COLORADO SUPREME COURT Colorado State Judicial Building 2 East 14th Avenue Denver, CO 80203 Telephone: (303)837-3790	
Certiorari from the Colorado Court of Appeals, Case No. 99CA16	
Petitioner: LISL AUMAN **Respondent:** THE PEOPLE OF THE STATE OF COLORADO	▲COURT USE ONLY▲ **Case No.02SC885**
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OPENING BRIEF OF AMICUS CURIAE

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INTRODUCTION

The felony murder rule is a prosecutor's dream. It permits a murder conviction in a felony case where a death occurs, even though the death was not intended. It imputes malice from the commission of the felony, effectively reducing the prosecution's burden of proof for homicide. Joshua Dressler, *Understanding Criminal Law*, § 31.06[B][5] at 482-83 (2d ed. 1998); *see* Note, *Felony Murder as a First Degree Offense: An Anachronism Retained*, 66 Yale L.J. 427, 432 (1947) (felony murder broadens scope of first degree murder by supplying proof of mental state in law that may not exist in fact).

The rule is also inherently illogical and unfair. It does not punish an actor for the social harm caused by her intentional conduct. Instead, it looks beyond the intentional conduct to punish the social harm caused by an unintended, perhaps unforeseeable result—and it does so with the severest possible penalties available under law. Even if a felony that results in a death should be punished more severely than one that does not, it hardly follows that the person who commits a felony and has absolutely no intent or expectation that anyone will die is as deserving of these ultimate punishments as is the premeditated murderer. Dressler, *Understanding Criminal Law*, § 31.06[B][3] at 481-82. *See Enmund v.Georgia,* 458 U.S. 782, 798-801 (1982) ("American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to 'the degree of his criminal culpability,' and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing."), quoting *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975).

These are but a few of the reasons why the felony murder rule is justifiably seen as "an unsupportable 'legal fiction,' 'an unsightly wart on the skin of the criminal law,' and as an 'anachronistic remnant' that has 'no logical practical basis for existence in modern law.'" Nelson E. Roth & Scott E. Sundby, *The Felony Murder Rule: A Doctrine at Constitutional Crossroads*, 70 Cornell L.Rev. 446 (1985) (internal citations omitted). In fact, criticism of the rule "constitutes a lexicon of everything that scholars and jurists can find wrong with a legal doctrine." *Id.* The National Association of Criminal Defense Lawyers stands with those who reject the basic logic of the felony murder rule.[1]

The NACDL therefore urges this Court to reverse the Court of Appeals' judgment affirming Ms. Auman's conviction. Judge Webb's majority opinion, arising out of a prosecution that has been widely reported in the media—and that has been roundly criticized from the very moment Lisl Auman was charged with felony murder in 1998—gives a stunningly broad reading to Colorado's version of the felony murder rule. The majority's construction of § 18-3-102(1)(b), 6 C.R.S., minimizes that statute's specific demand for proof of a causal connection between a defendant's felonious act and the

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[1]Felony murder has been abolished in Hawaii, Kentucky, and Michigan. Haw. Rev. Stat. § 707-701 (1985 & Supp.1989) (abolishing the felony-murder doctrine); Ky. Rev. Stat. Ann. § 507.020 (Michie/Bobbs-Merrill 1985 & Supp.1988) (including no felony-murder provision in its murder statute); *People v. Aaron*, 299 N.W.2d 304 (Mich. 1980) (abolishing the felony-murder doctrine by holding that the term "murder" in the first degree murder statute requires the state prove malice for all first degree murders). Ohio effectively abolished the felony murder rule by defining a death caused by commission or attempt to commit a felony as involuntary manslaughter. Ohio Rev.Code Ann. §§ 2903.01 and .04 (Baldwin 1988). England, whose common law rule is the foundation for the felony murder rules adopted throughout this country, abolished felony murder by act of Parliament in 1957. Homicide Act, 5 & 6 Eliz. 2, ch. 11 (1957) (Eng.)

resulting death, and it narrows the elements and issues on which a jury must be instructed. *People v. Auman*, 67 P.3d 741 (Colo.App. 2002).

Felony murder, punishable by death or life in prison, is among the most serious offenses integrated into Colorado's modern criminal code. *See Alvarez v. District Court*, 186 Colo. 37, 525 P.2d 1131 (1974) (summarizing the legislative history of the felony murder statute). Since malice is not an element for this brand of murder, by default the most critical aspect of crime is the existence of a causal connection between the actor's felonious conduct and the death. *E.g., Callis v. People*, 692 P.2d 1045, 1054 (Colo. 1984) ("This statute makes clear that the legal basis of criminal liability for felony murder is the causation of another's death in the course of or in furtherance of certain enumerated felonies or in the course of immediate flight therefrom."); *People v. Rostad,* 669 P.2d 126, 128 (Colo. 1983) (felony murder liability not established without "proof by the prosecution of the causal relationship between the defendant's conduct and the result"); *Alvarez*, 186 Colo. at 40-41, 525 P.2d at 1132-33 (the felony murder statute codifies the common law's limitation of liability "to a participant in the underlying felony [ ] who caused the death of another while perpetrating or attempting to perpetrate the felony, or while fleeing therefrom"); *see People v. Saavedra-Rodriguez,* 971 P.2d 223, 225-27 (Colo. 1999) (defendant absolved of criminal liability for death of victim if an intervening act "destroys the causal connection between the defendant's act and the victim's injury and, therefore, becomes the cause of the victim's injury"), citing *People v. Calvaresi*, 188. Colo. 277, 283, 534 P.2d 316, 319 (1975).

The *Auman* opinion presents a host of groundbreaking holdings related to causation. The opinion interprets the statutory phrase "in the course of or in furtherance of the crime that [s]he is committing or attempting to commit, or of immediate flight therefrom, the death of a [nonparticipant] is caused by anyone," and establishes a broad new definition of "immediate flight" that expands the *res gestae* of the underlying felony. *Auman*, 67 P.3d at 751-72. Remarkably, the opinion declares the pattern jury instruction for felony murder to be the definitive black letter law on all matters relating to causation—no clarification of definitions or of the specific underlying offense need be supplied to a jury, ever. *Id.* at 754-55. The decision holds that the statutory phrase "that she is committing or attempting to commit" is surplusage and not intended by the legislature to limit the reach of the felony murder liability. *Id.* at 751, 754. It treats the concept of "intervening cause" as an evidentiary issue and not a matter of law on which a jury instruction is required if supported by the necessary scintilla of credible evidence. *Id.* at 755.

These compelling issues arise from a case with equally compelling facts. Lisl Auman is imprisoned for the rest of her life even though she was in police custody when a police officer was killed in a gun battle with Mattheus Jaehnig. Jaehnig was a virtual stranger to Ms. Auman.

Lisl Auman had enlisted a few friends to help her retrieve her own belongings from her ex-boyfriend's room. Those friends, not one of whom was charged with felony murder despite participating in and fleeing from an alleged felony, brought Mattheus Jaehnig along. He was already on the run from police; he had guns hidden in his stolen car; he was high on near-toxic levels of speed; he

just wanted to get Lisl Auman alone and have sex with her. When Lisl Auman got into his car, she knew none of these things.

Well after Jaehnig drove away from the rooming house, police responding to a reported burglary sighted Jaehnig's car heading down the road toward Denver. Jaehnig spied the police and led them on a breakneck chase at deadly speeds down a winding two-lane mountain highway, through metropolitan traffic and into a Denver neighborhood. Lisl Auman was terrified.

At the end of a long and frightening ride punctuated by Jaehnig's threats to do her harm, Lisl Auman surrendered to the police; Jaehnig chose to run. While she sat handcuffed in a police car, he played a game of cat-and-mouse with police until he shot and killed one of them, then killed himself. Lisl Auman alone was charged with felony murder. She alone was convicted for the offense.

This Court granted certiorari to determine "whether the court of appeals properly determined that the petitioner's arrest by police did not preclude her liability for felony murder." The answer to that question necessarily revolves around the issue of causation in the felony murder statute. The simplistic causation analysis advanced by the prosecution at trial improperly broadened the scope of liability for felony murder to punish Lisl Auman for the mad and unforeseeable acts of a stranger which were beyond her control. The Court of Appeals sanctioned that overly broad reach of felony murder by holding that "the felony murder statute

does not include any particular standard of causation, and that there was no need to define

causation beyond the elemental instructions that included the statutory language." *Id.* at 755.

ARGUMENT

I. CRIMINAL CAUSATION IS NOT A SIMPLE "BUT FOR" PROPOSITION.

Criminal causation is properly determined employing a multi-part test. First, the prosecution must prove that the defendant's conduct was the cause-in-fact of the result. *See* 1 W. LaFave & A. Scott, Jr., *Substantive Criminal Law* § 3.12, at 390 (1986); Paul H. Robinson, *Criminal Law Defenses* § 88(b) (1984). In homicide cases, this usually means that the prosecution must prove the death would not have occurred "but for" the defendant's conduct. *See* 1 LaFave & Scott, *supra,* § 3.12(b) at 393-94. Under the Model Penal Code, "[c]onduct is the cause of a result when ... it is an antecedent but for which the result in question would not have occurred." *Model Penal Code* §2.03(1)(a) (2000). *See, e.g.*, Ariz. Rev. Stat. Ann. § 13- 203(A) (1989); Del. Code Ann. tit. 11, § 261 (1987); N.J. Stat. Ann. § 2C:2-3(a)(1) (West 1982); 18 Pa. Cons. Stat. Ann. § 303(a)(1) (1983); Tex. Penal Code Ann. § 6.04(a) (West 1974). Another formulation of the same concept is that the defendant's conduct was a "substantial factor" in bringing about the result in question. *See* 1 LaFave & Scott, *supra*, § 3.12(b) at 394- 95; David J. Karp, Note, *Causation in the Model Penal Code*, 78 Colum. L. Rev. 1249, 1265 (1978).

A "but for" relationship between conduct and result will not establish criminal causation. "Even where a 'but for' relationship exists, a defendant may yet escape liability if the harmful result caused is so remote or accidental in its manner of occurrence as to make it unjust to hold the defendant liable for it," Robinson, *Criminal Law Defenses, supra,* § 88(b)—that is, if the conduct is not the "legal" or

"proximate" cause of the result. *See id.* at § 88(e); Model Penal Code § 2.03(1)(b). In short, prosecutors must prove that the defendant's conduct is also the "legal" or "proximate" cause of the criminal result, *People v. Rostad*, 699 P.2d 126, 128 (Colo. 1983); *see generally* 1 LaFave & Scott, *Substantive Criminal Law, supra*, § 3.12(c) at 396-99, and both remoteness and foreseeability of result will play a role in the determination.[2]

II. "LEGAL" OR "PROXIMATE" CAUSE HAS ITS LIMITS: THE ROLE OF INTERVENING CAUSE AND FORESEEABILITY IN PROVING CRIMINAL CAUSATION IN FELONY MURDER CASES.

The "gist" of the concept of proximate cause in the criminal law "is the not-so-complex principle that persons normally should be deemed responsible for the natural and probable consequences of their acts. The principle serves an evidentiary function, requiring proof by the prosecution of the causal relationship between the defendant's conduct and the result." *Rostad*, 669 P.2d at 128, citing *Hamrick v. People*, 624 P.2d 1320 (Colo.1981).

Whether there is a sufficient causal connection between the felony and the homicide "depends on whether the [principal's] felony dictated [the] conduct which led to the homicide." 1 W. LaFave & A. Scott, Jr., *Handbook on Criminal Law* § 71, at 557 (1972); *see People v. Saavedra-Rodriguez*,

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[2]Once "but for" causation is proved, prosecutors also must establish

(1) that the result is not too remote or accidental in its manner or occurrence to have a just bearing on the actor's liability or on the gravity of the offense; and

(2) that the relationship between the conduct and the result satisfies any additional causal requirements imposed by the Model Penal Code or by the law defining the offense.

Robinson, *Criminal Law Defenses, supra,* § 88 (c).

971 P.2d 223, 225-226 (Colo. 1999) (a conviction for criminal homicide "requires proof beyond a reasonable doubt that death was a natural and probable consequence of the defendant's unlawful act"), citing *Hamrick*, 624 P.2d at 1324.

Unlawful conduct which is broken by an independent intervening cause is too remote to constitute the legal or proximate cause of another person's death. *Id.*; *People v. Calvaresi*, 188 Colo. 277, 534 P.2d 316, 319 (1975).

> To warrant a conviction for homicide, the death must be the natural and probable consequence of the unlawful act, and not the result of an independent intervening cause in which the accused does not participate, and which he could not foresee. If it appears that the act of the accused was not the proximate cause of the death for which he is being prosecuted, but that another cause intervened, with which he was in no way connected, and but for which death would not have occurred, such supervening cause is a defense to the charge of homicide.

1 Ronald A. Anderson, *Wharton's Criminal Law and Procedure* § 200, at 448 (12th ed.1957); *Calvaresi,* 534 P.2d at 319 (adopting Wharton's rule on intervening cause); *see* Robinson, *Criminal Law Defenses*, *supra,* § 88 (e) ("The remoteness issue ... is whether the physical causal connection is present but too attenuated to be relied upon. At common law these issues were frequently considered under the rules defining and governing the effect of 'superseding' or 'intervening' cause.").

A defendant "is absolved of liability for the death of the victim" if there has been an unforeseeable independent intervening act or cause, because that act "destroys the causal connection between the defendant's act and the victim's injury and, therefore, becomes the cause of the victim's injury." *Saavedra-Rodriguez*, 971 P.2d at 225-27, citing *Calvaresi*; *Coleman v. United States*, 295

F.2d 555, 561 (1961) (arrest of the defendant "will break the essential link between the robbery and the killing" and presents a jury question), *cert. denied*, 369 U.S. 813, 82 S.Ct. 689, 7 L.Ed.2d 613 (1962).

The concept of intervening cause is applicable to felony murder in Colorado.[3] *People v. Bowman*, 669 P.2d 1369, 1379-80 (Colo. 1983) (directing the district court to instruct the jury on intervening or supervening cause case charging first degree murder, felony murder and arson, if still supported by evidence on retrial); *People v. Burns*, 686 P.2d 1360, 1361 (Colo.App. 1983) (noting that felony murder/burglary jury properly received instruction on intervening cause). *See* 2 LaFave & Scott, *Substantive Criminal Law, supra,* § 7.5 at 214 ("When death has occurred only as a consequence of some intervening act following the defendant's conduct (as is frequently the case in the felony-murder context), the issue is frequently put in terms of whether the intervening cause was 'foreseeable' (as distinguished from actually 'foreseen').").

An intervening act can be a coincidence, where the defendant's conduct puts the victim at a certain place at a certain time. Or, the intervening act can be a response, where it is a reaction to conditions that were created by the defendant. Generally, if the intervening act creates a coincidence,

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[3]In Colorado, felony murder is defined at § 18-3-102(1)(b):

> (1) A person commits the crime of murder in the first degree if:
> (b) Acting either alone or with one or more persons, he or she commits or attempts to commit arson, robbery, burglary, kidnaping, sexual assault..., or the crime of escape..., and, in the course of or in furtherance of the crime that he or she is committing or attempting to commit, or in immediate flight therefrom, the death of a person, other than one of the participants, is caused by anyone.

that act will break the causal chain unless it was foreseeable. If the intervening act is a response to the conditions created by the defendant, the intervening act will break the causal chain if it is an abnormal response. The same analysis applies in the situation where a nonparticipant in the felony kills a police officer. *See* Michelle S. Simon, *Whose Crime Is it Anyway?: Liability for the Lethal Acts of Nonparticipants in the Felony*, 71 U.Det. Mercy L.Rev. 223, 256-57 (Winter 1994).

Any homicide that is "a fresh and independent product of the mind of one of the confederates, outside of, or foreign to, the common design" of the other confederates is the product of an unforeseeable intervening act or cause, Anderson, *Wharton's Criminal Law and Procedure, supra,* § 252 at 547, which cannot support a felony murder conviction. "There is no criminal responsibility on the part of an accomplice if the homicide is a fresh and independent product of the killer's mind." *Id.*; *People v. Aaron,* 299 N.W.2d 304, 327 (Mich. 1980) ("It is fundamentally unfair and in violation of basic principles of individual criminal culpability to hold one felon liable for the unforeseen and unagreed-to results of another felon.").

Not surprisingly, uncommon and contorted fact patterns are the hallmark of the unforeseeable or intervening cause cases. So, for example:

- "[I]f one of two burglars ransacking a home glances out of a window, sees his enemy for whom he has long been searching and shoots him, the unarmed accomplice, party only to the burglary" would be absolved of felony murder liability. Morris, *The Felon's Responsibility for the Lethal Acts of Others,* 105 U.Pa.L.Rev. 50, 73 (1956); *see Commonwealth v. Walters*, 418 A.2d 312, 317 (Pa.1980).

- Felony murder liability will be in doubt when the common scheme or design was to commit a burglary of an unoccupied residence, the defendant encounters but does not harm the homeowner, yet the homeowner dies as the result of a sexual battery subsequently committed

by the codefendant who has a history of predatory homosexual conduct. *Bryant v. State*, 412 So.2d 347, 349 (Fla.1982) (facts supported jury instruction on independent act, conviction reversed).

- Felony murder liability is in doubt when the defendant and friends make and execute a plan to combine their efforts to sexually assault a woman they know, but when the woman unexpectedly strikes one of the other men he does the unexpected—he pulls out the knife concealed in his pocket and stabs the woman, causing her death. *United States v. Heinlein*, 490 F.2d 725, 728 (D.C. Cir. 1973) (facts supported instruction on intervening cause, conviction reversed).

- If A, B, and C undertake to rob X and, in the process, B accidentally kills either X or C, A is guilty of felony-murder. If, however, B, angry at C's inept manner of assisting in the robbery of X, intentionally shoots C, "B's intentional shooting of C is so far removed from the common plan as not to make A responsible for B's intent-to-kill murder." 2 Lafave & Scott, *Substantive Criminal Law, supra,* § 7.5 at 212. The reason is that "B's conduct had nothing to do with furthering the robbery, the only connection between the robbery and the shooting being a mere coincidence of time and place." *Id.*

- "If A and B start out together with the design to kill C, and while that design exists B kills D as a separate and distinct act, not as a part of the offense designed against C, A is not guilty of the crime of murder in the first degree or of any crime merely because he has murder in his heart directed at C at the time of such killing." *People v. Sobieskoda*, 139 N.E. 558, 559 (N.Y. 1923).

Lisl Auman's case fits squarely into the irregular mold of the cases and scenarios in which causation is cut off by intervening causes and unforeseeable results. Everything about Mattheus Jaehnig's conduct was unforeseeable and independent of any purported burglary: he had his own reasons for offering Ms. Auman a ride to and from the rooming house (sex), for fleeing from police (stolen car and illegal guns), for putting himself, Lisl, and everyone on or near the road at risk with his death-defying driving and gunplay (ingestion of toxic levels of methamphetamine). He was a self-destructive maniac Lisl Auman had never met before, and by the time he shot Vanderjagt, he was on

his own in every possible way. Under these facts, there was no causal connection between the felony and the officer's death.

III. EVEN "BUT FOR" LIABILITY HAS ITS LIMITS: THE UNFORESEEABLE WILL BREAK THE CAUSAL CHAIN IN FELONY MURDER CASES.

A handful of jurisdictions purport to impose felony murder liability when only the "but for" element of causation has been met. Mostly, they have done so in order to attach felony murder liability when the death is caused not by the accused or a co-felon but by police or victims resisting the felony. *See, e.g., Palmer v. State*, 704 N.E.2d 124, 126 (Ind. 1999) (accomplice killed by police while trying to escape); *State v. Lowery*, 687 N.E.2d 973, 977 (Ill. 1997) (accomplice killed by police); *State v. Hernandez*, 624 N.E.2d 661, 662, 664-665 (N.Y. 1993) (victim's retaliation resulted in death of bystander); *State v. Oimen*, 516 N.W.2d 399, 401 (Wis. 1994) (accomplice killed by intended victim of felony); *Mikenas v. State*, 367 So.2d 606, 609 (Fla. 1978) (accomplice killed by police). In other words, these courts hold that when a felon commits a criminal act, he sets in motion a chain of events; if that chain of events leaves a person dead, then the felon is criminally liable for that death. This is precisely the syllogism the prosecution urged in its closing argument in this case. (*Record at* V.6, p. 83-84)

However, even jurisdictions that apply a "but for" test for felony murder causation recognize that liability *cannot* be proved if the causal chain is broken by intervening causes or unforeseeable results. *E.g., State v. Ray*, 755 So.2d 604, 608-9 (Fla. 1999) (independent act doctrine applies "when one co-felon, who previously participated in a common plan, does not participate in acts

committed by his co-felon, 'which fall outside of, and are foreign to, the common design of the original collaboration'") (internal cites omitted); *Lowery*, 687 N.E.2d at 978 ("It is true that an intervening cause ... does relieve a defendant of criminal liability."); *Hernandez*, 624 N.E.2d at 666 ("More than civil tort liability must be established; criminal liability will adhere only when the felons' acts are a sufficiently direct cause of the death. When the intervening acts of another party are supervening or unforeseeable, the necessary causal chain is broken, and there is no liability for the felons.") (internal cites omitted); *Sims v. State,* 466 N.E.2d 24, 25 (Ind. 1984) ("A defendant will not be held criminally responsible for the death of another unless the variation between the result intended or hazarded and the result actually achieved is not so extraordinary that it would be unfair to hold the defendant responsible for the actual result."); *cf. Oimen*, 516 N.W.2d at 408 (foreseeability and intervening cause are taken into account in sentencing). Thus, the prosecution's syllogism apparently adopted by the Court of Appeals describes a too-broad rule of felony murder causation that is simply wrong.

IV. A THEORY OF FELONY MURDER LIABILITY THAT DISREGARDS INTERVENING CAUSES AND UNFORESEEABLE RESULTS DOES NOT ADVANCE PUBLIC POLICY.

A. It is Contrary to Accepted Principles of Criminal Culpability.

The reason courts have adopted a theory of felony murder causation that is narrowed by concepts of intervening causes and remoteness of result is that it yields results that reflect accepted notions of criminal liability.

The primary criticism of the broad "but for" causation theory that was advanced by the prosecutors in Ms. Auman's case is that it extends the tort system's standard of responsibility to the

criminal context and leads to absurd results. Tort notions of causation do not translate so easily to the criminal context because of the very different goals and purposes of each system. *See, e.g., Campbell v. State*, 444 A.2d 1034, 1041 (Md. 1982) ("There is a difference between the underlying rationale of tort and criminal law."); *Washington*, 402 P.2d at 133; Recent Cases, 71 Harv. L. Rev. 1565, 1566 (1958).

The primary purpose of the tort system is to shift the burden of loss from an innocent injured party to whatever party may have had any responsibility for the injury. *See Commonwealth v. Root*, 170 A.2d 310, 311 (Pa. 1961); 1 LaFave & Scott, *Substantive Criminal Law, supra,* § 3.12(c) at 397; Recent Cases, 71 Harv. L. Rev. at 1566. In furthering this purpose of shifting the burden of injuries away from the victim, the trend has been to expand liability, *see Root,* 170 A.2d at 311 (tort law "has been progressively liberalized in favor of claims for damages for personal injuries to which careless conduct of others can in some way be associated"), to the point at which "but for" causation is sufficient to establish civil liability. *Id.; see generally* 1 LaFave & Scott, *Substantive Criminal Law, supra,* at 397 ("The trend in tort law has ... been in the direction of expanding liability, though courts still talk in terms of legal or proximate cause.").

The criminal law has a different mission. It is concerned with imposing punishment on those who deserve it. Recent Cases, 71 Harv. L. Rev. at 1566; *see also* Note, *Felony Murder: A Tort Law Reconceptualization*, 99 Harv. L. Rev. 1918, 1923 (June 1986) ("Criminal punishment should be imposed only after someone has been deemed blameworthy consistent with the central principles of criminal responsibility."). To ensure that criminal liability reflects a defendant's moral culpability and

"because of the extreme penalty attached to a conviction of felony murder, a closer and more direct causal connection is required than the causal connection ordinarily required under the tort concept of proximate cause." *Campbell*, 444 A.2d at 1041; *see also Commonwealth ex rel. Smith v. Myers*, 261 A.2d 550, 557 (Pa. 1970); Recent Cases, 71 Harv. L. Rev. at 1566; Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. Pa. L.Rev. at 59-60.

B. It Will Not Deter Crime.

The broad "but for" theory of felony murder causation argued by the prosecution in Ms. Auman's case does not increase the deterrence value of the felony murder rule enough to justify the increased harshness of its results. Historically, the justification for the felony murder rule has been "to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit." *People v. Washington*, 402 P.2d. 130, 133 (Cal. 1965). The validity of this deterrence rationale has been challenged generally. *See, e.g., Commonwealth ex rel. Smith v. Myers*, 261 A.2d 550, 554 (Pa. 1970) ("[I]t is very doubtful that [the felony-murder rule] has the deterrent effect its proponents assert."); Nelson E. Roth & Scott E. Sundby, *The Felony Murder Rule: A Doctrine at Constitutional Crossroads*, 70 Cornell L.Rev. 446, 451 (1985) ("Quite simply, how does one deter an unintended act?").

The deterrence rationale is even more questionable in cases like this one, where a sweeping "but for" causation analysis is applied to hold the accused liable for unforeseeable killings committed by parties acting for their own independent purposes. If the accused has no control over the self-directed intentional acts of those parties, as was the case here, it is difficult to see how expanding the scope of

the felony murder rule to embrace those acts could deter such killings. *Id.* "[T]he proposition that criminal offenders not deterred by well-established and proper application of the felony-murder rule will be deterred by [a] markedly broader version is dubious at best." *State v. Bonner*, 411 S.E.2d 598, 603 (N.C. 1992).

CONCLUSION

"Criticism of the [felony murder] rule constitutes a lexicon of everything that scholars and jurists can find wrong with a legal doctrine." Roth & Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 Cornell L. Rev. at 446. And yet the Court of Appeals has sanctioned the prosecutorial stretch of the rule, upholding felony murder charges in a case where the causal chain plainly was broken by Mattheus Jaehnig's unforeseeable intervening acts and by ruling that evidence of a felony and a death, standing alone, will support a conviction for the crime.

Felony murder is a most serious offense in Colorado, punishable only by life in prison or by death. Causation is the most critical element of proof for this offense, because it restricts the reach of felony murder to those cases where the defendant's liability is consistent with fairness and established principles of criminal responsibility. If the courts do not put prosecutors to their proof on every facet of this element of felony murder, unjust results, as in this case, are sure to follow.

DATED: June 4, 2003.

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