attributable to social and political pressure, and not to flawed logic on the part of its many critics). This was exemplified during the 1996 Ohio election campaign. Incumbent Judge Lee Hildebrandt, Jr. misled voters in his bid for reelection to the First District Court of Appeals by claiming that his opponent, while a member of Congress, voted to "end the death penalty." *In re* Judicial Campaign Complaint

The political need to appear tough on crime has an undeniable effect on judges at all levels.[272] The Ohio State Bar Association Criminal Justice Committee expressed this concern in the November 8, 1997, report it made to the Council of Delegates, noting, "The impact of politics in the use of the death penalty is widely recognized but often not acknowledged."[273] As Justice Stevens stated, "The 'higher authority' to whom present-day capital judges may be 'too responsive' to is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty."[274]

Another and perhaps related reason for such a legally indefensible position might be the court's visceral reaction to the particular defendant and facts in *Williams*. The case involved two compelling, utterly innocent victims and a loathsome villain. Williams beat an elderly man to death in his own home so he could take a videocassette recorder and $1800.[275] Mrs. Melnick was beaten so badly she was blinded; surgeons were forced to remove her right eye, and she lost sight in the other eye.[276] Because of her injuries she cannot remember the brutal attack or the attempted rape—an ironically merciful fate.[277] The attempted rape of Mrs. Melnick may well demonstrate that Williams is depraved, but this fact cannot serve as a basis to impose death under Ohio's statutory scheme. The imposition of the death penalty in Ohio must be based on *statutory* aggravating circumstances specified in the indictment and proved beyond a reasonable doubt.[278] Ohio does not have an aggravating circumstance that focuses on the depravity of mind of the accused or the cruelty of his actions.[279] There have been

---

Against Lee Hildebrandt, Jr., 675 N.E.2d 889, 890 (Ohio 1997). Judge Hildebrandt was sanctioned for his misconduct by a five-judge commission appointed by order of the Ohio Supreme Court. *Id*. at 891–92. Judge Hidebrandt, however, won the election and continues to serve on the First District Court of Appeals. *Id*. at 890.

[272] According to President John F. Kennedy:

> In no other occupation but politics is it expected that a man will sacrifice honors, prestige and his chosen career on a single issue. Lawyers, businessmen, teachers, doctors, all face difficult personal decisions involving their integrity—but few, if any, face them in the glare of the spotlight as do those in public office.

JOHN F. KENNEDY, PROFILES IN COURAGE 7–8 (1956).

[273] THE OHIO STATE BAR ASSOCIATION, REPORT OF THE CRIMINAL JUSTICE COMMITTEE TO THE OSBA COUNCIL OF DELEGATES 24 (Nov. 8, 1997) (on file with the author).

[274] Harris v. Alabama, 513 U.S. 504, 519 (1995) (Stevens, J., dissenting).

[275] State v. Williams, 660 N.E. 2d 724, 727–28 (Ohio 1996).

[276] *Id.* at 728.

[277] *Id.*; *see also* Phyllis L. Crocker, *Crossing the Line: Rape-Murder and the Death Penalty*, 26 OHIO N.U. L. REV. 689, 716 (2000) (noting that "rape [in the felony-murder context is] an emotionally-laden crime that facilitates the application of the death penalty").

[278] *See* OHIO REV. CODE ANN. § 2929.04(A) (West 1997).

[279] *Id*. In Ohio, the nature and circumstances of the aggravated murder offense may only be "weighed" on the side of mitigation, and cannot be labeled an "aggravating circumstance."

many cases delineating the constitutional problems of vagueness and arbitrariness that often attend the effort to enforce such provisions[280] and the Ohio Legislature has wisely declined to enact one. No non-statutory aggravating circumstances may be weighed against mitigating factors in Ohio.[281] If the depravity of the accused and the cruelty of his actions are the explanation, the *Williams* decision represents a distortion of the law motivated by a desire to capture Williams within the purview of an otherwise inapplicable aggravating circumstance—an illegitimate, non-statutory aggravating circumstance disguised as a legitimate, statutory aggravating circumstance.

The court did not need to distort the felony-murder doctrine to uphold the death sentence in *Williams*. Williams was found guilty of four death penalty specifications—the subsequent and incidental attempted rape was only one of them.[282] In rejecting one specification but upholding the death sentence, the court of appeals in *Williams* stated: "[A]s there are three remaining valid aggravating circumstances in this case, our independent reweighing in the penalty phase will cure any error by the jury in considering the improper specification."[283] The Ohio Supreme Court could have done the same. The state can only kill him once.

Whatever the court's motivation, the fact remains that *Williams* and its progeny represent an unwarranted expansion of the felony-murder doctrine in Ohio. The doctrine will now be applied to defendants and circumstances not intended by the legislature for such treatment—accused citizens who are far removed from Williams in moral failings. The appropriate gradation of the offense and accompanying punishment will be ratcheted up—murder, with a statutorily authorized sentence of fifteen years to life, being treated as aggravated murder, with a sentence of imprisonment for life or even death.

State v. Wogenstahl, 662 N.E.2d 311, 320 (Ohio 1996). For an excellent discussion of how Ohio's statutory scheme "culls out the non-death eligible case in the trial phase" and "identifie[s] all the relevant aggravating circumstances to be placed before the sentencer," see Margery M. Koosed, *Averting Mistaken Execution by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. ILL. U. L. REV. 41, 104–05 (2001).

[280] *See* Maynard v. Cartwright, 486 U.S. 356, 363–64 (1988) (holding that "[t]he language of the Oklahoma aggravating circumstance at issue—'especially heinous, atrocious, or cruel'—gave no more guidance than the 'outrageously or wantonly vile, horrible or inhuman' language . . . in Godfrey"); Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (holding that a death sentence based on no more than that the offense was "outrageously or wantonly vile, horrible and inhuman . . . did not impl[y] any inherent restraint on the arbitrary and capricious infliction of the death sentence").

[281] State v. Johnson, 494 N.E.2d 1061, 1066 (Ohio 1986).

[282] State v. Williams, 660 N.E.2d 724, 729 (Ohio 1996).

[283] State v. Williams, No. 89-T-4210, 1995 WL 237092, at *50 (Ohio Ct. App. Mar. 24, 1995).

The solution must be a legislative one. If the Ohio Supreme Court insists on distorting plain language to achieve its preferred result, perhaps even plainer language will provide the necessary deterrence.