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adjoining circuit and could hear testimony on the issue. In this manner the parties would be before the court and a more complete and thorough inquiry could be achieved.

Jamies Clark Gardill

**Criminal Law--Vicarious Liability--Robber Convicted of
Murder when Robbery Victim Killed Accomplice**

Daniels and Smith entered a liquor store to commit a robbery. While holding the managers, Mr. and Mrs. West, at gunpoint, they repeatedly threatened to kill them if they did not cooperate. Mrs. West drew a pistol and shot Smith, who later died from his wounds. Taylor, a third accomplice waiting outside in the getaway car, was arrested and charged with both robbery and the murder of Smith. A motion to set aside the murder indictment was denied and Taylor appealed. *Held*: Affirmed. Although the petitioner could not be convicted under the felony-murder rule, he could be found guilty of murder under the theory of vicarious liability. *Taylor v. Superior Court*, 3 Cal. 3d 578, 477 P.2d 131, 91 Cal. Rptr. 275 (1970).

The court recognized the rule of *People v. Washington*,¹ that a felon could not be held liable under the felony-murder rule for a killing committed by the victim. However, petitioner's liability was predicated on a theory enunciated in *Washington* and *People v. Gilbert*² that one may be held vicariously responsible for a killing committed by another where the defendant or his accomplice intended to kill, or with a conscious disregard for life committed acts likely to result in death. *Washington* and *Gilbert* both noted that where defendants initiate gun battles, such initiation would constitute an act done in total disregard of life and likely to result in death. The majority in *Taylor* found that pointing the gun at the victims and threatening lethal force if the victims did not cooperate "was sufficiently provocative of lethal resistance to lead a man of ordinary caution and prudence to conclude that Daniels and Smith 'initiated' the gun battle, or that such conduct was done with conscious disregard for human life and with natural consequences dangerous to life."³

¹ 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965).

² 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1965).

³ *Taylor v. Superior Court*, 3 Cal. 3d 578, 584, 477 P.2d 131, 135, 91 Cal. Rptr. 275, 279 (1970).

In *Washington* a service station manager was in his office when he heard someone yell "Robbery!" One of the robbers entered the office and pointed a gun at the manager, who immediately shot and killed the robber. Washington, the accomplice, was convicted of murder. In reversing the conviction the court held that where the killing was committed by the victim, malice aforethought was not imputed to the robber since the killing was not actually committed by him. The court rejected the proximate cause theory of establishing defendant's guilt⁴ and held that the California Murder Statute⁵ required that the homicide had to be committed by the felon himself or an accomplice.

The *Taylor* majority distinguished *Taylor* from *Washington* on the theory that in the latter the defendants *merely* pointed a gun at the victim while in the former the defendants verbally communicated the threats to use the gun if necessary.⁶

In a dissenting opinion, Justice Peters stated that the effect of the majority opinion was to reinstate a particular application of the felony-murder rule abolished by *Washington*. He thought it absurd "that robbers who point guns at their victims without articulating the obvious threat inherent in such action cannot be convicted of murder for a killing committed by the victims, whereas robbers who point guns at their victims and articulate their threat can be convicted of murder in the same situation."⁷ Moreover, Justice Peters maintained that the majority totally ignored the concept of *Washington* and *Gilbert* that criminal culpability should be based upon the acts of the defendant, not upon the acts of the victims. The majority's factual

⁴ For critical comments on the role of proximate cause in establishing criminal liability, see, 71 HARV. L. REV. 1565, 1566 (1958); 16 HAST. L.J. 620, 624 (1965); 38 S. CAL. L. REV. 698, 703 (1965).

⁵ CAL. PEN. CODE § 189.

"Murder; degrees. All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or any act punishable under § 288, is murder of the first degree; and all other kinds of murders are of the second degree."

California's statute is substantially similar to W. VA. CODE ch. 61, art. 2, § 1 (Michie 1966), *infra* note 27.

⁶ Justice Burke, who wrote the *Taylor* majority opinion dissented vigorously in *People v. Washington*. Justice Burke's distinction between *Taylor* and *Washington* is less convincing when read in light of his *Washington* dissent in which he stated that *anytime* a victim shoots first when confronted by a robber with a deadly weapon, the robber should be regarded as having initiated the gun battle. He reached that conclusion in *Washington* despite the lack of verbal threats.

⁷ 3 Cal. 3d at 585, 477 P.2d at 135, 91 Cal. Rptr. at 279.

distinction was also criticized as being legally insignificant by Justice Mosk in his dissenting opinion. He noted that the elements of force and fear are necessary components of the crime of robbery and that "every such conditional threat—whether express or implied—is inherent in the commission of the robbery itself."⁸ He contended that the threats were merely incidental to the robbery and did not materially increase the danger of harm to the victims.

The majority in *Taylor* cited *People v. Reed*⁹ as authority for the contention that gun battles could be initiated without firing the first shot. However, *Reed* is clearly distinguishable from *Taylor* in that *Reed* involved a hostage situation where the victim was used as a shield. Murder convictions in the "shield" cases have been based on the theory that malice is expressed by such conduct because one forces another into an extremely dangerous position against his will.¹⁰

Taylor is in sharp contrast to the recent trend in California toward an increasingly narrow application of the felony-murder rule.¹¹ Indeed, prior to *Taylor*, it appeared that the application of the rule had been severely limited.¹² In light of Justice Burke's dissenting opinion in *Washington*¹³ and the material similarity in facts between

⁸ *Id.* at 593, 477 P.2d at 141, 91 Cal. Rptr. at 285.

⁹ 270 Cal. App. 2d 37, 75 Cal. Rptr. 430 (1969). When the police arrived at the scene of a robbery, the defendant was holding the victim at gunpoint and refused the officers' order to surrender. As the defendant pointed his gun at the head of the victim, the officers started firing and accidentally killed the hostage. Affirming the robber's conviction of murder, the court held that under these circumstances the defendant initiated the gun battle.

¹⁰ *Commonwealth ex rel. Smith v. Myers*, 438 Pa. 218, 229, 261 A.2d 550, 556 (1970); *Commonwealth v. Redline*, 391 Pa. 486, 508, 137 A.2d 472, 482 (1958); *Morris, The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50, 63 (1956). *See also* *Wilson v. State*, 188 Ark. 846, 68 S.W.2d 100 (1934); *Keaton v. State*, 41 Tex. Crim. 621, 57 S.W. 1125 (1900).

¹¹ *People v. Sears*, 2 Cal. 3d 180, 465 P.2d 847, 84 Cal. Rptr. 711 (1970) (felony-murder rule did not apply where the burglary was a separate and independent felony); *People v. Wilson*, 1 Cal. 3d 431, 462 P.2d 22, 82 Cal. Rptr. 494 (1969) (burglary cannot support first degree felony-murder conviction where the felonious intent of the burglary is assault with a deadly weapon); *People v. Ireland*, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969) (assault with a deadly weapon is a lesser included offense of homicide and cannot be used as a basis for California's second degree felony-murder rule).

¹² In note, *The California Supreme Court Assaults the Felony-Murder Rule*, 22 STAN. L. REV. 1059 (1970), the writer contends that the felony-murder rule would not be applicable to forcible rape, armed robbery, or burglary.

¹³ 62 Cal. 2d at 785, 402 P.2d at 135, 44 Cal. Rptr. at 447. Justice Burke argued that application of Cal. PEN. CODE § 189 did not require that the killing be committed by the felon, and that *Washington* should have been convicted under the felony-murder rule.

Washington and *Taylor*, it would appear that *Taylor* has revived the felony-murder rule under a different name.

In other jurisdictions, the issue of a felon's responsibility for a killing committed by one other than a participant in the crime has been met squarely as an issue of the applicability of the felony-murder rule. In *People v. Austin*¹⁴ the Supreme Court of Michigan held that it would be an unwarranted extension of the felony-murder rule to convict the robber for a killing committed by the intended victim of the robbery. In ruling as it did, the court refused to extend the ruling of *People v. Podolski*¹⁵ in which one of the robbers was held liable for the murder of a police officer who was accidentally killed by another officer in a gun battle which ensued after the robbery.

The Supreme Court of Pennsylvania in *Commonwealth v. Almeida*¹⁶ affirmed a murder conviction of a robber when a policeman, in attempting to stop a robbery in progress, shot and killed an innocent bystander. The *Almeida* rule was extended in *Commonwealth v. Thomas*¹⁷ to hold the surviving robber guilty of murder for the killing of his accomplice by the intended victim of the robbery. Then in *Commonwealth v. Redline*,¹⁸ the court expressly overruled *Thomas* restricted the application of *Almeida* to the particular facts presented. The court stated that *Almeida* was a judicial extension of the felony-murder rule.¹⁹ The rationale of *Redline* was that as to the victim of the robbery "the homicide was justifiable and, obviously, could not be availed of, on any rational legal theory, to support a charge of murder."²⁰ Finally, in *Commonwealth ex rel. Smith v. Myers*,²¹ the court expressly overruled *Almeida* and in general questioned the validity of the felony-murder rule.²²

¹⁴ 370 Mich. 12, 120 N.W.2d 766 (1963); See 66 W. VA. L. REV. 129 (1964).

¹⁵ 332 Mich. 508, 52 N.W.2d 201 (1952).

¹⁶ 362 Pa. 596, 68 A.2d 595 (1949).

¹⁷ 382 Pa. 639, 117 A.2d 204 (1955). For a critical comment on this case, see 58 W. VA. L. REV. 415 (1956).

¹⁸ 391 Pa. 486, 137 A.2d 472 (1958).

¹⁹ *Id.* at 490, 137 A.2d at 473. The court stated that the power to define crimes and penalties lay exclusively with the legislature.

²⁰ *Id.* at 509, 137 A.2d at 483; In *Commonwealth v. Thomas*, 382 Pa. 639, 685, 117 A.2d 204, 224-25 (1955) Justice Musmanno expressed similar sentiments: "Should the courts be placed in the preposterous situation of trying a murder case where no murder was committed?"

²¹ 438 Pa. 218, 261 A.2d 550 (1970). *Smith* was *Almeida*'s accomplice in the crime for which they were both convicted.

²² *Id.* at 227, 261 A.2d at 555. The court, after stating that it was not abolishing the felony-murder rule, noted that "we do want to make clear how shaky are the basic premises on which it rests."

Several jurisdictions have considered the issue of vicarious criminal liability for homicides not committed by the defendant. In the absence of a showing that the act was committed by the defendant or his accomplice, or that the case involved the "shield" situation, the recent trend has been toward not holding the defendant liable for murder.²³ The Model Penal Code also expressly suggests a restricted application of the felony-murder rule.²⁴

The West Virginia Supreme Court of Appeals has not decided the issue presented in *Taylor*. Some statements made by the court regarding the felony-murder rule indicate that the court may require the act to be that of the defendant²⁵ or his accomplice.²⁶ It must be noted, however, that those causes did not involve homicides committed by one other than the felon, and the court did not anticipate the issue of vicarious liability.

Aside from the inferences that may be drawn from the case law, a cogent argument can be made against application of the felony-

²³ *Commonwealth v. Moore*, 121 Ky. 97, 88 S.W. 1085 (1905); *Commonwealth v. Balliro*, 349 Mass. 505, 209 N.E.2d 308 (1965); *People v. Austin*, 370 Mich. 12, 120 N.W.2d 766 (1963); *People v. Wood*, 8 N.Y.2d 48, 167 N.E.2d 736 (1960); *Commonwealth ex rel. Smith v. Myers*, 438 Pa. 218, 261 A.2d 550 (1970); *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472 (1958). See generally *Wilson v. State*, 188 Ark. 846, 68 S.W.2d 100 (1934); *People v. Garippo*, 292 Ill. 293, 127 N.E. 75 (1920); *Butler v. People*, 125 Ill. 641, 18 N.E. 338 (1888).

²⁴ MODEL PENAL CODE § 201.2 (b), Comment 4 (Tent. Draft No. 9, 1959). In discussing the felony-murder rule, the comment states:

Such homicides will only constitute murder if they are committed purposely or knowingly, or recklessly where the recklessness demonstrates extreme indifference to the value of human life, subject, however, to a presumption of such recklessness if the actor is committing robbery, rape by force or its equivalent, rape by intimidation, arson, burglary, kidnapping or felonious escape. If the presumption of extreme recklessness is rebutted, the homicide may still be adjudged reckless, in which event it constitutes manslaughter, as do all reckless homicides, whether the actor's conduct is otherwise felonious or not. See Section 201.3. Beyond this, we submit that the felony-murder doctrine, as a basis for establishing the criminality of homicide, should be abandoned.

²⁵ See *State v. Lewis*, 133 W. Va. 584, 606, 57 S.E.2d 513, 527 (1949). The court in discussing the statutory felony-murder rule stated that under the statute, "a person who kills another person, in committing or attempting to commit robbery, with no motive for the homicide other than robbery, is guilty of first degree murder." (emphasis supplied).

²⁶ See *State v. Beale*, 104 W. Va. 617, 631, 141 S.E. 7, 12 (1927). An instruction on the application of the felony-murder rule stated that if the jury believed that the deceased came to her death as a result of injuries inflicted upon her by the defendant or his accomplice in committing the act of rape, then the defendant could be found guilty of murder in the first degree.

murder rule to a situation similar to the facts in *Taylor*. The West Virginia Code defines only the degrees of murder.²⁷ Whether a murder has in fact occurred must be decided by reference to the common law, and once established, the statute operates only to determine the degree.²⁸ Accordingly, before the statutory felony-murder rule can be applied, the corpus delicti of murder must be established. The corpus delicti is shown by proving (a) a death, and (b) the existence of a criminal agency.²⁹ Where the victim of a robbery kills one of the robbers, it is justifiable homicide.³⁰ Therefore, the criminal agency necessary to establish the corpus delicti is lacking. It necessarily follows that since no murder was committed, the surviving robber cannot be convicted of a crime which never occurred.³¹

Taylor v. Superior Court represents a revival of the felony-murder rule in California and is contrary to a recent judicial movement toward limiting application of that rule. Moreover, the decision could become a foundation for repudiation of previous decisions in California which restricted application of the rule.

Ronald B. Johnson

**Criminal Law—Malicious Mischief—
Felony or Misdemeanor?**

Charles A. Cogar was indicted by the Webster County Circuit Court for damaging and destroying approximately \$890 worth of realty belonging to a local resident. The indictment followed the language of West Virginia's malicious mischief statute,¹ except that it contained the word "feloniously" instead of the phrase "but not feloniously" as set forth in the statute. Cogar pleaded guilty and was

²⁷ W. VA. CODE ch 61, art. 2, § 1 (Michie 1966):
"Murder by poison, lying in wait, imprisonment, starving, or by any wilful, deliberate and premeditated killing, or in the commission of, or attempt to commit, arson, rape, robbery or burglary, is murder of the first degree. All other murder is murder of the second degree."

²⁸ 63 Cal. 2d at 705, 408 P.2d at 374, 47 Cal Rptr. at 918; 105 U. PA. L. REV. at 59.

²⁹ *State v. Stevenson*, 147 W. Va. 211, 214, 127 S.E.2d 638, 641 (1962).

³⁰ *Randolph v. Commonwealth*, 190 Va. 256, 56 S.E.2d 226 (1949). See *State v. Hamric*, 151 W. Va. 1, 18, 151 S.E.2d 252, 263-64 (1966); *State v. Cain*, 20 W. Va. 679 (1882).

³¹ A contrary result may prove inherently contradictory. See *supra* note 20.

¹ W. VA. CODE ch. 61, art. 3, § 30 (Michie Supp. 1971).