

Casenote

***State v. Jackson* and the Explosion of Liability for Felony Murder**

I. INTRODUCTION

In *The Discourses*,¹ Niccolò Machiavelli wrote, “The dangers involved in conspiracies[] . . . are considerable, and go on all the time, for in a conspiracy dangers crop up alike in forming the plot, in carrying it out, and as a result of its having been carried out.”² Although by its context this remark refers to conspiracies to commit regicide and the problems these conspiracies pose to the conspirators,³ this remark well describes practical and legal problems that can result from conspiracies to commit felonies. In Georgia this is particularly true following the June 28, 2010 ruling in *State v. Jackson*.⁴ *Jackson* involved a conspiracy, the failure of which caused one conspirator’s death and exposed his fellow conspirators to liability for a crime greater than the conspiracy’s intended aim.⁵ In what could lead to an explosion of criminal liability, the Georgia

1. NICCOLÒ MACHIAVELLI, *THE DISCOURSES* (Bernard Cricked ed., Leslie J. Walker trans., Penguin Books 1970).

2. *Id.* at 401.

3. *See id.*

4. 287 Ga. 646, 697 S.E.2d 757 (2010).

5. *See id.* at 646-47, 697 S.E.2d at 757-58.

Supreme Court held that whenever one felon dies as a proximate result of the felony, the co-felons are liable for felony murder.⁶ Abolishing the decades-old rule from *State v. Crane*,⁷ the court extended defendants' felony-murder liability to killings committed by their prospective victims.⁸

II. FACTUAL BACKGROUND

The chain of events giving rise to *State v. Jackson*⁹ started when Jerold Daniels and the two co-defendants, Carlester Jackson and Warren Smith, planned the armed robbery¹⁰ of a supposed drug dealer named Arthur Hogan.¹¹ At the time of the incident, Smith and Jackson waited in the vicinity;¹² Smith stayed in an SUV, ready to fulfill his job as the getaway driver, while Jackson stood by as Daniels's lookout.¹³ As Daniels, armed with a handgun, moved in to carry out the robbery, Hogan realized what was going on, and a gunfight ensued. At least one bullet from Hogan's gun hit Daniels, killing him. Smith and Hogan left immediately after the shooting, but Jackson was arrested at the site by an off-duty police officer. Smith returned briefly to the scene but drove away when he encountered the police. He escaped briefly to Rhode Island before he was caught and extradited back to Georgia.¹⁴

The prosecution obtained indictments against Jackson and Smith for the felony murder of Daniels. Both Smith and Jackson were accused of aggravated assault as an underlying felony to felony murder.¹⁵ Smith faced an additional felony murder charge based on "possession of a firearm by a convicted felon."¹⁶ The trial judge dismissed the felony murder charges because the causal link between the defendants' actions and the victim's death was indirect.¹⁷ The State petitioned the supreme court, which granted certiorari.¹⁸

6. *Id.* at 653, 660, 697 S.E.2d at 762, 767.

7. 247 Ga. 779, 279 S.E.2d 695 (1981).

8. *See Jackson*, 287 Ga. at 647, 652, 660, 697 S.E.2d at 758, 762, 767.

9. 287 Ga. 646, 697 S.E.2d 757 (2010).

10. *Id.* at 646, 697 S.E.2d at 757-58.

11. Brief of Appellant at 3-4, *State v. Jackson*, 287 Ga. 646, 697 S.E.2d 757 (2010) (No. S10A0070), 2009 WL 5244085 at *5.

12. *Jackson*, 287 Ga. at 648, 697 S.E.2d at 758.

13. Brief of Appellant, *supra* note 11, at 4.

14. *Id.* at 4-5.

15. *Jackson*, 287 Ga. at 648, 697 S.E.2d at 758.

16. *Id.*

17. *Id.*

18. *Id.* at 648, 697 S.E.2d at 758-59.

III. LEGAL BACKGROUND

An understanding of aiding and abetting, conspiracy, and felony murder in Georgia is necessary to appreciate the impact of the holding in *State v. Jackson*¹⁹ and its legal implications.

A. *Aiding and Abetting and Conspiracy*

Section 16-2-20 of the Official Code of Georgia Annotated (O.C.G.A.)²⁰ reads as follows:

- (a) Every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime.
- (b) A person is concerned in the commission of a crime only if he:
 - (1) Directly commits the crime;
 - (2) Intentionally causes some other person to commit the crime under such circumstances that the other person is not guilty of any crime either in fact or because of legal incapacity;
 - (3) *Intentionally aids or abets in the commission of the crime or*
 - (4) *Intentionally advises, encourages, hires, counsels, or procures another to commit the crime.*²¹

Under subsection (b)(3) an aider or abettor who is not “personally involved in” a crime is still vicariously liable for the crime.²² In *Carter v. State*,²³ the Georgia Court of Appeals articulated this rule.²⁴ The defendants, Carter and Waters, were charged with aggravated sodomy. Carter coerced the victim into engaging in sodomy with Waters by beating the victim.²⁵ The court held that Carter aided and abetted the sodomy.²⁶

The judiciary in Georgia has also determined that O.C.G.A. § 16-2-20 creates vicarious liability for conspirators.²⁷ As announced in *Bruce v. State*,²⁸ participants in a conspiracy are vicariously liable for “inciden-

19. 287 Ga. 646, 697 S.E.2d 757 (2010).

20. O.C.G.A. § 16-2-20 (2007).

21. *Id.* (emphasis added).

22. *Carter v. State*, 168 Ga. App. 177, 177, 308 S.E.2d 438, 439-40 (1983); *see also* O.C.G.A. § 16-2-20(b)(3).

23. 168 Ga. App. 177, 308 S.E.2d 438 (1983).

24. *Id.* at 177, 308 S.E.2d at 439-40.

25. *Id.* at 177, 308 S.E.2d at 439.

26. *Id.* at 177, 308 S.E.2d at 439-40.

27. *See, e.g., Grant v. State*, 198 Ga. App. 357, 358, 401 S.E.2d 761, 762-63 (1991) (quoting *Scott v. State*, 229 Ga. 541, 544, 192 S.E.2d 367, 370 (1972)).

28. 263 Ga. 273, 430 S.E.2d 745 (1993).

tal and probable" measures taken by another participant to facilitate a conspiratorial objective, whether or not such measures were agreed upon.²⁹

In *Bruce* the Georgia Supreme Court applied this rule to a conspiracy to commit burglary.³⁰ Johnny Bruce, the defendant, made plans with Jack Adams and Randall Pettyjohn to burglarize Donald Ivey's house. In preparation, Bruce dropped off Adams and Pettyjohn close to Ivey's house, equipping them with a gun and binoculars as well as pantyhose to conceal their faces. The purpose was to reconnoiter before committing the burglary. According to the plan, Adams and Pettyjohn were supposed to call Bruce from a convenience store to pick them up following their reconnoiter. Instead, Adams and Pettyjohn chose to break in alone. Upon doing so, they were surprised by the presence of Ivey's girlfriend. While the burglars were still there, Ivey came back home. Receiving no reply after calling to his girlfriend, he walked into the living room where the burglars were restraining his girlfriend at knifepoint, and he exchanged gunfire with Adams. Adams was hit first by two bullets; however, before dying Adams fatally wounded Ivey.³¹

Bruce was found guilty of Ivey's murder. On appeal to the supreme court, Bruce argued that the conspiracy he formed with Adams and Pettyjohn was only to reconnoiter and was distinct from the conspiracy Adams and Pettyjohn formed to carry out the burglary.³² The court rejected that argument, holding that knowledge of when a crime would be attempted is unnecessary for a conspirator's vicarious liability.³³ The court reasoned that Bruce had a "common design" with Adams and Pettyjohn—to perpetrate a burglary—and the measures Adams and Pettyjohn took "were expedient to the accomplishment of the common design."³⁴

The supreme court decision in *Crosby v. State*³⁵ outlines the temporal extent of conspirator liability.³⁶ The court addressed conspirator liability for the theft of an automobile.³⁷ The court stated that conspirator liability extends to "such matters as concealing the crime or suppressing evidence."³⁸ The court held that the duration of a

29. *Id.* at 274-75, 430 S.E.2d at 747.

30. *Id.* at 275, 430 S.E.2d at 747-48.

31. *Id.* at 273, 430 S.E.2d at 746.

32. *Id.* at 273-74, 430 S.E.2d at 746-47.

33. *Id.* at 275, 430 S.E.2d at 747-48.

34. *Id.*

35. 232 Ga. 599, 207 S.E.2d 515 (1974).

36. *Id.* at 601, 207 S.E.2d at 518.

37. *Id.* at 600, 207 S.E.2d at 517.

38. *Id.* at 601, 207 S.E.2d at 518.

conspirator's liability spans the time from the conspiracy's inception—even if predating the conspirator's entry—to its termination.³⁹ The court reasoned that because “[t]he crimes were so interrelated”—because they involved the same stolen automobile—they were all part of the same conspiracy.⁴⁰

B. Felony Murder Liability

According to the supreme court in *Ford v. State*,⁴¹ O.C.G.A. § 16-5-1(c)⁴² simply reiterates the common law felony murder rule.⁴³ The O.C.G.A. states, “A person also commits the offense of murder when, in the commission of a felony, he causes the death of another human being irrespective of malice.”⁴⁴ As stated in *Ford*, a felony serving as a predicate for felony murder must “create a foreseeable risk of death.”⁴⁵ This, the court said, is because the felony murder rule is aimed solely at deterring dangerous felonies.⁴⁶

Using this line of reasoning in *Ford*, the court declined to uphold a felony murder conviction based on possession of a firearm by a convicted felon.⁴⁷ In *Ford* the defendant accidentally shot someone to death while trying to unload his semiautomatic pistol in a house that, unbeknownst to him, stood above an apartment. The gun went off, causing a bullet to drill through the floor and hit the victim below.⁴⁸ The court observed that in a different situation the same felony might have met the requisite dangerousness to support felony murder.⁴⁹

Such was the situation in *Hines v. State*,⁵⁰ in which the defendant-felon killed the victim in a hunting accident.⁵¹ The court distinguished *Ford*, explaining that the defendant in *Hines* was aware that there were people in the vicinity, had consumed alcohol prior to the incident, had deliberately aimed and fired, and “took an unsafe shot at dusk, through

39. *Id.*

40. *Id.* at 600-01, 207 S.E.2d at 517-18.

41. 262 Ga. 602, 423 S.E.2d 255 (1992).

42. O.C.G.A. § 16-5-1(c) (2007 & Supp. 2010).

43. *Ford*, 262 Ga. at 603, 423 S.E.2d at 256.

44. O.C.G.A. § 16-5-1(c).

45. 262 Ga. at 603, 423 S.E.2d at 256.

46. *Id.*

47. *Id.* at 602-03, 423 S.E.2d at 255-56.

48. *Id.* at 602, 423 S.E.2d at 255.

49. *Id.* at 603, 423 S.E.2d at 256.

50. 276 Ga. 491, 578 S.E.2d 868 (2003).

51. *Id.* at 491, 493, 578 S.E.2d at 871-72.

heavy foliage, at a target eighty feet away.⁵² The court held that these considerations made the underlying felony “inherently dangerous.”⁵³

Evaluation of a felony’s inherent dangerousness is based on the facts of a case as opposed to abstraction.⁵⁴ The decision in *Mosley v. State*⁵⁵ illustrated this view eleven years ago when the supreme court held that a child’s possession of a knife at school was inherently dangerous.⁵⁶ The child-defendant, Lyndon Mosley, was convicted of felony murder predicated on his possession of a weapon on school property.⁵⁷ Mosley stabbed Ronald Gaines to death during a schoolyard fight.⁵⁸ The court held the felony was sufficiently dangerous for felony murder.⁵⁹ The court reached this result by examining the events leading up to Gaines’s death and concluded, “Th[e] evidence shows that Mosley’s possession of the knife played a critical role in escalating a typical schoolyard fight into a homicide.”⁶⁰ The court reasoned that the fight’s onlookers persuaded Gaines to either fight Mosley or withdraw from the altercation because Mosley was armed.⁶¹ The court, noting Gaines’s bulkier build, also suggested that initially the knife emboldened Mosley to engage Gaines in the altercation.⁶²

C. Felony Murder and Mens Rea

To be convicted of felony murder, a defendant need not have had any particular mental state with regard to the killing⁶³ but must have had “criminal intent to commit the underlying felony.”⁶⁴ Once a conspiracy

52. *Id.* at 493, 578 S.E.2d at 872. He thought he was aiming at a turkey. *Id.*

53. *Id.*

54. *Mosley v. State*, 272 Ga. 881, 883, 536 S.E.2d 150, 152 (2000).

55. 272 Ga. 881, 536 S.E.2d 150 (2000).

56. *Id.* at 881-82, 536 S.E.2d at 151.

57. Mosley violated O.C.G.A. § 16-11-127.1(b) (amended 2010) (current version at O.C.G.A. § 16-11-127.1(b) (2007 & Supp. 2010)). In 2000 the statute stated as follows:

[I]t shall be unlawful for any person to carry or to possess or have under such person’s control while within a school safety zone or at a school building, school function, or school property or on a bus or other transportation furnished by the school any weapon or explosive compound, other than fireworks Any person who violates this subsection shall be guilty of a felony

Id.

58. *Mosley*, 272 Ga. at 881-82, 536 S.E.2d at 151.

59. *Id.* at 883, 536 S.E.2d at 152.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Tessmer v. State*, 273 Ga. 220, 223, 539 S.E.2d 816, 819 (2000).

64. *Id.* at 222, 539 S.E.2d at 818 (quoting *Martin v. State*, 271 Ga. 301, 303, 518 S.E.2d 898, 901 (1999)).

to rob is formed, any killing to pursue the conspiracy's objective makes the conspirators liable, as a matter of law, for felony murder based on the robbery.⁶⁵ Whether a conspirator is ever aware of the killer's weapon is immaterial.⁶⁶ Aggravated assault can also be a predicate for felony murder in Georgia.⁶⁷ As the supreme court reasoned in *Durden v. State*,⁶⁸ however, sufficient provocation of the aggravated assault mitigates the felony murder to voluntary manslaughter.⁶⁹ The court in *Durden* held that a single aggravated assault cannot make a person guilty of both voluntary manslaughter and felony murder.⁷⁰

D. Felony Murder and Direct Causation

The 1981 case *State v. Crane*⁷¹ was the origin of Georgia's rule that its felony murder statute does not impose liability without direct causation linking the actions of a felon or co-felon to a death.⁷² In *Crane* Roy Combs was shot to death during his burglary of the shooter's home.⁷³ The State successfully petitioned the supreme court for certiorari after the trial court dismissed the felony murder charges against Combs's three co-felons.⁷⁴ To arrive at its holding, the court found ambiguity in the statutory meaning of "he causes" and applied the rule of lenity.⁷⁵ The court made its decision in spite of its expressed inclination to rule in favor of liability.⁷⁶ The opinion was unanimous.⁷⁷ No cases were cited in support of its brief decision, save one articulating the rule of lenity.⁷⁸ Decades later, the State in *Jackson* would maintain that *Crane* rejected the proximate cause theory in favor of an agency theory of felony murder.⁷⁹

At least three cases following *Crane* have created some confusion about the supreme court's definition of causation; however, overall these

65. *Williams v. State*, 276 Ga. 384, 385, 578 S.E.2d 858, 860 (2003).

66. *Id.* at 386, 578 S.E.2d at 861.

67. *See, e.g., Huntley v. State*, 271 Ga. 227, 230, 518 S.E.2d 890, 893 (1999).

68. 271 Ga. 449, 519 S.E.2d 921 (1999).

69. *Id.* at 451, 519 S.E.2d at 923.

70. *Id.*

71. 247 Ga. 779, 279 S.E.2d 695 (1981).

72. *Id.* at 779, 279 S.E.2d at 696.

73. *Id.* at 779 & n.1., 279 S.E.2d at 696 & n.1.

74. *Id.* at 779, 279 S.E.2d at 696.

75. *Id.* (internal quotation marks omitted).

76. *Id.*

77. *Id.* at 779, 279 S.E.2d at 697.

78. *See id.* at 779, 279 S.E.2d at 696.

79. Brief of Appellant, *supra* note 11, at 8-9.

cases appear to relax the standard for directness.⁸⁰ First, in the 1982 decision of *Durden v. State*,⁸¹ William Durden burglarized a bait shop. The owner, upon hearing the alarm go off in his residence behind the store, entered his store and got into a gunfight with the defendant. No bullet hit the owner, but he died from a heart attack created by the stress of the incident. At the time of the incident, the owner was overweight and had pre-existing cardiovascular disease.⁸² In addressing Durden's challenge to his felony murder conviction on causation grounds, the supreme court modified a homicide standard for proximate causation and applied the standard specifically to felony murder:

Where one commits a felony upon another, such felony is to be accounted as the efficient, proximate cause of the death whenever it shall be made to appear either that the felony directly and materially contributed to the happening of a subsequent accruing immediate cause of the death, or that the injury materially accelerated the death, although proximately occasioned by a pre-existing cause.⁸³

The court also decided proximate cause could exist without physical injury to the homicide victim.⁸⁴ In upholding the felony murder conviction based on aggravated assault and burglary, the court expressly distinguished *Crane*, reasoning that "[Durden's] actions were directed at the deceased" whereas the actions in *Crane* were not.⁸⁵ The court held the defendant's actions could have proximately caused the victim's death based on the proximate cause standard the court articulated.⁸⁶ There was no explicit discussion of the court's application of this standard to the facts.⁸⁷

A second case, *McCoy v. State*,⁸⁸ decided in 1993, also caused confusion about *Crane*. McCoy was an arsonist who set fire to a house. The victim, a volunteer firefighter, arrived to combat the flames but while doing so fell down a nearby well—whose cover had also caught fire—and succumbed to carbon monoxide poisoning.⁸⁹ The supreme court upheld McCoy's felony murder conviction, deciding that one could

80. See generally *Smith v. State*, 267 Ga. 372, 477 S.E.2d 827 (1996); *McCoy v. State*, 262 Ga. 699, 425 S.E.2d 646 (1993); *Durden v. State*, 250 Ga. 325, 297 S.E.2d 237 (1982).

81. 250 Ga. 325, 297 S.E.2d 237 (1982).

82. *Id.* at 325, 297 S.E.2d at 239.

83. *Id.* at 328, 297 S.E.2d at 241-42.

84. *Id.* at 328, 297 S.E.2d at 241.

85. *Id.* at 329, 297 S.E.2d at 242.

86. *Id.* at 329, 297 S.E.2d at 241-42.

87. See *id.*

88. 262 Ga. 699, 425 S.E.2d 646 (1993).

89. *Id.* at 699-700, 425 S.E.2d at 647.

“directly attribut[e]” the firefighter’s death to McCoy’s actions.⁹⁰ The court reasoned that the incineration of the well cover, the victim’s presence, and the smoke the victim fatally inhaled were “direct result[s]” of the arson.⁹¹ Thus, the opinion appears to raise the question of what significance, if any, a victim’s actions have regarding direct causation. The ruling is further confusing when juxtaposed with the distinction the court drew in *Durden* considering that McCoy did not direct his arson at the firefighter.⁹²

Finally, the 1996 case *Smith v. State*⁹³ concerned defendants who were shooting at each other when one of their bullets hit and killed a bystander.⁹⁴ The supreme court held that both defendants could be liable for felony murder based on their aggravated assaults on one another even though only one of the defendants actually shot the victim.⁹⁵ In support of this decision, the court reasoned that the gunfight was a product of the defendants “acting in concert,” and “the death was *directly caused* by the gunfight.”⁹⁶

The case law establishes that conspirators are criminally liable for “incidental and probable” illegal actions taken by each other to facilitate conspiratorial objectives.⁹⁷ This includes murder.⁹⁸ Moreover, a defendant can be guilty of felony murder if death results from the felony.⁹⁹ At the time *Jackson* reached the supreme court, the main restriction was that the actions of a felon or co-felon must be a direct cause of death.¹⁰⁰

IV. COURT’S RATIONALE

A. *Majority Opinion*

In *State v. Jackson*,¹⁰¹ an opinion authored by Justice Nahmias, the supreme court abolished the direct cause rule for felony murder, deciding

90. *Id.* at 700, 425 S.E.2d at 647-48.

91. *Id.*

92. *Compare Durden*, 250 Ga. at 329, 297 S.E.2d at 241-42, *with McCoy*, 262 Ga. at 700, 425 S.E.2d at 647.

93. 267 Ga. 372, 477 S.E.2d 827 (1996).

94. *Id.* at 372, 477 S.E.2d at 830.

95. *Id.* at 372, 375, 477 S.E.2d at 830, 832.

96. *Id.* at 375-76, 477 S.E.2d at 832-33 (emphasis added).

97. *Bruce*, 263 Ga. at 274-75, 430 S.E.2d at 747.

98. *See id.* at 273, 430 S.E.2d at 746.

99. *See* O.C.G.A. § 16-5-1(c); *Smith*, 267 Ga. at 375, 477 S.E.2d at 832; *McCoy*, 262 Ga. at 700, 425 S.E.2d at 647-48; *Durden*, 250 Ga. at 329, 297 S.E.2d at 242.

100. *Crane*, 247 Ga. at 779, 279 S.E.2d at 696.

101. 287 Ga. 646, 697 S.E.2d 757 (2010).

that as long as a felony is a proximate cause of death the causation element for felony murder is satisfied.¹⁰² The court justified its break with stare decisis by noting the disharmony of earlier case holdings on the direct cause rule.¹⁰³ According to the court, in both *Durden v. State*¹⁰⁴ and *McCoy v. State*,¹⁰⁵ "the death[s] could hardly be said to have been 'caused directly' by the defendant's acts."¹⁰⁶ With regard to *Smith v. State*,¹⁰⁷ the court implied that the court had made an awkward distinction between the facts of that case and those originally giving rise to the direct cause rule.¹⁰⁸ The court criticized the characterization of two persons engaged in a gunfight as "acting in concert."¹⁰⁹

The court maintained that legislative inaction was no indicator of acquiescence in the case of the direct cause rule, reasoning that the Georgia General Assembly (Assembly) would probably not be sensitive enough to the ramifications of earlier rulings requiring direct cause for felony murder to induce action on the Assembly's part.¹¹⁰ This, the court said, is partly because felony murder has seldom been prosecuted when the causation was only indirect.¹¹¹ The court also pointed out "*Crane's* odd reasoning and the inconsistent application of its holding."¹¹² The court further considered that the Assembly might reasonably fear that changing the causation wording in the felony murder statute alone would send the courts a message to infer a requirement of direct causation in all other criminal statutes.¹¹³

The court analogized felony murder liability to vehicular homicide liability.¹¹⁴ The court observed that the same issue regarding proximate versus direct cause has arisen in vehicular homicide cases, and indirect proximate cause has been held sufficient for conviction.¹¹⁵ Reasoning that the statutory wording of causation for vehicular homicide

102. *Id.* at 660, 697 S.E.2d at 767.

103. *Id.* at 654-58, 697 S.E.2d at 763-66.

104. 250 Ga. 325, 297 S.E.2d 237 (1982).

105. 262 Ga. 699, 425 S.E.2d 646 (1993).

106. *Jackson*, 287 Ga. at 656, 697 S.E.2d at 764.

107. 267 Ga. 372, 477 S.E.2d 827 (1996).

108. *See Jackson*, 287 Ga. at 655-56, 697 S.E.2d at 764.

109. *Id.* at 656, 697 S.E.2d at 764 (quoting *Smith*, 267 Ga. at 376, 477 S.E.2d at 833) (internal quotation marks omitted).

110. *Id.* at 659-60, 697 S.E.2d at 766-67.

111. *Id.* at 660, 697 S.E.2d at 767.

112. *Id.* at 659, 697 S.E.2d at 766.

113. *Id.* at 660, 697 S.E.2d at 767.

114. *Id.* at 656-58, 697 S.E.2d at 765-66.

115. *Id.* at 656-57, 697 S.E.2d at 764-65.

is practically no different from that for felony murder, the court decided that causation should be interpreted the same in both instances.¹¹⁶

Tracing the history of the direct cause rule, the court mentioned *Hyman v. State*¹¹⁷ and *Hill v. State*¹¹⁸ and indicated *Hyman* as a case that might have been decided the same way without the direct cause rule.¹¹⁹ The defendant in *Hyman* lied to police who were trying to track down a murder suspect who, unbeknownst to the police was hiding in the defendant's house. Hyman denied the suspect was there, but the police searched the premises anyway. The suspect shot to death a police officer upon the officer's search of a closet. Hyman was convicted of felony murder predicated on making a false statement.¹²⁰ The supreme court reversed, reasoning that the lie was not the direct cause of the officer's death.¹²¹ In *Hill* the defendant engaged police in a gunfight, during which a bystander was shot and killed by a police officer, who was shot and killed by the defendant. During the gunfight, there were multiple people in the vicinity, including the defendant, the two victims, and several children.¹²² Applying direct cause analysis, the supreme court decided Hill's felony murder conviction for the death of the bystander was insupportable.¹²³

B. Dissenting Opinions

There were two dissenting opinions in *Jackson*.¹²⁴ First, Chief Justice Hunstein objected to the ruling pursuant to O.C.G.A. § 16-2-20¹²⁵: the defendants' purported felony murder did not occur in any of the four situations that permit a criminal conviction under the statute.¹²⁶ Chief Justice Hunstein reasoned that, for the purposes of the statutory wording of the first situation, Jackson and Smith "did not directly commit the alleged crime."¹²⁷ She considered the second situation inapplicable because the supposed drug dealer's deadly actions were not "intentionally cause[d]" by the defendants.¹²⁸ She character-

116. *Id.* at 657-58, 697 S.E.2d at 765-66.

117. 272 Ga. 492, 531 S.E.2d 708 (2000).

118. 250 Ga. 277, 295 S.E.2d 518 (1982).

119. *Jackson*, 287 Ga. at 654-55, 697 S.E.2d at 763-64.

120. *Hyman*, 272 Ga. at 492, 531 S.E.2d at 709-10.

121. *Id.* at 493, 531 S.E.2d at 710.

122. *Hill*, 250 Ga. at 278-79, 295 S.E.2d at 520-21.

123. *Id.* at 279-80, 295 S.E.2d at 521.

124. *See Jackson*, 287 Ga. at 661, 663, 697 S.E.2d at 767, 769.

125. O.C.G.A. § 16-2-20 (2007).

126. *Jackson*, 287 Ga. at 662, 697 S.E.2d at 768 (Hunstein, C.J., dissenting).

127. *Id.*

128. *Id.* (alteration in original) (internal quotation marks omitted).

ized the majority decision as “blatant judicial activism” and an assumption of the Assembly’s lawmaking power.¹²⁹

In the second dissent, Justice Thompson focused on stare decisis.¹³⁰ Justice Thompson considered whether there had been “legislative acquiescence” to the direct cause rule.¹³¹ In support of stare decisis, he cited the need to maintain “predictability, stability, and continuity” and the court’s duty to act consistently with legislative intent as indicated by the Assembly’s acquiescence.¹³²

V. IMPLICATIONS

The ramifications of *State v. Jackson*¹³³ extend beyond a felon’s liability for the death of a co-conspirator. To reach its result the supreme court stripped away a critical sub-element of causation in felony murder.¹³⁴ The significance of the direct cause rule can be discerned by evaluating *Hyman v. State*¹³⁵ and *Hill v. State*¹³⁶ using only proximate cause analysis.

As the court expressed in *Jackson*, “the issue of proximate causation is so fact-intensive. That is why proximate cause determinations are generally left to the jury at trial.”¹³⁷ In *Hyman* the State asserted in its brief to the supreme court that the defendant’s false statement about the suspect hiding in his house foreseeably endangered the police officer’s life. To support this, the State argued there was evidence that the defendant was aware of the suspect’s violent propensities and armed status and that he had warned the suspect that police had arrived.¹³⁸ The State continued, “Additionally, [police] provided that had the appellant’s false statement not been given, the officers would not have searched the residence but would have forced [the suspect] outside by other means.”¹³⁹ The court never reached the issue of foreseeability in *Hyman*.¹⁴⁰ Yet, so long as *Durden v. State*¹⁴¹ remains good law,

129. *Id.* at 663, 697 S.E.2d at 769.

130. *See id.* at 663-65, 697 S.E.2d at 769-70 (Thompson, J., dissenting).

131. *Id.* at 664, 697 S.E.2d at 769.

132. *Id.* at 665, 697 S.E.2d at 770.

133. 287 Ga. 646, 697 S.E.2d 757 (2010).

134. *See id.* at 647, 697 S.E.2d at 758.

135. 272 Ga. 492, 531 S.E.2d 708 (2000).

136. 250 Ga. 277, 295 S.E.2d 518 (1982).

137. 287 Ga. at 652, 697 S.E.2d at 762.

138. Brief of Appellee at 9-11, *Hyman*, 272 Ga. 492, 531 S.E.2d 708 (No. S00A0844), 2000 WL 34252047 at *9-11.

139. *Id.* at 11.

140. *Hyman*, 272 Ga. at 493, 531 S.E.2d at 710.

141. 250 Ga. 325, 297 S.E.2d 237 (1982).

there was proximate cause in *Hyman* if the shooting was an “accruing immediate cause of the death” and making the false statement “directly and materially contributed to the happening of” the shooting, though this assumes that by lying Hyman “commit[ted] a felony upon” the victim.¹⁴² In light of *Jackson*, should the supreme court consider such arguments for proximate cause persuasive a conviction of felony murder would stand.¹⁴³

A compelling argument exists for finding proximate cause in *Hill* by analogizing it to *Smith v. State*,¹⁴⁴ a vehicular homicide case decided in 2009. In *Smith* the defendant was in a pickup truck, speeding to avoid apprehension by police. A police car chasing the defendant plowed into another car at an intersection; the police officer’s view was obstructed by the defendant’s truck as the truck and police car ran a red light. The victim inside the other car was killed. As a result, the defendant was convicted of first degree homicide by vehicle.¹⁴⁵ The supreme court held the evidence sufficient for conviction,¹⁴⁶ thereby implicitly holding that the defendant’s actions could have proximately caused the victim’s death.¹⁴⁷ Thus, in *Hill* and *Smith* the deadly acts of a third party were incited by the defendant’s illegal conduct and misdirected at the victim.¹⁴⁸

The New York case *People v. Hernandez*¹⁴⁹ offers further persuasive support for proximate causation in the fact pattern in *Hill*. In *Hernandez* the New York Court of Appeals held that drawing gunfire from police could proximately cause an officer’s death by friendly fire.¹⁵⁰ The court stated, “[I]t is simply implausible for defendants to claim that defendants could not have foreseen a bullet going astray when Hernandez provoked a gun battle outside a residential building in an urban area.”¹⁵¹ If the Georgia Supreme Court similarly held this, the holding

142. *Id.* at 329, 297 S.E.2d at 241.

143. *See Jackson*, 287 Ga. at 647, 697 S.E.2d at 758 (holding proximate cause sufficient for felony murder).

144. 285 Ga. 725, 681 S.E.2d 161 (2009).

145. *Id.* at 725-26, 681 S.E.2d at 162.

146. *Id.* at 726, 681 S.E.2d at 162.

147. *See id.* at 728-29, 681 S.E.2d at 163-64 (Hunstein, C.J., dissenting) (explaining that a “trier of fact could find that [the defendant] was the proximate cause of the victim’s death” but ultimately concluding that the evidence on the issue of proximate causation was insufficient as “the officer could reasonably be found to be the proximate cause of the collision”).

148. *Compare Smith*, 285 Ga. at 725-26, 681 S.E.2d at 162 (majority opinion), *with Hill*, 250 Ga. at 278-79, 295 S.E.2d at 520.

149. 624 N.E.2d 661 (N.Y. 1993).

150. *Id.* at 662, 666.

151. *Id.* at 666.

would suggest that, under certain circumstances, accidental killings by third parties attempting to thwart a defendant in the commission of a crime could result in felony murder liability for the defendant.¹⁵²

Suppose a defendant tried to elude police but did not fire at them. Instead, a bullet fired by one officer accidentally hit an innocent third party. Would there be proximate cause then? A 1974 case from Illinois, *People v. Hickman*,¹⁵³ may be instructive. In *Hickman* the Illinois Supreme Court addressed "whether the fleeing perpetrators of a forcible felony are guilty of murder when a pursuing police officer is mistakenly shot and killed by a fellow officer also in pursuit of the fleeing felons."¹⁵⁴ The police were trying to catch Glenn Hickman and Anthony Rock who had just burglarized a liquor warehouse. Chasing Hickman and Rock as they ran away from the warehouse, one police officer, Sergeant Cronk, came across "a crouched figure carrying a handgun" who was, in fact, his fellow police officer, Detective Loscheider.¹⁵⁵ Thinking Loscheider to be one of the suspects he was after, Cronk shot at him after issuing a warning. Loscheider died, and Hickman and Rock were prosecuted for felony murder.¹⁵⁶

The jury returned a guilty verdict, but "the trial court entered an order arresting the judgment."¹⁵⁷ The supreme court affirmed the intermediate appellate court's reversal of the trial court's decision, reasoning in part that the defendants caused the chase by running away after burglarizing the warehouse.¹⁵⁸ The supreme court reasoned that this made Cronk's fatal action "a direct and foreseeable consequence of [the] defendants' actions" because Cronk discharged his firearm to stop the defendants.¹⁵⁹

Had the same facts in *Hickman* taken place in Georgia before *Jackson*, Hickman and Rock would not have been liable for felony murder. The actions of Cronk, not those of Hickman or Rock, would have been the direct cause of Loscheider's death.¹⁶⁰ After *Jackson* a felony murder

152. See *Jackson*, 287 Ga. at 647, 697 S.E.2d at 758 (holding proximate cause sufficient for felony murder).

153. 319 N.E.2d 511 (Ill. 1974).

154. *Id.* at 511.

155. *Id.* at 511-12.

156. *Id.*

157. *Id.* at 511.

158. *Id.* at 513-14

159. *Id.* at 513.

160. See *Hill*, 250 Ga. at 279-80, 295 S.E.2d at 521 (holding a defendant who instigated a gunfight with police not liable for felony murder as a result of the killing of an innocent bystander by a police officer).

conviction would be supportable, provided that a jury could find the burglary proximately caused Loscheider's death.¹⁶¹

The opinion in *Mosley v. State*¹⁶² sheds more light on the potential reach of the *Jackson* ruling. Consider this change to the facts: a child brings a weapon to school but does not use it. Rather, a second child sees the first child carrying the weapon in full view during a fight the second child has with another student. The second child snatches the weapon and kills the student he is fighting. Under *State v. Crane*,¹⁶³ there would be no felony murder liability for the first child because that child's actions did not directly cause the victim's death.¹⁶⁴ Now, under *Jackson* the causation element is satisfied if the possession of the weapon by the first child proximately caused the victim's death.¹⁶⁵

Examining such hypothetical situations, it appears there is ample room for felony murder liability to expand following *Jackson*. Of course, Georgia courts might decide to control the explosion by creating exceptions to *Jackson*. After all, three supreme court justices—Chief Justice Hunstein, Justice Thompson, and Justice Benham—dissented in *Jackson*.¹⁶⁶

On the other hand, Georgia conspiracy law stands to widen the explosion's radius. Under *Bruce v. State*¹⁶⁷ and *Crosby v. State*,¹⁶⁸ if a defendant joined a conspiracy with another person the defendant could be vicariously liable for certain "incidental and probable" felonies committed by co-conspirators¹⁶⁹ regardless of what time during the conspiracy they were committed.¹⁷⁰ Under *Jackson* the defendant would also be liable for felony murder if any of those felonies proximately caused a death.¹⁷¹

In light of these implications, it appears that conspirators have much to worry about just as Machiavelli opined.¹⁷² Not only is their own

161. See *Jackson*, 287 Ga. at 647, 697 S.E.2d at 758 (holding proximate cause sufficient for felony murder).

162. 272 Ga. 881, 536 S.E.2d 150 (2000).

163. 247 Ga. 779, 279 S.E.2d 695 (1981).

164. See *id.* at 779, 279 S.E.2d at 696 (holding there is no felony murder liability without direct causation linking the actions of a felon or co-felon to a death).

165. See *Jackson*, 287 Ga. at 647, 697 S.E.2d at 758 (holding proximate cause sufficient for felony murder).

166. *Id.* at 660, 697 S.E.2d at 767.

167. 263 Ga. 273, 430 S.E.2d 745 (1993).

168. 232 Ga. 599, 207 S.E.2d 515 (1974).

169. *Bruce*, 263 Ga. at 274-75, 430 S.E.2d at 747.

170. *Crosby*, 232 Ga. at 601, 207 S.E.2d at 518.

171. See *Jackson*, 287 Ga. at 647, 697 S.E.2d at 758 (holding proximate cause sufficient for felony murder).

172. See MACHIAVELLI, *supra* note 1, at 401.

physical safety threatened by others seeking to thwart their plans, but there is also greater potential criminal liability for deaths none of them may ever have intended. The boundaries of this new liability remain to be defined. Depending on the supreme court's future rulings on proximate causation, accidents committed by third parties may result in serious criminal liability. Defense attorneys should prepare ways to attack proximate causation given the particular facts of their cases, as that now appears to be the key to saving clients who face felony murder charges. Prosecutors should be conscious of the powerful weapon that has been placed in their hands and decide what restraint, if any, should be exercised for justice.

BRIAN E. BRUPBACHER

**INDEX
TO
VOLUME 62**

TABLE OF CONTENTS

Topical Index to Articles, Lead Articles, Special Contributions, and Student Articles	1353
Index to Annual Survey of Georgia Law	1355
Index to Annual Survey of Eleventh Circuit Law	1357
Title Index to Leads and Articles Editions	1359
Author Index	1361
Title Index to Student Comments and Notes	1365
Table of Cases	1367
