MURDER FELONY IS FELONY MURDER: HOW THE NEVADA SUPREME COURT'S DECISION IN *NAY V. STATE* REFLECTS THE GROWING MISCONCEPTION SURROUNDING "AFTERTHOUGHT" ROBBERY

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I. INTRODUCTION

The basis is straightforward and rather explicit: if you commit a felony and cause the death of another in perpetration of the felony, then you are *probably* guilty of felony murder.[1] Criminal liability is only probable because the law surrounding felony murder has been subject to numerous legislative and judicial limitations from its original common law formulation.[2] Often defined as murder "[c]ommitted in the perpetration or attempted perpetration" of one or more statutorily enumerated felonies,[3] courts recognize felony murder as akin to a strict liability offense because of the lack of any *mens rea* element in proving commission of the homicide if the prosecution can establish that the

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[1] *See* 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, 1430 (1994) (stating that felony murder "follows a compellingly simple, almost mathematical, logic: a felony + a killing = a murder").

[2] The common law provided that "a person will be held criminally responsible for a death that occurs 'in the commission or attempted commission of' a felony." Dana K. Cole, *Expanding Felony-Murder in Ohio: Felony-Murder or Murder-Felony?*, 63 OHIO ST. L.J. 15, 15 (2002) (citing WAYNE R. LAFAVE, CRIMINAL LAW 682 (3d. ed. 2000) and MODEL PENAL CODE § 210.2 cmt. 6 (1980)). For a discussion of the Model Penal Code's rather adverse position to felony murder, see, e.g., Guyora Binder, *Felony Murder and Mens Rea Default Rules: A Study in Statutory Interpretation*, 4 BUFF. CRIM. L. REV. 399 (2000) [hereinafter Binder, *A Study in Statutory Interpretation*]. For examples of limitations engrafted upon the felony murder doctrine, see, e.g., 40 AM. JUR. 2D *Homicide* §§ 67, 70 (2008); 40 C.J.S. *Homicide* §§ 55–56 (2006); 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 149 (15th ed. 2007). For an extensive analysis of the background and historical development of the doctrine, see, e.g., Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59 (2004) [hereinafter Binder, *Origins of Felony Murder*]; Leonard Birdsong, *Felony Murder: A Historical Perspective by which to Understand Today's Modern Felony Murder Rule Statutes*, 32 T. MARSHALL L. REV. 1 (2006).

[3] *See, e.g.*, NEV. REV. STAT. § 200.030(1)(b) (2007) ("Murder of the first degree is murder which is: . . . . Committed in the perpetration or attempted perpetration of sexual assault, kidnapping, arson, robbery, burglary, invasion of the home, sexual abuse of a child, sexual molestation of a child under the age of 14 years, child abuse or abuse of an older person or vulnerable person. . . . ."). For a comprehensive list of state murder statutes using the phrase "in perpetration of" to proscribe felony murder, see Cole, *supra* note 2, at 16 n.4.

defendant intended to commit the underlying felony.[4] Although critics have expressed constructive opposition, and even outright hostility, toward the rule,[5] the doctrine continues to enjoy widespread acceptance in our society.[6]

The purpose of this Note is not to analyze, criticize, commend, or compare and contrast the pros and cons of the felony murder doctrine. Commentators and authors past have adequately, and to a certain extent, exhaustively, provided a thorough analysis for others to comprehend the doctrine and its inherent underlying complexities from both its early English common law formulation and adverse rejection by the Model Penal Code, to those interpretations and views of well-known criminal law scholars such as Wayne R. LaFave, Austin W. Scott, Francis Wharton, and Joshua Dressler.[7] Rather, this Note is limited to the following inquiry: whether a state can prosecute a defendant for felony murder when the circumstances lead a reasonably prudent person to believe that the defendant committed a felonious act after he committed homicide, often referred to as murder felony or as an "afterthought" killing.[8] State courts across the United States have split on deciding whether a defendant, who first commits a homicide, and then commits a felony, nevertheless commits felony murder in the statutory sense, even though the intent to commit the felony may have arose after the homicide.[9]

The underlying basis for this Note rests primarily on the recent decision by the Nevada Supreme Court in *Nay v. State* (hereinafter referred to as the "principal case"),[10] where the court reviewed a felony murder conviction in the context of murder felony.[11] As an issue of first impression in Nevada,[12] the court

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[4] *See, e.g.*, Binder, *A Study in Statutory Interpretation*, *supra* note 2, at 401; Birdsong, *supra* note 2, at 2; John S. Huster, Comment, *The California Courts Stray from the Felony in Felony Murder: What is "In Perpetration" of the Crime?*, 28 U.S.F. L. REV. 739, 746 (1994); 40 AM. JUR. 2D *Homicide* § 64 (2008); 40 C.J.S. *Homicide* § 51 (2006); *see also* Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73, 74-75 (1990) (analyzing the notion of strict liability with regard to felony murder as a running controversy between intent based retributivism and harm based retributivism).

[5] *See, e.g.*, Cole, *supra* note 2, at 17-19; Huster, *supra* note 4, at 742-43; Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 446-48 (1985); Tomkovicz, *supra* note 1, at 1429-31. *But see* Cole, *supra* note 4, at 73-78; David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359, 359-61 (1985); Frederick C. Moesel, Jr., Note, *A Survey of Felony Murder*, 28 TEMP. L. Q. 453, 454-55 (1954).

[6] Crump & Crump, *supra* note 5, at 359. For a list of state statutes prescribing felony murder, see 50 STATE STATUTORY SURVEYS, CRIMINAL LAWS, CRIMES: FELONY MURDER (West 2008).

[7] *See* sources cited *supra* notes 1–6. The author of this Note does not intend for the foregoing list of names to be exhaustive.

[8] *See infra* Part II.A and cases cited therein. This Note focuses on the context of murder-robbery, or "afterthought" robbery, though the author intends for the implications and views expressed herein to be drawn upon to apply to other circumstances involving murder felony, including but not limited to in the context of arson, burglary, kidnapping, or other enumerated dangerous felonies as prescribed in a state's murder statute.

[9] 40 AM. JUR. 2D *Homicide* § 67 (2008). *See also infra* Part II.A (discussing the jurisdictions in favor of, and in opposition to, application of the felony murder doctrine under these particular circumstances).

[10] Nay v. State, 167 P.3d 430 (Nev. 2007).

[11] *Id.* at 431. *See also infra* note 16.

issued its decision in accord with the so-called "majority view," requiring the perpetrator to have "intend[ed] to commit the underlying felony at the time the killing occur[ed]."[13] In adopting this rule, the court consequently refused to permit the State to rest the defendant's conviction on a felony murder charge where the evidence suggested that the felony only occurred as an "afterthought" to the killing.[14] The court rejected the so-called "minority view," which follows a *res gestae* approach to the totality of the circumstances: so long as the felony and murder are "part and parcel of one continuous action [or occurrence]," it is irrelevant, for the purposes of conviction, whether the defendant formed the intent to commit the felony prior to committing murder.[15] The court's decision further exacerbates the interstate conflict between the majority and minority view, demonstrating a growing need to address the underlying controversy.[16]

As a preliminary matter, putting aside for a moment whether the majority view is really the prevailing or dominant view of jurisdictions across this country,[17] the controversy surrounds the law's failure to adequately define the scope of "in perpetration," or language of similar import,[18] in the state statutes prescribing felony murder.[19] As a result, states' highest courts must interpret the ambiguity inscribed in their respective murder statutes by analyzing the common law with regard to the felony murder doctrine, any applicable precedential authority, persuasive authority from other state court decisions, and the general principles and rationales behind the doctrine as disseminated by scholars and legal professionals, before deciding how to apply the doctrine in the context of murder felony. The author of this Note supports adherence to the minority view, and therefore, as discussed more fully herein, concludes that the Nevada Supreme Court erred by adopting the majority view in the principle case.[20]

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[12] *Nay*, 167 P.3d at 433.

[13] *See id.* at 434 (quoting State v. Buggs, 995 S.W.2d 102, 107 (Tenn. 1999)) and cases cited therein.

[14] *Id.*

[15] *See id.* at 434–35 and cases cited therein.

[16] As this Note proceeded through the publication process, the Nevada Supreme Court issued a decision in *Cortinas v. State*, 195 P.3d 315 (Nev. 2008). In *Cortinas*, the court reaffirmed its decision in *Nay* rejecting the use of "afterthought" robbery to serve as a predicate felony for a felony murder conviction. *Id.* at 318–19. To note, the court also reaffirmed the harmless-error approach implemented relative to reviewing instructional errors, discussed briefly *infra*. *See id.* at 320.

[17] *See infra* Part II.A (breaking down the number of states for and against the minority view).

[18] Similar words or phrases used by different state legislatures include "while," "during," "in commission of," "in furtherance of," and "in the course of." For a comprehensive list of state statutes adopting these phrases to proscribe felony murder, see Cole, *supra* note 2, at 15 n. 2, 16 nn. 3, 5–6.

[19] *See* Huster, *supra* note 4, at 741.

[20] In brief, the Nevada Supreme Court should have adopted the minority view, applied a *res gestae* approach to the context of murder felony, and affirmed the defendant's conviction for first-degree murder with the use of a deadly weapon. Alternatively, the court should have sustained the defendant's conviction in light of sufficient circumstantial evidence to corroborate the prosecution's case, support the jury's verdict, and conclude that the district court's failure to instruct the jury that the defendant must have had the requisite intent to rob his victim at the time of, or prior to, the commission of the homicide was harmless error.

The remainder of this Note is organized into the following sections. Part II establishes a contextual framework and historical background for understanding the controversy between the majority and the minority views. Specifically, Part II presents the following: (A) an overview of the current[21] breakdown of the states in favor of, and opposed to, the minority view; (B) the concept of, and legal support for, the minority view; (C) the majority view, including some of its underlying similarities with the minority view and how state courts supporting the majority view often allow the jury to consider a charge of felony murder in the context of murder felony based on circumstantial evidence presented by the prosecution to refute an "afterthought" defense; and (D) pertinent Nevada case and statutory law as relevant to the principal case, including the elements of the crime for robbery, with particular emphasis upon the lack of any formal required showing of a defendant's specific intent to commit robbery.

Part III addresses, in detail, the facts and circumstances of the principal case. Part IV provides an in-depth analysis of both the principal case and the minority view. Specifically, Part IV(A) argues that the Nevada Supreme Court should have adopted the minority view because of the following: (1) the resulting intra-court inconsistency in Nevada by requiring the prosecution to prove that a defendant had the requisite intent to commit robbery in the context of felony murder, in accord with the law in Nevada on robbery; (2) the *res gestae* approach to felony murder in the context of murder felony is satisfied, corroborated by the three elements necessary to intimately associate a homicide with the subsequent felonious act (time, place, and causation);[22] and (3) adherence to the minority view does not render the purposes and rationales behind the felony murder doctrine superfluous (a major concern for states previously rejecting the minority view). Part IV(B) discusses a related, yet distinct concept troubling some state courts and opponents of the minority view: in light of another recent decision by the Nevada Supreme Court in *McConnell v. State*,[23] a defendant does not face the possibility of receiving a death sentence upon conviction of felony murder in the context of murder felony through the use of the commission of the felony as an aggravating factor; rather, the State must present evidence of one or more of the other enumerated factors "by which

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[21] The research for this Note closed in December 2008.

[22] 40 C.J.S. *Homicide* § 56 (2006) ("Time, distance, and the causal relationship between the underlying felony and the killing are factors to be considered . . . . [I]n order for a killing to have been done in the perpetration or attempted perpetration . . . of a particular felony, some causal connection must exist."); 40 AM. JUR. 2D *Homicide* § 71 (2007) ("For an unintended homicide committed in the perpetration of another crime to be culpable . . . the [felonious act] and the homicide must be integrated and related in a causal way [and] [s]omething more than a mere coincidence of time and place between the wrongful act and the death is necessary.") (footnotes omitted); 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 150 (15th ed. 2007) ("[H]omicide is within the 'res gestae' of the felony [if] there was close proximity in terms of time and distance between the felony and the homicide and there was no break in the chain of events from the inception of the felony to the time of the homicide.") (internal citations omitted).

[23] *See* McConnell v. State, 102 P.3d 606, 624–25 (Nev. 2004), *aff'd* 107 P.3d 1287 (Nev. 2005) (forbidding the State to use the same predicate felony for conviction of felony murder as an aggravating circumstance to invoke the death penalty; instead, the State must introduce one or more additional aggravators).

murder of the first degree may be aggravated"[24] to warrant imposing the death sentence. Part V concludes by suggesting that the court reconsider the substantive merits of the minority view on murder felony and retreat from its current position favoring the majority view.

II. Contextual Framework and Historical Development

A. The Interstate Battle between the Minority and Majority View

Although circumstances giving rise to murder felony are not as common as those giving rise to felony murder, a number of state courts have had the opportunity to visit the issue and offer a fair amount of comprehensive and substantive legal analysis. By this author's count, as of December 2008, ten states favored the minority view (Florida,[25] Georgia,[26] Illinois,[27] Minnesota,[28] New Mexico,[29] North Carolina,[30] Ohio,[31] Oklahoma,[32] Washington,[33] and Wyoming[34]) and twelve states, along with the District of Columbia,[35] followed the majority view (Alabama,[36] Alaska,[37] California,[38] Idaho,[39] Maryland,[40] Massachusetts,[41] Missouri,[42] Nevada,[43] New York,[44] Pennsylvania,[45] Tennes-

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[24] *See* Nev. Rev. Stat. § 200.033(4) (2007).

[25] *See, e.g.*, Leiby v. State, 50 So. 2d 529 (Fla. 1951); Taylor v. State, 640 So. 2d 1127 (Fla. Dist. Ct. App. 1994).

[26] *See, e.g.*, Francis v. State, 463 S.E.2d 859 (Ga. 1995); Prince v. State, 355 S.E.2d 424 (Ga. 1987); Davis v. State, 340 S.E.2d 862 (Ga. 1986).

[27] *See, e.g.*, People v. Ward, 609 N.E.2d 252 (Ill. 1992); People v. Pitsonbarger, 568 N.E.2d 783 (Ill. 1990).

[28] *See, e.g.*, State v. Harris, 589 N.W.2d 782 (Minn. 1999); State v. Peou, 579 N.W.2d 471 (Minn. 1998).

[29] *See, e.g.*, State v. Nelson, 338 P.2d 301 (N.M. 1959).

[30] *See, e.g.*, State v. Roseborough, 472 S.E.2d 763 (N.C. 1996); State v. Handy, 419 S.E.2d 545 (N.C. 1992).

[31] *See, e.g.*, State v. Williams, 660 N.E.2d 724 (Ohio 1996); State v. Smith, 574 N.E.2d 510 (Ohio 1991).

[32] *See, e.g.*, Perry v. State, 853 P.2d 198 (Okla. Crim. App. 1993).

[33] *See, e.g.*, State v. Hacheney, 158 P.3d 1152 (Wash. 2007); State v. Craig, 514 P.2d 151 (Wash. 1973).

[34] *See, e.g.*, Hightower v. State, 901 P.2d 397 (Wyo. 1995); Bouwkamp v. State, 833 P.2d 486 (Wyo. 1992).

[35] *See, e.g.*, United States v. Bolden, 514 F.2d 1301 (D.C. Cir. 1975).

[36] *See, e.g.*, *Ex parte* Johnson, 620 So. 2d 709 (Ala. 1993); Eggers v. State, 914 So. 2d 883 (Ala. Crim. App. 2004); Freeman v. State, 776 So. 2d 160 (Ala. Crim. App. 1999).

[37] *See, e.g.*, Hansen v. State, 845 P.2d 449 (Alaska Ct. App. 1993).

[38] *See, e.g.*, People v. Prince, 156 P.3d 1015 (Cal. 2007); People v. Ainsworth, 755 P.2d 1017 (Cal. 1988).

[39] *See, e.g.*, State v. Cheatham, 6 P.3d 815 (Idaho 2000).

[40] *See, e.g.*, State v. Allen, 875 A.2d 724 (Md. 2005); Metheny v. State, 755 A.2d 1088 (Md. 2000).

[41] *See, e.g.*, Commonwealth v. Christian, 722 N.E.2d 416 (Mass. 2000), *abrogated on other grounds by* Commonwealth v. Paulding, 777 N.E.2d 135 (Mass. 2002).

[42] *See, e.g.*, State v. Newman, 605 S.W.2d 781 (Mo. 1980).

[43] *See, e.g.*, Cortinas v. State, 195 P.3d 315 (Nev. 2008); Nay v. State, 167 P.3d 430 (Nev. 2007).

[44] *See, e.g.*, People v. Joyner, 257 N.E.2d 26 (N.Y. 1970).

see,[46] and Texas[47]). Both Hawaii and Kentucky exclude the felony murder rule altogether from their statutes prescribing criminal homicide.[48] Some courts and commentators have also included Arkansas, Nebraska, and Michigan as favoring the majority view,[49] bringing that total number to fifteen. However, including these three states with the majority view arguably is misplaced for the following reasons. First, in *Grigsby v. State*,[50] the Arkansas Supreme Court adopted the *res gestae* approach, stating, "[w]here the killing and the felony cannot rationally be disassociated, an inference that the killing was part of the res gestae is justifiable, particularly as against retrospective subjective disavowal."[51] Moreover, the court in *Grigsby* agreed with views previously expressed by the Pennsylvania Supreme Court in *Commonwealth v. Hart*,[52] which adhered to the minority rule.[53] Second, in *State v. Montgomery*,[54] the Nebraska Supreme Court analogized to a case from the Washington Supreme Court[55] and made positive reference to another early case from the Pennsylvania Supreme Court,[56] both holding in favor of the minority view (the line of Pennsylvania cases supporting the minority view were later abrogated;[57] however, this reversal in Pennsylvania law had yet to occur at the time the Nebraska Supreme Court rendered its opinion in *Montgomery*).[58] Finally, although the Michigan Supreme Court spoke in favor of the majority view in *People v. Brannon*,[59] the judiciary had previously abolished the felony murder

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[45] *See, e.g.*, Commonwealth v. Legg, 417 A.2d 1152 (Pa. 1980). *But see infra* notes 61-65 and accompanying text (calling into doubt the inclusion of Pennsylvania among the collection of states supporting the majority view).

[46] *See, e.g.*, State v. Rice, 184 S.W.3d 646 (Tenn. 2006); State v. Buggs, 995 S.W.2d 102 (Tenn. 1999).

[47] *See, e.g.*, Herrin v. State, 125 S.W.3d 436 (Tex. Crim. App. 2002); Robertson v. State, 871 S.W.2d 701 (Tex. Crim. App. 1993).

[48] *See* HAW. REV. STAT. §§ 707-701, -701.5 (2008); KY. REV. STAT. ANN. § 507.020 (West 2008).

[49] *See, e.g.*, State v. Allen, 875 A.2d 724, 729 (Md. 2005); *Buggs*, 995 S.W.2d at 107; Cole, *supra* note 2, at 18 n.20.

[50] Grigsby v. State, 542 S.W.2d 275 (Ark. 1976).

[51] *Id.* at 280-81. *But see id.* (agreeing with views expressed by the California Supreme Court, a state in opposition of the minority view).

[52] Commonwealth v. Hart, 170 A.2d 850, 853-54 (Pa. 1961).

[53] *Grigsby*, 542 S.W.2d at 281-82 (discussing *Hart*, 170 A.2d at 853-54). *But see supra* note 45 and *infra* note 58.

[54] State v. Montgomery, 215 N.W.2d 881 (Neb. 1974).

[55] *See id.* at 884 (referencing factual similarities to *State v. Craig*, 514 P.2d 151 (Wash. 1973)).

[56] *See id.* (citing text from *Commonwealth v. Butcher*, 304 A.2d 150 (Pa. 1973)).

[57] *But see* Commonwealth v. Garcia, 479 A.2d 473, 477 n.3 (Pa. 1984) (calling into doubt the court's continued adherence to the majority view); *infra* notes 61-65 and accompanying text.

[58] *See* Commonwealth v. Legg, 417 A.2d 1152, 1154 (Pa. 1980) (departing from previous holdings subscribing to the minority view and adopting the position the court took in *Commonwealth v. Spallone*, 406 A.2d 1146, 1147 n.2 (Pa. Super. Ct. 1979), which rendered superfluous the relevant language purportedly adopting the minority view in *Butcher*).

[59] People v. Brannon, 486 N.W.2d 83, 85-86 (Mich. Ct. App. 1992) (holding that the "felony-murder doctrine will not apply if the intent to steal property of the victim was not formed until after the homicide").

rule altogether in *People v. Aaron*,[60] rendering inclusion of Michigan with the majority view irrelevant and inconsequential.

With respect to Pennsylvania, in *Commonwealth v. Garcia*,[61] the Pennsylvania Supreme Court called into doubt the decision to hold in favor of the majority position first taken in *Commonwealth v. Legg*.[62] In *Garcia*, Chief Justice Nix, in a concurring opinion, was convinced the court was in error in its decision in *Legg*[63] and "expressed [his] view that it does not matter when the intent to take the property of the victim occurs; it becomes a felony murder when the deadly force is used to accomplish the theft."[64] The majority opinion in *Garcia* acknowledged Chief Justice Nix's concurrence, mentioning the subsequent criticisms to the *Legg* decision and its departure from state precedent, though refused to reconsider the matter because the issue was not before the court on appeal.[65] As a result, the law in Pennsylvania is ambiguous on how the state supreme court may rule in subsequent cases presenting similar circumstances surrounding murder felony.

Virginia law is also uncertain with respect to the crime of murder felony.[66] The Maryland Court of Appeals grouped Virginia with the minority view in *State v. Allen*,[67] and the Virginia Supreme Court embraced the *res gestae* concept in connection with felony murder in *Haskell v. Commonwealth*.[68] However, because the circumstances before the Virginia Supreme Court in *Haskell* were unrelated to "afterthought" felony murder, this author cannot determine, with any degree of certainty, how broadly or narrowly to interpret *Haskell* or accurately ascertain which view Virginia favors.

In sum, by this author's revised, though admittedly favorable, calculation, fourteen states favored, and ten states (plus the District of Columbia) opposed, the minority view prior to the decision rendered by the Nevada Supreme Court in *Nay v. State*.[69] Therefore, characterizing the *current* minority view as the *actual* majority view may afford a more accurate description of the interstate jurisprudence in the context of murder felony. Alternatively, the *current* minority view enjoys a similar degree of judicial support as does the *current* majority view and does not suffer from any disproportionate following on the interstate level among the states' highest courts. Unfortunately, from this author's perspective, the Nevada Supreme Court both misperceived and misconstrued the measure of interstate support for the *current* minority view, which may have influenced, in part, its decision to adopt the *current* majority view in the principal case.

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[60] People v. Aaron, 299 N.W.2d 304, 324 (Mich. 1980). *See* Birdsong, *supra* note 2, at 20 n.135; Roth & Sundby, *supra* note 5, at 446 n.6, 491.

[61] *Garcia*, 479 A.2d 473.

[62] *Id.* at 477 n.3.

[63] *See id.* at 481 n.2 (Nix, C.J., concurring).

[64] *Id.* at 481 (Nix, C.J., concurring).

[65] *See id.* at 477 n.3 (majority opinion).

[66] *See, e.g.*, Haskell v. Commonwealth, 243 S.E.2d 477 (Va. 1978).

[67] *See* State v. Allen, 875 A.2d 724, 730 (Md. 2005).

[68] *See Haskell*, 243 S.E.2d at 482-83.

[69] Minority view figure based on the original ten states plus Arkansas, Nebraska, Pennsylvania, and Virginia; majority view figure reduced from fifteen to ten through exclusion or removal of Arkansas, Michigan, Nebraska, Nevada, and Pennsylvania.

B. The Minority View

The following summarizes and illustrates how state courts interpret and apply the minority view. When a person commits murder within the *res gestae* of a felonious act, whether the homicide preceded or succeeded the felony is neither determinative nor dispositive—"[t]o hold otherwise would render a felony-murder conviction practically impossible where the evidence is entirely circumstantial . . . ."[70] As long as the felony and the killing are part of a single and continuous transaction or occurrence, the temporal order between the felony and the homicide is irrelevant for the purposes of conviction.[71] If a defendant's actions "are so closely connected as to be inseparable in terms of time, place and causal relation, and the actions tend to be explanatory and incidental to each other," felony murder has been committed as prescribed in the statutory sense.[72] If the evidence demonstrates that the homicide and accompanying felonious act were part of the same "criminal episode," the prosecution is not required to prove, beyond a reasonable doubt, that the intent to commit the felony arose before the defendant committed murder.[73]

Whether a killing and felonious act were part of one continuous transaction or occurrence is a question of fact for the jury to decide.[74] For example, a jury is not required to believe or defer to a defendant's defense that he committed robbery only as an "afterthought," particularly where the evidence supports a finding to the contrary.[75] Requiring the prosecution to present witness testimony that the defendant intended to rob the victim at the time he exerted the fatal force against his victim would be erroneous because the law sanctions proof by circumstantial evidence.[76]

In the context of "afterthought" robbery, as expressed by the Washington Supreme Court, "[a] killing to facilitate a robbery would clearly be 'in furtherance of' the robbery . . . [because,] where the killing itself is the force used to obtain or retain the property, . . . the death can be said to be the probable consequence of the felony."[77] Therefore, if the law does not require the prosecution to prove that the defendant had the specific intent to commit the predicate enumerated felony prior to or contemporaneously with committing the homicidal act, it is not a defense that the defendant lacked the intent to rob his victim at the moment the killing took place.[78] Where "the two crimes were inextricably interwoven," and there was such "continuity of evil action"

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[70] *See* State v. Nelson, 338 P.2d 301, 306-07 (N.M. 1959).
[71] *See* State v. Roseborough, 472 S.E.2d 763, 767 (N.C. 1996); *see also* State v. Harris, 589 N.W.2d 782, 792 (Minn. 1999) (noting that, as long as the killing took place in the same chain of events as the underlying felony, it does not matter whether the killing preceded or followed the felonious act).
[72] *See* Perry v. State, 853 P.2d 198, 200 (Okla. Crim. App. 1993) (quoting Clark v. State, 558 P.2d 674, 678 (Okla. Crim. App. 1977)).
[73] People v. Pitsonbarger, 568 N.E.2d 783, 790 (Ill. 1990) (citing People v. Thomas, 561 N.E.2d 57 (Ill. 1990)).
[74] *See, e.g.*, Bouwkamp v. State, 833 P.2d 486, 492 (Wyo. 1992).
[75] *See, e.g.*, Davis v. State, 340 S.E.2d 862, 867 (Ga. 1986).
[76] *See, e.g.*, People v. Ward, 609 N.E.2d 252, 274 (Ill. 1992).
[77] *See* State v. Hacheney, 158 P.3d 1152, 1160 n.6 (Wash. 2007) (citing State v. Allen, 147 P.3d 581 (Wash. 2006)).
[78] *See, e.g.*, State v. Craig, 514 P.2d 151, 155-56 (Wash. 1973).

between the two offenses as to form "part of the same criminal enterprise,"[79] the defendant cannot escape application of the felony-murder rule.[80]

C. The Majority View

1. General Principles

The following discusses how state courts interpret and apply the majority view. A felony, either accompanying or incidental, yet unrelated to, a homicide, committed as a mere afterthought, should neither support nor sustain a conviction for felony murder.[81] The prosecution cannot proceed on felony murder charges against an accused with evidence insufficient to reasonably infer that the accused formed the intent to commit the felony prior to committing homicide.[82] Nor can the prosecution proceed with felony murder charges where the defendant formulated his intent to rob his victim after killing his victim.[83] A judge should instruct the jury that the defendant must have had the intent to rob his victim at the time he committed murder.[84] As expressed by the Texas Court of Criminal Appeals, "the point at which [a defendant] formulated his intent to take his victim's property is critical to differentiating, in the abstract, between his commission of capital murder in the course of robbery [(felony murder)] and his commission of first degree murder, followed by theft . . . ."[85]

Two states in particular have criticized and opposed the minority view, evidenced by the lengthy court opinions, almost treatise-like in nature and intended effect, with respect to "afterthought robbery," issued by the highest courts in Maryland and Tennessee in *State v. Allen*[86] and *State v. Buggs*,[87] respectively. The Nevada Supreme Court relied heavily on, and afforded a moderate degree of deference to, the insight provided by these two decisions in reaching its own decision in *Nay v. State*.[88]

In *Allen*, the Maryland Court of Appeals held that "a defendant is guilty of first-degree felony-murder only if the defendant's intent to commit the predicate enumerated felony [arose] prior to, or concurrent with, the conduct resulting in death."[89] The court based its decision, in large part, on two of the underlying principles of the felony murder doctrine: deterrence and the legal

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[79] Haskell v. Commonwealth, 243 S.E.2d 477, 483 (Va. 1978).

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

[81] *See* People v. Prince, 156 P.3d 1015, 1072 (Cal. 2007); *see also* Eggers v. State, 914 So. 2d 883, 909 (Ala. Crim. App. 2004); Commonwealth v. Spallone, 406 A.2d 1146, 1147 (Pa. Super. Ct. 1979).

[82] *See, e.g.*, State v. Cheatham, 6 P.3d 815, 819 (Idaho 2000).

[83] *See* People v. Joyner, 257 N.E.2d 26, 27 (N.Y. 1970).

[84] *See, e.g.*, State v. Newman, 605 S.W.2d 781, 786-87 (Mo. 1980).

[85] *See, e.g.*, White v. State, 779 S.W.2d 809, 815 (Tex. Crim. App. 1989).

[86] State v. Allen, 875 A.2d 724 (Md. 2005).

[87] State v. Buggs, 995 S.W.2d 102 (Tenn. 1999).

[88] *See* Nay v. State, 167 P.3d 430, 434-35 (Nev. 2007). For the purposes of this Note, the author maintains that the Maryland and Tennessee courts, among others in support of the majority view, misconstrued the implications, support, application, and effect of the minority view.

[89] *Allen*, 875 A.2d at 728.

fiction of transferred intent.[90] Placing a substantial amount of emphasis on social policy, the court of appeals ruled in accord with those courts and criminal scholars embracing the majority view,[91] holding "that there can be no felony-murder where the felony occurs as an afterthought following the killing."[92]

Similarly, in *Buggs*, the Tennessee Supreme Court held that, although the statute on felony murder does not mandate that the felony precede the killing to support a conviction for felony murder,[93] "[i]f [the] accused had no intent to commit the underlying felony at the time of the killing, the basis for the felony-murder rule does not apply."[94] In line with the underlying rationales proposed by the Maryland Court of Appeals in *Allen*, the court in *Buggs* was reluctant to extend the felony murder doctrine in the context of "afterthought" robbery.[95]

2. Underlying Similarities with the Minority View

Although the principles and rationales for the majority view and the minority view in murder felony situations stand in direct opposition, courts adopting the majority view still seemingly incorporate certain criteria underlying the minority view. For example, courts adhering to the majority view still import similar language in accord with the *res gestae* approach to felony murder, requiring the prosecution to demonstrate that the two offenses were part of a "continuous chain" of events,[96] "one continuous transaction,"[97] or of "the same general criminal occurrence."[98] Even the Tennessee Supreme Court in *Buggs* required a killing "[to have] an intimate relation and close connection with the felony[,] . . . [to] not be separate, distinct, and independent from it . . . [and to have] a connection in time, place and continuity of action."[99]

In addition, notwithstanding the reasons behind adopting the majority view, nearly every state court allows the matter to proceed to the jury, which may infer, based on the facts and circumstances of the case, whether the evidence demonstrates, beyond a reasonable doubt, that the defendant had the requisite intent to commit the felony at the time of, or prior to, the killing.[100] According to the Court in *Buggs*, it is a "generally accepted" principle, particularly in robbery-murder cases, "that the intent to rob may be inferred from a defendant's actions immediately following a killing."[101] Rather than prohibit, as a matter of law, "afterthought" robbery to serve as a predicate felony for

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[90] *See id.* at 729-33.
[91] *See id.*
[92] *Id.* at 733.
[93] State v. Buggs, 995 S.W.2d 102, 106 (Tenn. 1999).
[94] *Id.* at 107.
[95] *See id.*
[96] *See, e.g.*, *Ex parte* Johnson, 620 So. 2d 709, 714 (Ala. 1993); Eggers v. State, 914 So. 2d 883, 910 (Ala. Crim. App. 2004) (internal citations omitted).
[97] *See, e.g.*, People v. Prince, 156 P.3d 1015, 1072 (Cal. 2007).
[98] *See, e.g.*, State v. Cheatham, 6 P.3d 815, 821 (Idaho 2000).
[99] *See* State v. Rice, 184 S.W.3d 646, 663 (Tenn. 2006) (quoting WHARTON ON HOMICIDE § 126 (3d ed. 1907) and *Buggs*, 995 S.W.2d at 106).
[100] *See Eggers*, 914 So. 2d at 910; *Prince*, 156 P.3d at 1072-73; State v. Allen, 875 A.2d 724, 733 (Md. 2005); State v. Newman, 605 S.W.2d 781, 786 (Mo. 1980); *Rice*, 184 S.W.3d at 662-64; Herrin v. State, 125 S.W.3d 436, 442 (Tex. Crim. App. 2002).
[101] *Buggs*, 995 S.W.2d at 108 n.3.

felony murder,[102] a court should permit the jury to determine whether the "afterthought" defense is wholly unreasonable, or even illogical.[103] Although the defense may argue that the felonious act was merely an afterthought and unrelated to the homicidal act, the question of intent is a matter best left for the jury to decide.

D. The Law in Nevada prior to Nay v. State

1. Early Use of the Res Gestae *Approach by the Nevada Supreme Court in the Context of Felony Murder*

The Nevada Legislature codified felony murder under section 200.030 of the Nevada Revised Statutes. The statute provides, in pertinent part, that murder "[c]ommitted in the perpetration or attempted perpetration of . . . robbery" is murder in the first degree.[104]

As first prescribed by the Nevada Supreme Court in 1867 in *State v. Millain*,[105] "[t]he law presumes that every unlawful voluntary killing is murder."[106] In *Millain*, evidence showing that the defendant meticulously killed his victim by striking her over the head, choking and strangling her, then immediately robbing her, sufficiently allowed the court to reasonably infer "that the deliberation required to effect the robbery must have been the result of a well matured plan either to murder and rob, or at least to plunder the house, and to murder if necessary in carrying out the main object."[107] Although the context of murder felony was not before the court, the court implicitly adopted and applied a *res gestae* approach to felony murder.

In general, under the *res gestae* approach to felony murder, the law will attach together those acts immediately preceding, or immediately succeeding, the commission of a homicide.[108] As discussed by the Nevada Supreme Court in *State v. Fouquette*,[109] the *res gestae* approach to a crime

> embraces not only the actual facts of the transaction and the circumstances surrounding it, but the matters *immediately antecedent to and having a direct causal connection with it, as well as acts immediately following it and so closely connected with it* as to form in reality a part of the [same] occurrence.[110]

The Court in *Fouquette* required the homicide, for the purposes of felony murder, to be "within the res gestae of the initial crime, and [be] an emanation thereof."[111]

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[102] *See supra* note 14 and accompanying text.
[103] *See, e.g.*, *Newman*, 605 S.W.2d at 786 ("The jury [is] at liberty to reject as unreasonable an explanation that robbery was an afterthought to a justifiable homicide[, and] . . . might well consider that such behavior would be so destructive of a defense to the homicide as to be wholly illogical."); *see also Eggers*, 914 So. 2d at 910 ("The jury may infer from the facts and circumstances that the robbery began when the accused attacked the victim and the capital offense was consummated when the defendant took the victim's property and fled.").
[104] *See* NEV. REV. STAT. § 200.030(1)(b) (2007).
[105] State v. Millain, 3 Nev. 409 (1867).
[106] *Id.* at 445.
[107] *Id.* at 484.
[108] *See supra* notes 70-73 and accompanying text.
[109] State v. Fouquette, 221 P.2d 404 (Nev. 1950).
[110] *Id.* at 417 (emphasis added).
[111] *Id.* at 416-17.

The Nevada Supreme Court offered further guidance on the law surrounding felony murder in *Payne v. State*.[112] In *Payne*, the court noted that the original purpose behind the felony murder doctrine was to hold a felon strictly liable for any negligent or accidental killings resulting from the commission or attempted commission of a felony.[113] Although the circumstances in *Payne* involved the prototypical felony murder context, the court adopted the *res gestae* approach and the corresponding principle of causation.[114] The court required that the killing "be linked to or part of the series of incidents so as to be one continuous transaction" in order to fall within the scope of the felony murder doctrine.[115] Furthermore, the court noted, "[t]he res gestae of the crime begins at the point where an indictable attempt is reached and ends where the chain of events between the attempted crime or completed felony is broken[.]"[116]

The Nevada Supreme Court's position in *Payne* arguably encompasses the situation presented in *Nay v. State* relative to the context of "afterthought" robbery, where a homicide occurs *before* the felonious act takes place.[117] Therefore, the court had ample authority to adopt the minority view in *Nay* without facing subsequent criticism for acting beyond the scope of the court's authority.

2. Robbery

To properly analyze the principal case with respect to the Nevada Supreme Court's decision on murder felony, the following is a brief synopsis of the law in Nevada on robbery.[118] The material should help the reader understand the context of "afterthought" robbery with respect to the felony murder doctrine.

The Nevada Legislature codified the crime of robbery under section 200.380 of the Nevada Revised Statutes as follows:

> Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery. A taking is by means of force or fear if force or fear is used to:
>
> (a) Obtain or retain possession of the property . . .
>
> The degree of force used is immaterial if it is used to compel acquiescence to the taking of or escaping with the property. A taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.[119]

The Nevada Supreme Court has incorporated the following additional nuances relative to the law on robbery. Robbery need not be confined to a

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[112] Payne v. State, 406 P.2d 922 (Nev. 1965).
[113] *Id.* at 924.
[114] *See id.*
[115] *Id.*
[116] *Id.*
[117] *See infra* Part III.A.
[118] *See supra* note 8.
[119] NEV. REV. STAT. § 200.380(1) (2007).

fixed locus or particular period of time,[120] and the acts of violence and intimidation may precede the actual taking of property and may be intended for another purpose altogether.[121] Moreover, the evidence will suffice, for the purposes of conviction, if it demonstrates that the defendant "[took] advantage of the terrifying situation he created" and fled the scene of the crime with the victim's property.[122] Finally, a victim of robbery need not be a living person.[123]

3. A Former, Indirect Approach to "Afterthought" Robbery by the Nevada Supreme Court

A recent decision issued by the Nevada Supreme Court sheds additional light on the court's use of the felony murder doctrine in Nevada and provides further support for concluding that the court should have upheld the defendant's conviction for felony murder in the principal case in light of ample circumstantial evidence presented to the jury. In *Leonard v. State*,[124] the defendant argued that he failed to form the intent to rob his victim until *after* he killed him.[125] In brief, the defendant, victim, and other acquaintances were out drinking at a bar one evening.[126] The defendant and the victim had previously gotten into a dispute over a debt owed by the victim to the defendant.[127] The police later discovered the defendant to be in possession of several of the victim's goods.[128] A witness testified that the defendant confided in him that he had killed the victim,[129] even though the defendant and victim were friends.[130] The court determined that the evidence was sufficient for the jury to find the defendant guilty beyond a reasonable doubt for robbery and to *infer* that the defendant had killed his victim to obtain his possessions.[131] The court rejected the defendant's contention that "the instruction on the felony murder rule failed to inform the jury that the homicide must occur in the course of the commission of a felony, and not vice versa, [in order] for the rule to apply."[132]

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[120] Norman v. Sheriff, Clark County, 558 P.2d 541, 542 (Nev. 1976).

[121] Sheriff, Clark County v. Jefferson, 649 P.2d 1365, 1367 (Nev. 1982). *See also* Chappell v. State, 972 P.2d 838, 841 (Nev. 1998) (holding that the law "does not require that the force or violence be committed with the specific intent to commit robbery").

[122] *Jefferson*, 649 P.2d at 1367.

[123] Leonard v. State (*Leonard II*), 17 P.3d 397, 412 (Nev. 2001).

[124] Leonard v. State (*Leonard I*), 969 P.2d 288 (Nev. 1998). *See also Leonard II*, 17 P.3d 397 (involving the court's affirmation of another felony murder conviction for the same defendant under the same circumstances based on circumstantial evidence whereby the defendant was found to be in possession of the victim's goods and the jury reasonably inferred that the robbery occurred at the time of, or immediately following, the killing).

[125] *Leonard I*, 969 P.2d at 297.

[126] *Id.* at 291-93.

[127] *Id.* at 291.

[128] *Id.* at 292-93.

[129] *Id.* at 293.

[130] *See id.*

[131] *Id.* at 297. Note that the jury could *infer* that the defendant had the requisite intent to rob the victim at the time of the homicide; the record presented nothing to prove or disprove this claim.

[132] *Id.* at 296. The court in *Nay* seemingly ruled otherwise by finding harmless error in the district court's failure to so instruct the jury. *See* Nay v. State, 167 P.3d 430, 436 (Nev. 2007).

Based on the court's ruling in *Leonard*, it remains questionable why the Nevada Supreme Court overlooked this portion of the *Leonard* opinion in reaching its decision in *Nay v. State*. Without expressly denouncing or repudiating *Leonard*, the court in *Nay* overlooked mandatory precedential case law in favor of the law in other states and implemented a new rule of law governing the felony murder doctrine.

III. THE PRINCIPAL CASE: *NAY V. STATE*

A. Factual Background

The following is a summary of the facts and circumstances in *Nay v. State* as presented by Justice Cherry, author of the majority opinion.[133] Christopher Nay ("Nay") first met the decedent, Elijah Ansah ("Ansah"), in April 2003.[134] Shortly thereafter, Ansah moved in with Nay.[135] In an interview with the Las Vegas Metropolitan Police Department, Nay recounted the sequence of events leading to Ansah's death.[136] In the early morning hours of July 27, 2003, around twelve thirty or one a.m., Joshua McCrarey, one of Nay's friends, drove both Nay and Ansah out to Lone Mountain to drop them off to meet some girls.[137] No other individuals were present at or near the scene of the crime.[138] Ansah brought a handgun and Nay brought a baseball bat.[139] Notably, "[a]lthough Nay claimed he got the bat . . . to protect himself from a gang member," Michael Eaton, another one of Nay's friends, "claimed that Nay . . . made a joke about using [the bat] to pull a 'lick'—catching someone off guard, knocking them out, and quickly taking their possessions."[140]

After waiting approximately twenty minutes, Nay asked Ansah where the girls were.[141] Ansah then allegedly became rather hostile and pulled the handgun on Nay.[142] A fight ensued, whereby Nay hit Ansah in the back of the head with the bat between five and eight times, and kicked him in the stomach and the ribs.[143] Afterward, Nay feared that either Ansah was dead, or, if he was not dead, that he might get back up and try to shoot him.[144] Nay first tried to burn Ansah's shirt with a lighter, then decided to take Ansah's shoes, fearing they had his fingerprints on them.[145] He also went through Ansah's pants and took

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133 *Nay*, 167 P.3d at 431.
134 *Id.*
135 *Id.*
136 *Id.* at 432.
137 *Id.* at 432 n.2.
138 *Id.* at 432.
139 *Id.* Why either individual needed to bring a weapon to meet up with "some girls" raises the first of a series of questions regarding the underlying circumstances of the supposedly "casual" visit to Lone Mountain, particularly given the absence of any other individuals at the time of the incident. In this author's opinion, the matter further explains how the jury reached its verdict and why the jury disregarded Nay's "afterthought" defense.
140 *Id.* at 432 n.3.
141 *Id.* at 432.
142 *Id.*
143 *Id.*
144 *Id.*
145 *Id.*

his money, marijuana, and the handgun; during his interview with the police, Nay alleged that he might as well get something from Ansah because Ansah had threatened to shoot him.[146] However, Nay also told police that "he had no intention to rob or kill Ansah."[147]

Nay subsequently walked to his apartment and threw Ansah's clothes in a dumpster.[148] Later that morning, around six forty-five a.m., two hikers at Lone Mountain discovered Ansah's body.[149] He had suffered "blunt force injuries to his head and body, and . . . appeared [to have been] set on fire postmortem."[150] The autopsy revealed high levels of hydrocondone, a narcotic analgesic, in Ansah's system.[151]

According to the record, Nay made the following comments to both friends and acquaintances after the incident: that he "used [the] bat to commit a robbery;" that he "used the bat in a 'lick;'" that he "'jumped' Ansah to get [his] money;" and that he acquired some cash, marijuana, and a handgun by putting a "'lick on Ansah."[152] Further, friends attested to Nay having made up his own rap lyrics about the incident as follows: "'I bashed someone over the head, now he lies dead behind Lone Mountain.'"[153] Out of suspicion that Nay may have killed Ansah, four acquaintances of Nay contacted the police to recount Nay's comments.[154]

B. Procedural History

Nay admitted to the police that he killed Ansah.[155] The State charged him with first-degree murder with the use of a deadly weapon and for robbery with the use of a deadly weapon.[156] The State "alleged that Nay beat his roommate . . . to death with a baseball bat and took his money, marijuana, and handgun."[157] Nay claimed self-defense and that he "only decided to take Ansah's property *after* he believed Ansah was dead."[158]

The jury found Nay guilty on both counts.[159] The district court sentenced Nay to two consecutive life sentences for the first charge and two 35- to 156-month sentences for the second charge.[160] Nay appealed both convictions.[161]

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146 *Id.*

147 *Id.* This single statement appeared to be rather dispositive in the Nevada Supreme Court's disposition, even though numerous contradictory statements made by both Nay and his mutual acquaintances seemingly led the jury to an opposite conclusion. *See id.* at 432-33; *supra* text accompanying note 140; *infra* text accompanying notes 152-54.

148 *Nay*, 167 P.3d at 432.

149 *Id.* at 431.

150 *Id.*

151 *Id.* at 431-32.

152 *Id.* at 432-33.

153 *Id.* at 433.

154 *Id.*

155 *Id.* at 432.

156 *Id.* at 431.

157 *Id.*

158 *Id.* (emphasis added).

159 *Id.* at 433.

160 *Id.*

161 *Id.* at 430.

C. On Appeal to the Nevada Supreme Court

The Nevada Supreme Court phrased the main issue on appeal as follows: "whether a defendant may be found guilty of first-degree felony murder if the intent to commit the predicate enumerated felony [arose] after the conduct resulting in death."[162] Nay argued that the district court should have instructed the jury that "a robbery committed as an afterthought to a murder cannot support a felony-murder conviction."[163] Although procedural issues involving jury instructions generally require an abuse of discretion or judicial error standard of review, the court imposed a de novo standard of review because the substantive issue presented a legal question of first impression.[164]

Section 200.030(1)(b) of the Nevada Revised Statutes prescribes the elements of felony murder.[165] The court initially found the statute to be ambiguous because it failed to define "in perpetration or attempted perpetration" of one of the predicate enumerated felonies.[166] Nay asserted that he did not intend to rob Ansah at the time he killed him, and therefore, the killing did not occur "in the perpetration of" the robbery as required by the language of the statute.[167] By contrast, the State argued that intent was irrelevant under the statute and, because the force or violence used to kill Ansah was necessary for Nay to commit the robbery, the force or violence used to kill Ansah was "in the perpetration of" the robbery.[168]

In observing that both interpretations of the felony murder statute were reasonable, the Nevada Supreme Court looked to other state law to ascertain how other courts have handled factually similar circumstances.[169] Nay based his argument on the "majority view" with respect to "afterthought" robbery in the context of felony murder.[170] By contrast, the State proposed the "minority view," where the timeframe for when a defendant forms "the intent to commit the underlying felony . . . is irrelevant," and the felony murder doctrine applies so long as the "robbery and murder are part and parcel of one continuous action."[171] Relying primarily on *State v. Buggs*[172] and *State v. Allen*,[173] the Nevada Supreme Court expressed two main reasons why it chose to adopt the majority view as the "better view."[174] First, the court explained that the purpose underlying the felony murder doctrine becomes inapplicable if the defendant did not have the intent to commit the felony at the time he committed the

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[162] *Id.* at 431.
[163] *Id.* at 433.
[164] *Id.*
[165] *Id. See supra* text accompanying note 104.
[166] *Nay*, 167 P.3d at 433-34.
[167] *Id.* at 433.
[168] *Id.* at 434.
[169] *Id.* As maintained *infra* in Part IV.A.1, it is unbeknownst to the author of this Note why the court was not comfortable drawing support exclusively from precedent case authority, something the concurring opinion touched upon briefly. *See infra* text accompanying notes 185-87.
[170] *Nay*, 167 P.3d at 434.
[171] *Id.* at 434-35.
[172] State v. Buggs, 995 S.W.2d 102 (Tenn. 1999).
[173] State v. Allen, 875 A.2d 724 (Md. 2005).
[174] *Nay*, 167 P.3d at 434-35.

homicide because the rule tries to deter a person from committing a felony in a dangerous manner, even if the killing is accidental or unintentional.[175] Second, the court explained that, in order to satisfy the underlying legal fiction behind the felony murder rule (that the intent to commit a dangerous felony supplies the requisite intent to kill), the defendant must have had the intent to commit the felony at the time he committed homicide.[176]

The court offered two reasons why it opposed adopting the minority view.[177] First, the court noted that a lack of intent to commit the predicate enumerated felony (fatally) eradicates the intent otherwise supplied to satisfy a conviction for murder.[178] Second, the court stated that the minority view expanded, rather than restricted, the felony murder rule, contrary to the weight of authority calling for a restriction of the doctrine.[179] Therefore, the court concluded that, to convict a defendant of first-degree felony murder, the defendant must have formed the intent to commit the felony either before or during the conduct resulting in the victim's death.[180]

In light of having accepted and adopted the majority view, the court found that the district court erred in failing to instruct the jury with regard to "afterthought" robbery, amounting to judicial error.[181] Applying harmless-error review, the court observed that the district court only instructed the jury on intent with respect to committing robbery (where the timeframe is irrelevant).[182] Additionally, the court held that the district court's error was not harmless because the verdict did not differentiate whether the jury convicted Nay for first-degree murder or for felony murder, which required the court to reverse and remand Nay's conviction with respect to first-degree murder with the use of a deadly weapon.[183] Notwithstanding, the court affirmed Nay's conviction with respect to robbery with the use of a deadly weapon.[184]

Chief Justice Maupin, with whom Justice Hardesty agreed, filed a concurring opinion.[185] In his concurrence, Chief Justice Maupin renounced any fault the majority opinion may have attributed to the district court in so construing state precedent as to embrace the minority, rather than majority, view.[186] Rather, he asked the court to acknowledge that the district court fairly assessed

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175 *Id.* at 434.

176 *Id.*

177 *Id.* at 435.

178 *Id.*

179 *Id.*

180 *Id.* at 431.

181 *Id.*

182 *Id.* at 435.

183 *Id.* at 435-36.

184 *Id.* at 436. The Court made this determination without providing any supporting analysis, stating simply that "the jury was presented with overwhelming evidence to support the robbery charge, including Nay's admission that he robbed Ansah." *Id.* The author of this Note challenges the reader to find a reason why the court decided to reverse Nay's murder conviction, while simultaneously affirming his robbery conviction.

185 *Id.* at 436.

186 *Id.*

precedent case law and had reason for deciding to adopt, albeit implicitly, the minority view.[187]

The next part of this Note proposes why, from a number of legal and social policy perspectives, the Nevada Supreme Court incorrectly decided *Nay* by adopting the majority view. The author of this Note hopes that, should another case involving murder felony come before the court in the future, the court will take a second look at its decision in *Nay*, as well as the case law from other states holding to the contrary, and reevaluate the decision to disavow the minority view.[188]

IV. ANALYSIS

A. The Nevada Supreme Court Erred in Rejecting the Minority View—The Better Approach in the Context of Murder-Robbery

1. The Court's Decision Imposes a New Burden on the State Not Found in the Felony Murder Statute or State Precedent

As discussed earlier in this Note, to convict a defendant for robbery in Nevada, the State need only prove that the defendant took advantage of the dangerous or terrifying situation he created to rob his victim.[189] The State is not required to prove that the defendant used force or violence with a specific intent to commit robbery.[190] Therefore, requiring the State to prove that a defendant had the requisite intent to commit robbery at the time he created a dangerous or terrifying situation using force or violence in the context of felony murder is inconsistent because it imposes an additional burden on the State not otherwise required by statute.

When the State presents its case against a defendant for murder "in the perpetration or attempted perpetration" of robbery,[191] the State must prove the following. First, the State must demonstrate, beyond a reasonable doubt, that the defendant committed robbery. Then, the State must show that, as per the clear and unambiguous language of the felony murder statute, the homicide occurred in the perpetration of the robbery. The dispositive portion of the State's presentation of its case is proving the commission of the robbery. The Nevada statute on robbery does not require the State to show that the defendant had the specific intent to commit robbery at the time the offense took place.[192] Thereafter, the State must establish a causal connection between the homicide and the robbery by showing that the defendant committed homicide during the

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[187] *Id.* at 437. For the reasons set forth in this Note, the author agrees with Chief Justice Maupin that the trial court correctly interpreted precedent case law, and questions why the majority did not go so far as to overrule precedent outright.

[188] *But see supra* note 16 (discussing a recent opinion issued by the Nevada Supreme Court, *Cortinas v. State*, 195 P.3d 315 (Nev. 2008), reaffirming the decision in *Nay*).

[189] *See* Sheriff, Clark County v. Jefferson, 649 P.2d 1365, 1367 (Nev. 1982); *see also supra* Part II.D.2.

[190] Chappell v. State, 972 P.2d 838, 841 (Nev. 1998).

[191] *See* NEV. REV. STAT. § 200.030(1)(b) (2007).

[192] *See* NEV. REV. STAT. § 200.380(1) (2007); *see also supra* text accompanying note 119.

sequence of events surrounding the robbery.[193] However, Nevada law does not require any proof that the defendant had a specific intent to commit murder, as evident from the plain language of the relevant provision governing felony murder.[194] To hold otherwise requires a district court to read an element of intent into the felony murder statute, a task vested in the powers of the Nevada Legislature and outside the bounds of the court's established authority under the Nevada Constitution.[195]

In the principal case, the Nevada Supreme Court upheld the defendant's conviction for robbery.[196] The court did not justify this conclusion, other than stating that there was "overwhelming" evidence supporting the conviction.[197] Therefore, in light of the elements prescribed in Nevada's statute governing robbery,[198] the author of this Note must assume that the prosecution satisfied its requisite burden of proof with respect to the following findings in the district court: 1) the force or violence used for the unlawful taking of the victim's property ultimately killed the victim; 2) the taking was against the victim's will; 3) the force or violence was immediate; and 4) the taking, by means of force or violence, was to obtain the possession of the victim's property. The court's reason behind foregoing affirmation of the defendant's conviction for felony murder is both suspect and clouded because the four essential findings outlined above appear to satisfy the "in perpetration" requirement for felony murder for the following reasons: 1) fatally hitting the victim over the head with a baseball bat supplied the force or violence used to commit robbery; 2) the victim did not willingly hand over his personal property; 3) the beating (and killing) took place at the time when the robbery occurred; and 4) the taking of the victim's property through the use of force and violence, resulting in the victim's death, was to acquire the victim's money, marijuana, and handgun. Further, the defendant made numerous bragging statements to acquaintances that he did rob Ansah by using the baseball bat, and only later told the police that he did not originally intend to rob his victim.[199] Both the first-hand statements of Nay, as well as those of his friends, served as ample circumstantial evidence of the defendant's guilt and further corroborated the State's charge, and the jury's conviction, for first-degree felony murder with the use of a deadly weapon.

Although the circumstances in the principal case materialize into an intimate connection between the homicide and the robbery, thereby proving the homicide was within the *res gestae* of the robbery,[200] the robbery appears to

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[193] *See, e.g.*, Sheriff, Clark County v. Morris, 659 P.2d 852, 856 (Nev. 1983) (noting the requirement of a direct causal connection between the robbery and homicide).

[194] *See* NEV. REV. STAT. § 200.030(1)(b) (2007); *see also* Nay v. State, 167 P.3d 430, 434 (Nev. 2007) (noting that interpreting the statute as not demanding a specific intent to commit robbery is reasonable).

[195] *See, e.g.*, Seaborn v. First Judicial Dist. Court, 29 P.2d 500, 503 (Nev. 1934) (noting that a court does not have legislative powers to "read into a statute something beyond the manifest intention of the Legislature, as gathered from the statute").

[196] *Nay*, 167 P.3d at 436.

[197] *See id.*; *see also supra* note 184.

[198] *See* NEV. REV. STAT. § 200.380(1) (2007); *see also supra* text accompanying note 119.

[199] *See Nay*, 167 P.3d at 432-33; *supra* text accompanying notes 140, 146-47, 152-54.

[200] *See infra* Part IV.A.2.

have been the underlying crime from the outset. The statements Nay voluntarily made to his friends are arguably more reliable than those he made to the police after being taken into custody. Although one may infer that Nay only bragged to his friends and applied a certain amount of puffery to the events that took place, one could just as reasonably infer that Nay robbed and killed his victim to "up" his street credibility, and later lied to the police to try to mitigate the gravity of the situation. As discussed earlier, Nay and Ansah were carrying a baseball bat and a handgun, respectively, out late at night, in a relatively isolated area, supposedly looking for girls. A person can easily carry a concealed handgun, whereas a baseball bat is rather large and conspicuous by nature. These facts and circumstances hardly lead a reasonably prudent person to infer that the defendant had no intent to kill the victim in order to rob him of his possessions any more so than actually having intended to commit robbery. Either way, the jury properly considered the totality of the evidence and found the intimate connection between the robbery and the murder, without any demand by law to take the defendant's unscrupulous "afterthought" defense at anything more than face value, particularly when the circumstances all but pointed to the contrary.[201]

To summarize, given the statutory elements of robbery, when a defendant commits a homicidal act (a dangerous or terrifying situation in it of itself), even if the defendant did not originally intend to rob his victim, the "in perpetration" component of the felony murder rule is satisfied. Had the defendant not committed the killing, the elements constituting robbery would not be present.[202] A killing used to facilitate obtaining the property of another is the "probable consequence of the felony."[203] Where a court sanctions drawing a connection from a homicidal act to a robbery to satisfy a conviction for robbery, while proscribing any connection from the robbery back to the homicide to satisfy a conviction for felony murder, the court is ignoring the general principles behind the *res gestae* approach.[204] The Nevada Supreme Court relied on less evidence in *Leonard v. State* to affirm the defendant's conviction, and even rejected the defendant's request for an instruction analogous to the majority view.[205] As a result, the court departed from mandatory state precedent, read an element of intent into the felony murder statute, and reversed the jury's conviction, irrespective of the weight of the evidence, by failing to acknowledge the obvious connection between the robbery and homicidal act.

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[201] *See, e.g.*, Davis v. State, 340 S.E.2d 862, 867 (Ga. 1986); State v. Harris, 589 N.W.2d 782, 793 (Minn. 1999); State v. Handy, 419 S.E.2d 545, 552 (N.C. 1992); Bouwkamp v. State, 833 P.2d 486, 492 (Wyo. 1992).

[202] This argument relates to the causation component of the *res gestae* approach, discussed *infra* Part IVA.2.b.

[203] *See* State v. Hacheney, 158 P.3d 1152, 1160 n.6 (Wash. 2007) (citing State v. Allen, 147 P.3d 581 (Wash. 2006)).

[204] *But see* Metheny v. State, 755 A.2d 1088, 1110 (Md. 2000) (arguing that the foregoing line of reasoning is "troubling [because it requires] simultaneously looking back in time at the application of force to find a robbery while looking forward in time to the taking of property to find a felony murder, where, in fact, no felony was contemplated when the homicide occurred").

[205] *See* Leonard v. State (*Leonard I*), 969 P.2d 288, 291-93, 296-97 (Nev. 1998); *see also supra* Part II.D.3.

2. Res Gestae *Embraces "Afterthought" Robbery and Warrants Having Affirmed, not Reversed, Nay's Conviction for First-Degree Murder*

Under the *res gestae* approach, a court must analyze the elements of time, distance, or place, and causation between the felony and the homicidal act before imposing the felony murder rule upon a defendant accused of homicide in the context of "afterthought" robbery.[206] As set forth below, the facts and circumstances presented in *Nay v. State* satisfy each of these elements to prove the homicide took place within the *res gestae* of the robbery.

a. Time and Distance or Place

The prosecution must show a close degree of proximity in terms of time and distance (or place) between the felonious act and the homicide to prove the offenses were essentially part of a "single series of continuous acts."[207] In other words, to demonstrate that the death occurred as part of the acts leading up to the felonious act, there must not be a substantial passage of time, nor great distance between, the homicide and felonious act.[208] Rather, the court must find unity with respect to time and place between the homicide and the felonious act; a sheer coincidence of time and place will not suffice.[209]

The facts and circumstances presented in *Nay* indicate that the prosecution satisfied the time and distance elements. Nay admitted that, immediately after realizing that he may have killed Ansah, he took his victim's pants containing the money and marijuana, as well as the victim's handgun.[210] Nay did not leave the area and return later to collect Ansah's belongings. Nay showed off the stolen handgun, cash, and marijuana to his friends,[211] as if pleased with his accomplishments. Although the police may not have had the means of deducing the exact time frame between the killing and the robbery given the lack of any eyewitnesses, the jury could reasonably infer that the two offenses were both connected and interrelated with respect to time because the police discovered the victim's body only hours after the incident[212] and the police found Nay in possession of the goods taken from the victim.[213] In addition, both offenses occurred at the exact same location.[214] The defendant did not kill Ansah, move the body to another location, and later conceive of the notion of robbing his

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[206] *See, e.g.*, State v. Heden, 719 N.W.2d 689, 697 (Minn. 2006); Perry v. State, 853 P.2d 198, 200 (Okla. Crim. App. 1993); Haskell v. Commonwealth, 243 S.E.2d 477, 482-83 (Va. 1978); *Hacheney,* 158 P.3d at 1157-60. *See also supra* note 22 (discussing the requisite elements necessary to show a crime is committed within the *res gestae* of another offense).

[207] *See, e.g.*, People v. Ward, 609 N.E.2d 252, 274 (Ill. 1992); *see also* State v. Buggs, 995 S.W.2d 102, 106 (Tenn. 1999); *Hacheney*, 158 P.3d at 1157-60.

[208] *See, e.g.*, State v. Williams, 660 N.E.2d 724 (Ohio 1996).

[209] *See, e.g.*, United States v. Bolden, 514 F.2d 1301, 1309 n.13 (D.C. Cir. 1975); *Hacheney*, 158 P.3d at 1157; 40 AM. JUR. 2D *Homicide* § 71 (2008); 40 C.J.S. *Homicide* § 56 (2006); 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 150 (15th ed. 2007).

[210] *See* Nay v. State, 167 P.3d 430, 432 (Nev. 2007).

[211] *See id.* at 432-33.

[212] *See id.* at 431-32.

[213] *See id.*

[214] *Id.*

victim. Rather, the incidents all occurred somewhere in the middle of the night at Lone Mountain.[215]

In sum, the evidence showed unity of time and place between the homicide and robbery, not a mere coincidence between the two offenses. The *res gestae* approach emphasizes how the two offenses in *Nay* were incidental and explanatory of one another. Had the Nevada Supreme Court adopted the minority view, the facts and circumstances justify the jury's first-degree murder conviction with the use of a deadly weapon.

b. Causation

Along with the elements discussed above, under a *res gestae* approach, the State needs to show a causal relationship between the felony and the homicide.[216] The circumstances must have a direct causal connection with one another to show continuity of action.[217] The death must be a probable consequence of the felony or a foreseeable consequence of the initial criminal conduct to establish a legal relationship between the two offenses.[218]

The evidence presented to the court in *Nay* met the causality requirement. First, but for the defendant having used force and violence to kill his victim, the defendant would not have created a terrifying or dangerous situation enabling him to commit robbery. Moreover, a reasonably prudent person may foresee that striking someone over the back of the head with a baseball bat five to eight times may either seriously injure or kill the person. In other words, the defendant's conduct proximately caused the victim's death.[219] By attacking the victim with such force and violence, the homicide was undoubtedly linked with the robbery. Therefore, as noted in the preceding section, had the court adopted the minority view, the facts and circumstances warranted a conviction for first-degree murder with the use of a deadly weapon.

c. The Elements Combined Show the Two Offenses as "Part and Parcel" of the Same Underlying Occurrence

As explained throughout this Note, *res gestae* encompasses "things done in and about, and as a part of, the transaction out of which the litigation in hand grew and on which transaction said litigation is based."[220] If "the murderous act is 'part and parcel' of the same transaction as the felony," the felony murder rule applies to the conduct,[221] irrespective of the underlying sequence of

[215] *Id.*

[216] *See, e.g.*, State v. Heden, 719 N.W.2d 689, 697 (Minn. 2006); State v. Nelson, 338 P.2d 301, 306 (N.M. 1959); Perry v. State, 853 P.2d 198, 200 (Okla. Crim. App. 1993); Haskell v. Commonwealth, 243 S.E.2d 477, 482-83 (Va. 1978).

[217] *See, e.g.*, *Haskell*, 243 S.E.2d at 483.

[218] *See, e.g.*, 40 C.J.S. *Homicide* §§ 55-56 (2006).

[219] *See, e.g.*, 40 AM. JUR. 2D *Homicide* § 71 (2008) ("In determining whether there is a causal relation, some courts have suggested using 'but for' causation, or that the death would not have occurred but for the unlawful conduct. The unlawful act must be the proximate cause of death, or death must be the probable consequence or the natural or necessary result of the unlawful act.") (footnotes omitted).

[220] Garcia v. State, 68 N.W.2d 151, 160 (Neb. 1955) (quoting Collins v. State, 64 N.W. 432, 434 (Neb. 1895)).

[221] Nay v. State, 167 P.3d 430, 435 (Nev. 2007).

events.[222] The Nevada Supreme Court previously adopted and implemented the concept of *res gestae* and the principle of causation with respect to felony murder.[223] The court should have implemented the same approach in *Nay*.

In the principal case, although the homicide occurred prior to the completion of the robbery, the issue is irrelevant because the *res gestae* approach embraces "matters immediately antecedent to and having a direct causal connection with [the felonious act]."[224] The moment the defendant began to strike his victim over the head with the baseball bat, which the district court seemingly attributed to be the force or violence used to commit robbery, an "indictable attempt [was] reached."[225] Conversely, the moment the defendant left the scene of the crime with his victim's money, marijuana, and handgun constitutes the point in time of the completion of the chain of events—the moment where the "indictable attempt" ended with respect to the *res gestate* of the overall occurrence.[226] Unity of time, distance, and purpose were present, as well as a direct causal connection between the two offenses. The jury did not need an instruction with regard to "afterthought" robbery because the defendant did not have to commit the homicide with the specific intent to rob the victim for the prosecution to prove robbery.

The homicide was so intimately associated and interrelated with the robbery in *Nay* to be part of the *res gestae* of the robbery. Robbery and homicide constituted the basis for the criminal proceedings, with the evidence stemming from the same underlying chain of events. The two were not discrete and mutually exclusive offenses occurring separately and distinctly from one another. Maintaining on appeal that the homicide was part of the *res gestae* of the robbery was reasonable given that the State would not have been able to prosecute the defendant for either robbery or homicide without introducing facts supporting prosecution for the other offense. Both offenses were sufficiently interrelated and connected to constitute part and parcel of the same transaction or occurrence. For example, the State could not show that the defendant used force or violence to create a terrifying or dangerous situation conducive to committing robbery absent showing that the defendant killed his victim. To leave out or downplay this detail to prove robbery would fail to disclose the full truth to the jury (and arguably lead the jury to question such omission of material fact). At the same time, in a prosecution for murder, the State would arguably have little choice but to make specific references to the robbery committed immediately after the homicide to show motive or intent to commit murder.[227] Looking at the facts and circumstances, the defendant's

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[222] *See, e.g.*, State v. Harris, 589 N.W.2d 782, 792 (Minn. 1999); State v. Nelson, 338 P.2d 301, 306 (N.M. 1959); State v. Roseborough, 472 S.E.2d 763, 767 (N.C. 1996).

[223] *See supra* Part II.D.1.

[224] State v. Fouquette, 221 P.2d 404, 417 (Nev. 1950).

[225] *See* Payne v. State, 406 P.2d 922, 924 (Nev. 1965).

[226] *See id.*

[227] Although there may be, for example, evidentiary reasons for withholding such information, nothing in the Nevada Supreme Court's opinion indicates any reason to infer that the prosecution would have needed to omit certain material information related to the underlying chain of events had they prosecuted the defendant for each crime separately.

conduct arguably went above and beyond his self-defense argument.[228] A reasonably prudent person could consider the totality of the evidence and reasonably infer that the purpose underlying the murder was to commit robbery.

Although the defendant may not have intended to kill his victim from the outset, his actions mirrored those of an individual seeking to commit robbery, willing to undertake fatal means if necessary in light of opposition by the victim, who would have used deadly force to resist such an attack if needed.[229] The State sufficiently proved the elements of robbery and the homicide's intimate association with robbery. To reiterate the *res gestae* approach, the temporal order of the killing and felonious act is immaterial when the offenses constitute one continuous transaction or occurrence.[230] In *Nay*, there was such "continuity of evil action," with the two offenses being "inextricably interwoven"[231] to justify imposing a conviction for felony murder upon the defendant. The homicide was an emanation of the felonious act—the force or violence used to commit robbery.[232]

3. The Minority View Does Not Circumvent the Purposes and Rationales Underlying the Felony Murder Doctrine

Until now, this Note has focused primarily on legal references to both precedent and persuasive case authority, analogizing to the facts and circumstances in the principal case. However, looking at the felony murder doctrine in light of its underlying purposes and rationales affords additional support for the minority view.

As an initial observation, only those courts adopting or adhering to the majority view supported their position by incorporating policy arguments. By contrast, those courts adopting or adhering to the minority view relied virtually entirely on case and statutory law, presumptively finding little reason, if any, to stray beyond the plain language of the statutes and the applicable use of the *res gestae* approach. The distinction suggests that, had the law vehemently opposed application of the felony murder rule in the context of "afterthought" robbery, the states' legislative bodies would have taken the necessary steps to proscribe any such application.

Every state choosing to dive into policy arguments opposed to the minority view focused, in large part, on deterrence and transferred intent. However, as discussed more fully below, other important rationales support the felony murder doctrine. In addition, the concepts of deterrence and transferred intent may not be missing altogether when applying the felony murder rule in the context of "afterthought" robbery. The law on felony murder has embraced

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[228] Nay v. State, 167 P.3d 430, 431 (Nev. 2007). The court only makes passing reference to Nay having raised a self-defense argument in the district court, leading the author of this Note to infer that either the jury or the district court summarily dismissed this affirmative defense or that the defendant failed to satisfy the elements necessary to prove self-defense.

[229] *See* Crump & Crump, *supra* note 5, at 360 n.7 ("[A] man could resist a felon with deadly force if necessary [at common law]; if a person is committing a crime for which he can be lawfully killed, 'the presumption is that the felon would kill if necessary and such implied intent is sufficient to make it murder.'") (internal citation omitted).

[230] *See, e.g.*, State v. Roseborough, 472 S.E.2d 763, 767 (N.C. 1996).

[231] *See, e.g.*, Haskell v. Commonwealth, 243 S.E.2d 477, 483 (Va. 1978).

[232] *See* State v. Fouquette, 221 P.2d 404, 416-17 (Nev. 1950).

both expansion and limitation, as evidenced by a court's willingness to convict co-felons having little to no role in a homicide occurring during the perpetration of a felony (i.e., accomplice liability),[233] though simultaneously adhering to the "merger" rule[234] and applying the doctrine exclusively toward enumerated felonies the legislature previously deemed dangerous.[235]

It is an onerous burden on the State to prove or disprove a defendant's claim that he accidentally or unintentionally killed a person, and then decided as an afterthought to rob his victim, particularly without any eyewitness testimony. In a robbery case where the two offenses constitute the same transaction or occurrence, it would render a felony murder conviction practically impossible to sustain without permitting the State to rest its case on circumstantial evidence to refute the defendant's "afterthought" argument.[236] The concern with perjury and falsification is obviously present,[237] particularly with an individual who has either admitted to committing both the felonious act and the homicide (though later claims they were separate and distinct offenses) or when the State has sufficient circumstantial evidence to prove that the defendant committed both acts. Additional concern rests with the defendant seeking to lessen the prospective of punishment by alleging an "afterthought" defense where the State may have little evidence to prove otherwise.

Society has long embraced the felony murder doctrine in accord with the demand for "law and order."[238] The doctrine is designed to protect society from those who present "unwarranted and unnecessary threats of death" in pursuance of criminal activity.[239] The public does not want to sympathize with an individual who willingly engages in activity conducive to the death of innocent victims to accomplish a felonious act.[240] Any individual who engages in "afterthought" robbery removed the need to use force or violence to commit robbery because he already committed a violent, deadly act immediately beforehand. There arguably is little injustice in holding a defendant criminally liable to the fullest extent of the law for committing murder felony, given the close and intimate connection between the two offenses and the culpability underlying the overall occurrence.

Proportionality in sentencing is satisfied where felonious conduct accompanies a killing, even if occurring immediately thereafter, because the conduct, in sum, is more culpable than each offense committed separately.[241] A defendant should not "be heard to say [that] his intentions were pure when he administered the blows which resulted in the death of [his] victim" (i.e., without the underlying intent to rob the victim).[242] The felonious conduct accompanying

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233 *See, e.g.*, Binder, *Origins of Felony Murder*, *supra* note 2, at 197-201.
234 *See, e.g.*, Crump & Crump, *supra* note 5, at 377-82; Huster, *supra* note 4, at 749-50.
235 *See, e.g.*, Binder, *Origins of Felony Murder*, *supra* note 2, at 187-91.
236 *See* Crump & Crump, *supra* note 5, at 389 ("[A] claim of accident, coupled with a claim of 'afterthought,' is facile and difficult to disprove."); *see also* People v. Ward, 609 N.E.2d 252, 274 (Ill. 1992); State v. Nelson, 338 P.2d 301, 307 (N.M. 1959).
237 *See* Crump & Crump, *supra* note 5, at 375-76, 389.
238 Tomkovicz, *supra* note 1, at 1461-63.
239 *Id.* at 1463.
240 *See id.* at 1472.
241 *See* Crump & Crump, *supra* note 5, at 389-90.
242 *See* State v. Craig, 514 P.2d 151, 155 (Wash. 1973).

the homicide arguably supplies an additional justification for imposing a harsher penalty on the defendant. Armed robbery already involves a significant risk of death, even without prior contemplation,[243] which suggests why it tends to be included among the list of dangerous felonies enumerated by state legislatures in statutes prescribing felony murder. A robbery coupled with a homicide occurring immediately beforehand, providing the foundation for engaging in the robbery, seems to be more culpable than robbery without the victim's death. Furthermore, the Nevada Supreme Court has limited, if not eliminated, any outstanding concern with disproportionality in sentencing through receipt of the death sentence in the context of "afterthought" robbery, thereby limiting the maximum sentence a defendant may receive in this context absent other aggravating circumstances.[244]

Another purpose of the felony murder doctrine is its value as a "prosecutorial tool."[245] The doctrine imposes strict liability, offering an efficient administration of justice, which optimizes judicial resources.[246] Felony murder provides relief to the prosecution from proving actual malice or premeditation on the part of the defendant relative to the homicidal act.[247] Imposition of felony murder in the context of "afterthought" robbery continues to promote efficient prosecution of criminals when circumstantial evidence implies that the homicide was part and parcel of the *res gestate* of the felonious act, even if it was committed prior to the commission of the felony. Moreover, criminal law embraces the concept of *res gestae* when a killing occurs subsequent to the commission or completion of the felonious act.[248] Simultaneously applying the concept when the killing precedes the felonious act is arguably consistent and results in judicial uniformity. The minority view also eliminates any confusion or undue waste of limited judicial resources arising from a defendant introducing the defense of "afterthought" robbery, which again plays into the concern with perjury and false allegations.[249]

It is important for society to acknowledge the inherent risks associated with any particular conduct. Support for the majority view could lead a felon to inquire whether he would be convicted of felony murder if he kills his victim, followed sometime thereafter by committing a felonious act. Rather, applying the minority view assures society that a criminal who kills, then robs, must suffer the same consequences otherwise imposed on a defendant who robs, then kills.

As suggested earlier, the concept of deterrence remains in effect in the context of "afterthought" robbery when the evidence leads to a reasonable inference that the defendant committed homicide in the perpetration of the fel-

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[243] *See* Moesel, *supra* note 5, at 454.

[244] *See infra* Part IV.B.

[245] Donald Baier, *Arizona Felony Murder: Let the Punishment Fit the Crime*, 36 ARIZ. L. REV. 701, 714 (1994).

[246] *See* Crump & Crump, *supra* note 5, at 374-75.

[247] 40 C.J.S. *Homicide* § 49 (2006).

[248] *See, e.g.*, *id.* § 56; 40 AM. JUR. 2D *Homicide* § 68 (2008); 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 150 (15th ed. 2007).

[249] The author of this Note does not go so far as to opine, however, that confusion or undue waste of limited judicial resources should govern a court's decision to adopt either view, given that a defendant's life and liberty is at stake.

ony. The felony murder doctrine purposely deters the killing of the victim of the felonious act once commission of the felonious act is underway.[250] The rule encourages a defendant to be careful when he commits a felony.[251] Aimed at discouraging violent or reckless behavior during commission of a felony, the harsh results imposed through the doctrine seek to caution a defendant who may otherwise kill to complete his felonious act.[252] However, a defendant who facilitates the commission of a felony by undertaking fatal means to accomplish his goal will be deterred from completing the act if the felony murder doctrine remains applicable in the context of "afterthought" robbery because the prosecution will have alternative means of prosecuting the defendant for murder. The resulting punishment associated with first-degree murder is more readily available upon conviction for felony murder, in light of the different steps required in prosecuting a defendant for felony murder versus the traditional, and more difficult, path required in prosecuting a defendant for first-degree murder.[253]

To reiterate, the law wants to encourage carefulness by deterring dangerous conduct.[254] It is difficult at best to determine (conclusively) whether a defendant had the requisite intent to commit robbery at the time of a killing. However, because the jury has the authority to make this determination, deterrence plays a role in situations where the evidence allows the jury to draw a reasonable inference that the defendant had the necessary intent, and therefore, should have known of the consequences of his actions.

Finally, the notion of transferred intent remains intact to a certain extent, though the timeframe when the intent first arose to commit the felony is inclusive of that occurring immediately after the killing. Although the prosecution need not prove specific intent for a robbery charge in Nevada, the defendant still forms intent at some point during the commission of the felonious act, which can then be attributed back to the homicidal act. Admittedly, this may lessen the strength of the legal fiction behind the transferred intent rationale necessary to prove that the defendant had a malicious intent to kill his victim at the time he committed the felony. However, absent a moment of complete involuntary control over one's own actions, such as acting in "a sudden heat of passion" or "without due caution or circumspection,"[255] an intent to do harm arises during the overall occurrence. Therefore, although the connection may not be as simple and straightforward as in the generally understood context of

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[250] *See* Cole, *supra* note 2, at 21.

[251] *See* Birdsong, *supra* note 2, at 2-3.

[252] *See* Tomkovicz, *supra* note 1, at 1448-51.

[253] *See* NEV. REV. STAT. § 200.030(1)(a) (2007) (requiring the state to prove the killing was "willful, deliberate and premeditated"). The author of this Note is not proposing that the State should easily be able to convict a defendant, who is otherwise innocent until proven guilty, with first-degree murder. However, until the Nevada Legislature eliminates the felony murder doctrine altogether, or clarifies the current ambiguity in the statute to account for the context of murder felony, the State should have the right to prosecute a defendant for felony murder, even if the burden is somewhat lighter than a prosecution for first-degree murder in the traditional sense.

[254] Nay v. State, 167 P.3d 430, 434 (Nev. 2007).

[255] *See* NEV. REV. STAT. § 200.040(2) (2007) (setting forth the statutory elements for manslaughter in Nevada).

traditional felony murder, the defendant does emanate an unlawful intent during the course of an "afterthought" robbery, satisfying the legal fiction of transferred intent.

In sum, the minority view still abides by many of the underlying purposes and rationales behind the felony murder doctrine and does not overtly extend the law to punish a person for conduct not otherwise attributable to his own criminal behavior. Ultimately, the State seeks to prosecute an individual with blood on his hands, and affording dispositive weight to a defendant's argument that he committed a robbery only as an afterthought, completely unrelated to the homicide, rather than affording due weight to the State's presentation of ample circumstantial evidence to indicate otherwise, unfavorably sides with the criminal over the State. The State is merely seeking justice on behalf of the general public for the consequences of the criminal behavior of a particularly culpable individual.

B. Choosing to Adopt the Minority View in Nevada Will Not Expose a Defendant to the Death Sentence Absent Other Aggravating Circumstances Other Than the Felonious Act

One particularly warranted fear of courts hesitating to adopt the minority view is the resulting consequence that the decision may have on the type of punishment a defendant may receive for a felony murder conviction in the context of "afterthought" robbery.[256] Although Nevada courts no longer conduct a proportionality review of death sentences, but rather, review a death penalty for excessiveness, "considering only the crime and the defendant at hand,"[257] imposing the death penalty on a defendant in the context of murder felony admittedly raises doubt as to whether adhering to the minority view will prevent imposing excessive punishment on a defendant. A defendant charged and convicted of felony murder may not have had the requisite intent to commit murder (in other words, only the intent to commit the underlying felony) which otherwise justifies imposing the death sentence.[258] However, as discussed more fully below, the Nevada Supreme Court's recent decision in *McConnell v. State*[259] eliminates any concern that adopting the minority view could result in a defendant receiving a death sentence where a district court upholds a felony murder conviction in the context of "afterthought" robbery.

Nevada Revised Statutes, section 200.030 provides, in pertinent part, as follows:

> A person convicted of murder of the first degree is guilty of a category A felony and shall be punished: (a) By death, only if one or more aggravating circumstances are

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[256] *See, e.g.*, Metheny v. State, 755 A.2d 1088, 1110-20 (Md. 2000).

[257] *See, e.g.*, Dennis v. State, 13 P.3d 434, 440 (Nev. 2000); *see also* NEV. REV. STAT. § 177.055(2)(e) (2007) (mandating review of a death sentence for excessiveness by the Nevada Supreme Court on appeal, even if the defendant waives the right to appeal).

[258] *See, e.g.*, NEV. REV. STAT. § 200.030(1)(a) ("Murder of the first degree is murder which is . . . [p]erpetrated by means of poison, lying in wait or torture, or by any other kind of *willful, deliberate and premeditated killing*. . . .") (emphasis added).

[259] McConnell v. State, 102 P.3d 606 (Nev. 2004), *reh'g denied*, 107 P.3d 1287 (Nev. 2005).

> found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances . . . .[260]

Section 200.033 of the Nevada Revised Statutes prescribes "the circumstances by which murder of the first degree may be aggravated;"[261] particularly relevant is the following:

> 4. The murder was committed while the person was engaged, alone or with others, in the commission of, or an attempt to commit or flight after committing or attempting to commit, any robbery . . . and the person charged:
>
> (a) Killed or attempted to kill the person murdered; or
>
> (b) Knew or had reason to know that life would be taken or lethal force used.[262]

The State's use of the predicate enumerated felony for conviction of felony murder as an aggravating circumstance to impose the death penalty on the defendant in a capital prosecution creates ample concern. The United States Supreme Court requires a constitutional capital sentencing scheme to "genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."[263] This requirement stems from the United States Supreme Court's decision in *Lowenfield v. Phelps*,[264] where the sole aggravating circumstance warranting the imposition of a death sentence on the defendant was the same element used in convicting the defendant of capital murder.[265] Based on the ruling in *Lowenfield*, the Nevada Supreme Court decided in *McConnell* that further narrowing of death eligibility was necessary in light of the broad language of Nevada's felony murder statute.[266] Additionally, the court found that the felony aggravator set forth in section 200.033(4) of the Nevada Revised Statutes was insufficient to narrow death eligibility to satisfy constitutional impositions mandated by the United States Supreme Court.[267] Therefore, the court held that, "in cases where the State bases a first-degree murder conviction . . . on felony murder, to seek a death sentence the State [has] to prove an aggravator *other than* one based on the felony murder's predicate felony."[268]

In light of the decision in *McConnell*, a penalty imposing death on the defendant in *Nay* would have been unlawful for the State to pursue, or the district court to impose, absent other aggravating circumstances. Although Nay could have received life in prison,[269] a life sentence is arguably proportional to the severity of the crimes that he committed. Regardless, death was not an

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[260] NEV. REV. STAT. § 200.030(4) (2007).
[261] NEV. REV. STAT. § 200.033 (2007).
[262] *Id.* § 200.033(4).
[263] *McConnell*, 102 P.3d at 620-21 (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)).
[264] Lowenfield v. Phelps, 484 U.S. 231, 246 (1988).
[265] *See McConnell*, 102 P.3d at 620 (discussing briefly how the *Lowenfield* decision "provide[d] the basic analytic framework [for the court] to approach [the] issue").
[266] *Id.* at 622.
[267] *See id.* at 621-24.
[268] *Id.* at 624 (emphasis added).
[269] *See* NEV. REV. STAT. § 200.030(4)(b) (2007). As discussed in Part III.B, the district court sentenced Nay to two consecutive life sentences for the felony murder conviction. *See supra* notes 159-60 and accompanying text.

option, absent a showing of other aggravating circumstances[270] not outweighed by one or more mitigating circumstances[271] as may have been presented by the State at Nay's sentencing hearing.[272]

Although the limit on imposing the death penalty on a defendant convicted of first-degree murder in the context of "afterthought" robbery may not be available in other states,[273] the Nevada Supreme Court should not consider similar arguments submitted on this issue after its ruling in *McConnell*. Therefore, the minority view may find additional support before the Court because the State may not pursue, and a district court may not impose, a death sentence on a defendant convicted of felony murder in the context of "afterthought" robbery based solely on circumstantial evidence, where the jury found that the homicide was part of the *res gestae* of the felonious act. Rather, the State must present to the jury other aggravating circumstances that outweigh any mitigating circumstances.

V. CONCLUSION

The facts and circumstances underlying the principal case are questionable at best. Although the author of this Note does not propose to have a better perspective on the matter than the justices of the Nevada Supreme Court who took the case en banc, he does question the heavy degree of reliance and deference afforded to the defendant's confession and "afterthought" defense. Although the presumption of "innocent until proven guilty" is vital to our system of criminal justice,[274] a reasonably prudent person may doubt that the defendant in *Nay v. State* only formed the intent to rob his victim after the killing. The lack of any eyewitnesses to attest to the crimes committed, the multitude of incriminating statements voiced by the defendant afterward, and the jury's disbelief in the defendant's "afterthought" defense substantiates, rather than diminishes, the likelihood that the defendant had the intent to rob on or around the time he killed his victim. As discussed at length in this Note, the *res gestae* approach encompasses circumstances that give rise to murder felony where the two crimes are so intimately associated and interrelated as to be part and parcel of the same overall criminal episode, and state courts adopting the minority view properly recognize the criminal culpability of a defendant who cries "afterthought" to charges for felony murder. The majority view simply falls short.

Given the current interstate conflict over support for the majority and minority views, it will be interesting to observe how other state courts adjudicate cases involving murder felony in general, and "afterthought" robbery in

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[270] *See* NEV. REV. STAT. § 200.033 (2007).
[271] *See* NEV. REV. STAT. § 200.035 (2007).
[272] *See* § 200.030(4)(a).
[273] *See, e.g.*, Cole, *supra* note 2, at 19-21, 25-26, 52-55 (fearing that a conviction based on afterthought robbery in Ohio will result in a death sentence through committing aggravated murder while committing an enumerated felony under the requisite statute, thus destroying the narrowing requirement and the limiting principles of the Eighth Amendment of the United States Constitution).
[274] *See, e.g.*, NEV. REV. STAT. § 175.191 (2007) ("A defendant in a criminal action is presumed to be innocent until the contrary is proved . . . .").

particular (both for those courts that have yet to visit the issue, and for those courts that revisit the issue in future opinions). In the meantime, the judiciary should not impede the State's authority to prosecute a defendant to the fullest extent permitted by law. Until the Nevada Legislature amends the felony murder statute and specifically requires the prosecution to prove that a defendant intended to commit a predicate enumerated felony prior to or concurrent with committing a homicide,[275] the State should be allowed to charge a defendant with, and seek a conviction for, felony murder when the circumstances indicate that the homicide occurred prior to the felonious act. The aftermath of the *Nay* decision adds a new burden on the State when prosecuting a defendant for felony murder in the context of "afterthought" robbery not founded in state precedent or the statutes proscribing robbery and murder. The author of this Note hopes the Nevada Supreme Court will take notice of the viable substantive legal arguments and corresponding social policy reasons for following the minority view, and reconsider its holding in *Nay* (particularly when coupled with the implications of the *McConnell* decision). Whether a defendant commits felony murder or murder felony, the result should be the same.

[275] *See, e.g.*, TENN. CODE ANN. § 39-13-202(b) (2008) ("No culpable mental state is required for conviction under subdivision (a)(2) [(the felony murder provision)] . . . except the *intent* to commit the enumerated offenses or acts in [that] subdivision[ ]."") (emphasis added).