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FELONY MURDER—HAPPY HUNTING GROUND OF PROSECUTORS

CHARLENE HERMANN*

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I. THE SCOPE OF THE PROBLEM

The Third District Court of Appeal has recently reached a decision which definitely, albeit cautiously, places Florida's hat in the ring of controversy surrounding the question whether a man may be tried for first degree murder under a felony murder statute and at a later date be indicted and tried for the felony which had undergirded the murder charge. In *State ex rel. Glenn v. Klein*,[1] the defendant was indicted and tried for first degree murder under the Florida felony murder statute[2] for the death of his co-participant in a robbery, who had been killed by the intended victim. He was convicted of manslaughter, a lesser included offense of the crime of first degree murder. Thereafter, the State sought to prosecute the defendant on an information charging robbery. The defendant's motion to quash on the ground of double jeopardy was denied, and he petitioned the Third District Court of Appeal for a writ of prohibition. Judgment in prohibition was granted.[3]

With no Florida precedent directly in point, the court was thus confronted with a difficult question involving philosophy as well as legal analysis. A perusal of the decisions of other jurisdictions evidences that the law is in a state of confusion, and when the problem arises the solution sometimes seems to turn on whether the deciding jurists are prosecution or defense oriented.

The basic question is easily understood. The law holds that a man is not criminally responsible if he was not possessed of criminal intent at the time of the crime with which he is charged. Thus, if X and his accomplice intend to rob their victim, but in the stress of the encounter

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1. 184 So.2d 904 (Fla. 3d Dist. 1966).

2. FLA. STAT. § 782.04 (1965):
The unlawful killing of a human being . . . when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping, shall be murder in the first degree, and shall be punishable by death.

3. State *ex rel.* Glenn v. Klein, 184 So.2d 904 (Fla. 3d Dist. 1966).

the accomplice shoots the man, X can hardly be said to have intended the homicide. Much less would he have intended that in fleeing the scene his accomplice should be shot and killed by a pursuing policeman. X intended only the robbery. But society abhors crimes of violence and has devised a means to stiffen the possible penalty for those who commit such crimes. Under the felony murder concept, originating at common law[4] and existing in all the states,[5] if a death occurs during the perpetration or attempted perpetration of certain felonies, now usually specified by statute,[6] the intent to commit such felony is transferred to the homicide, and all who participated in the felony may be prosecuted for *first degree murder.*[7] Since the specific intent to kill is conspicuously absent, the case for the prosecution must rest solely on proof that the defendant did in fact participate in the felony and thereby place himself within the gamut of the statute, so that the state may prosecute him for first degree murder. The question is, having done so, may the prosecution then turn and have a second fling at the defendant by prosecuting him for the felony which formed the basis for the murder charge? Does this violate all our traditional prohibitions against trying a man twice for the same offense?

The *Glenn* court cited section 12 of the Declaration of Rights of the Constitution of Florida, "no person shall be subject to be twice put in jeopardy for the same offense," and flatly held that the prosecution of Glenn for felony murder included trying him for the offense of robbery. This is a position that the court was by no means required to take. Indeed, the point is much litigated, with the majority of jurisdictions subscribing to view that there is no double jeopardy in such a situation.[8] Even the district court cautiously stated that a strong consideration in its decision was that the actual killing had not been done by Glenn. The court declined to consider what its decision might have been in a case involving a subsequent trial for the felony following conviction under the felony

4. Note, *Criminal Law—Felony Murder—Former Jeopardy*, 26 BROOKLYN L. REV. 299-300 (1960).

5. Note, *A Survey of Felony Murder*, 28 TEMPLE L.Q. 453, 456 (1955).

6. For a definitive survey of the types of felony murder legislation existing in this country, see generally, *A Survey of Felony Murder*, *op. cit. supra* note 5.

7. For informative appraisals of the general felony murder concept see, Note, *The Felony Murder Rule—A Re-Examination*, 5 SANTA CLARA LAWYER 172 (1965); and Note, *A Survey of Felony Murder*, *op. cit. supra* note 5.

8. *E.g.* People v. Johnson, Cal. App. 2d 195, 153 P.2d 784 (Ct. App. 1944); Harris v. State, 193 Ga. 109, 17 S.E.2d 573 (1941); People v. Andrae, 305 Ill. 530, 137 N.E. 496 (1922); State v. Ragan, 123 Kan. 399, 256 Pac. 169 (1927); State v. Calvo, 240 La. 75, 121 So.2d 244 (1960), *cert. denied*, 364 U.S. 882 (1960); Commonwealth v. Crecorian, 264 Mass. 94, 162 N.E. 7 (1928); State v. Moore, 326 Mo. 1199, 33 S.W.2d 905 (1930); Warren v. State, 79 Neb. 526, 113 N.W. 143 (1907); People *ex rel.* Santangelo v. Tutuska, 19 Misc. 2d 308, 192 N.Y.S.2d 350 (Erie County Ct. 1959), *aff'd*, 11 App. Div. 2d 906, 205 N.Y.S.2d 1006 (1960), *appeal denied*, 9 N.Y.2d 862, 175 N.E.2d 818 (1961); State v. Orth, 106 Ohio App. 35, 153 N.E.2d 394 (1957), *appeal dismissed*, 167 Ohio St. 388, 148 N.E.2d 917 (1958); Duvall v. State, 111 Ohio St. 657, 146 N.E. 90 (1924); State v. Barton, 5 Wash. 2d 234, 105 P.2d 63 (1940).

murder statute of one who, while engaged in the felony, had committed the homicide.[9] The problem is thus many-faceted, and the sharp conflict in reported decisions calls for a reevaluation of this aspect of the felony murder concept.[10]

II. Double Jeopardy

A. *The Tests*

All jurisdictions agree that a defendant should not be twice put in jeopardy of his life or liberty for the same offense.[11] In order to substantiate a plea of former jeopardy, the defendant must show that there was a former prosecution in the same jurisdiction for the same offense; that he, the defendant, was in jeopardy on the first prosecution; that the parties are identical in the present prosecution and in the former; and that the prosecution of the particular offense on which the jeopardy attached was such an offense as to constitute a bar to further prosecution.[12] It is this last requirement that has caused disparity among the jurisdictions, with the disagreement arising in the definition of "same offense." Generally, two tests have been employed by the several states. The courts most frequently rely on the "same evidence" test.[13] In the leading case of *Blockburger v. United States*,[14] the defendant committed the single act of selling morphine, but he thereby violated two separate statutory provisions. The court pointed out that each of the two offenses required proof of an element that the other did not, and stated the rule that:

> . . . where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.[15]

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9. State *ex rel.* Glann v. Klein, *supra* note 3.

10. The scope of this paper is primarily limited to the narrow question of the propriety of a trial for the underlying felony after a prior prosecution for the crime of felony murder. This is naturally immersed in much broader questions of the applicability of the doctrines of former jeopardy and res judicata to criminal actions generally. The larger area is surveyed in several excellent articles, of which the following are illustrative: Kerchheimer, *The Act, The Offense & Double Jeopardy*, 58 Yale L.J. 513 (1949); Note, *Double Jeopardy & the Concept of Identity of Offenses*, 7 Brooklyn L. Rev. 79 (1938).

11. For a concise review of the development of the concept of double jeopardy see Harrison, *Federalism & Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. Miami L. Rev. 306, 307 (1963), and Note, *Double Jeopardy & the Concept of Identity of Offenses*, *op. cit. supra* note 10, at 79-80.

12. State v. Bowden, 154 Fla. 511, 18 So.2d 478, 480 (1944), *aff'd.*, 156 Fla. 113, 22 So.2d 581 (1945).

13. This test originated in The King v. Vandercomb, 2 Leach 708, 720, 168 Eng. Rep. 455, 461 (Ex. 1796), where it was said that:

> Unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second.

14. 284 U.S. 299 (1932).

15. *Id.* at 304.

In the application of this test, some courts have said that to sustain a finding of double jeopardy, it must be shown that the same facts that would have been necessary to prove that the defendant committed one of the two offenses would have been equally sufficient to sustain the charge against him for the other offense. In other words, the proof of the two offenses must be mutually interchangeable. If the indictment in the first action was such that the defendant might have been convicted in that action upon proof of the facts by which the charge in the second action is sought to be sustained, the first action will bar the second. Conversely, if the facts alleged in the second action would not necessarily be sufficient to sustain the charge contained in the first indictment, the first action will not bar the second.[16]

A few courts employ the "same transaction" test instead of the more popular same evidence rule. In *State v. Mowser*,[17] the leading case dealing with this test, the defendant had been convicted of robbery and was subsequently indicted for felony murder, for the killing of the robbery victim during the perpetration of the crime. The court held that the robbery conviction barred the felony murder action, because:

> When such integral part of the principal offense is not a distinct affair, but grows out of the same transaction, then an acquittal or conviction of an offender for the lesser offense will bar a prosecution for the greater.[18]

It has been suggested[19] that the New Jersey court did not mean to imply that all illegal acts committed by a single defendant in a single span of time must be tried in the same action. The court said, "the legislature has made the crime of robbery a constituent element of murder in the first degree. . . ."[20] Since robbery is thereby made a part of the crime of murder, the entire crime is one legal transaction.[21]

The states have not adopted one or the other of these tests exclusively. Rather, they are used interchangeably in an effort to achieve justice on an *ad hoc* basis. It has been proposed that the courts cease to presume that all statutes are intended by legislatures to be cumulatively applicable, and seek instead to determine the particular interests sought to be protected, thus perhaps avoiding technical evasions of the intended effect of the prohibition of double jeopardy which sometimes occur.[22]

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16. *Supra* note 12.
17. 92 N.J.L. 474, 106 Atl. 416 (Ct. Err. & App. 1919).
18. *Id.* at 483, 106 Atl., at 420.
19. Harrison, *supra* note 11, at 329.
20. State v. Mowser, *supra* note 17, at 482, 106 Atl., at 419.
21. Harrison, *op. cit. supra* note 11, at 327-30, and Kirchheimer, *op. cit. supra* note 10, at 527-42, provide more extensive analyses of these tests.
22. Harrison, *op. cit. supra* note 11, at 329.

B. *Application of the Majority Rule*

The most extensively reasoned case espousing the majority position that there is no double jeopardy when the defendant is tried for both the murder felony and the felony is *People ex rel. Santangelo v. Tutuska.*[23] The court, in utilizing the same evidence test, argued that proof of a felony is not really evidence of the crime of felony murder, but is required merely as a kind of preliminary condition before evidence of that crime may be held to sustain a conviction. The court reasoned that separate and distinct acts were involved in the felony murder, although the indictment had alleged only murder in the first degree. Proof of the crimes of burglary and robbery could be used to infer criminal intent, but such proof did not make these independent crimes an *element* of the crime of murder in the first degree. Such proof did not constitute the element of criminal intent, since by definition, no actual.intent to murder is present in felony murder. Rather, proof of the underlying felonies was only evidence of inferred criminal intent.[24] The court cited *People v. Lytton,*[25] a decision by the late Justice Cardozo in which he reasoned that in a felony murder prosecution, the felony is alleged *solely to characterize the degree of the crime, rather than as an essential element of the crime.* Homicide can only be characterized as murder if there is proof of felonious intent, but when the defendant kills in the perpetration of a felony, and the intent to kill cannot be proved, the intent to commit the felony can be transferred to the homicide. It is for this reason that the indictment need not charge that the homicide was wrought in the commission of another felony. It is sufficient to state, as at common law, that the defendant acted "wilfully, feloniously, and with malice aforethought."[26] The court's reasoning seems clear as far as it goes and suffices when the defendant himself did the killing. But what of the situation resulting when his accomplice,[27] the victim, [28] a policeman,[29] or a chance passer-by commits the homicide? In such cases the felony does far more than characterize the degree of the crime; it is the entire offense. The *Santangelo* court did not discuss these possibilities.

23. 19 Misc. 2d 308, 192 N.Y.S.2d 350, (Erie County Ct. 1959), *aff'd.*, 11 App. Div. 2d 906, 205 N.Y.S.2d 1006 (1960), *appeal denied*, 9 N.Y.2d 862, 175 N.E.2d 818 (1961).

24. *Id.* at 314, 192 N.Y.S.2d, at 357.

25. 257 N.Y. 310, 178 N.E. 290 (1931).

26. Roberts v. State, 164 So.2d 817, 822 (Fla. 1964); People v. Nichols, 230 N.Y. 221, 226, 129 N.E. 883, 884 (1921).

27. People v. Washington, 62 Cal. App. 2d 777, 402 P.2d 130 (1965).

28. The felony murder doctrine can lead to extreme results, as in Commonwealth v. Thomas, 382 Pa. 639, 117 A.2d 204 (1955). In that case two men robbed a grocery store and fled in opposite directions. The victim, owner of the store, followed one of the robbers and killed him. The court felt that the intent element necessary to hold the surviving robber guilty of first degree murder could be satisfied by use of the felony murder doctrine. Pennsylvania carried the use of the felony murder concept almost to absurd lengths before revising its position to narrow the use of the concept in Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958).

29. Hornbeck v. State, 77 So.2d 876 (Fla. 1955); *contra*, Commonwealth v. Redline, *supra* note 28.

In a similar vein, the Supreme Court of Washington reasoned[30] that the felony is not an essential element of a felony murder charge. The court argued that there is no need for a close relation between the felony and the homicide, because the victim of the felony need not even be the same person as the victim of the homicide, and the felony can be committed in one jurisdiction and the killing in another, with the only connection between the two being the defendant's flight from the scene of the felony to the location of the homicide. The court argued that the felony need not necessarily be directly included as an integral part of the murder, but rather the two might merely be incidentally related. This reasoning appears fallacious, since although there may be no direct relation between the two, the felony murder statute is not satisfied, i.e., the crime of felony murder has not been committed, unless *both* the felony and the homicide have occurred, and unless there is some distinct connection between the two.[31]

In summary of its reasoning, the *Santangelo* court said:

> Proof of the commission of an underlying felony in a felony murder case is a condition of the murder charge conviction but is not an element of that crime. If it were an element of the felony murder, the elements of such a crime would be as various as the underlying felonies might be.[32]

It is submitted that this is a specious argument. How can proof of such felony be a condition of a murder charge and not an element of that crime?

Other courts, which apply the same evidence test use a more simplified approach to the double jeopardy issue,[33] and stress the fact that the evidence sufficient to sustain a conviction for the underlying felony would not have been wholly adequate to support the earlier felony murder prosecution.[34] These courts note that "in proving a [felony] it can never be important or necessary to show the murder of the person assaulted."[35] It is emphasized that the facts essential to sustain a murder felony charge will also suffice to sustain a charge for the underlying felony, but the converse is not true, since the facts supporting a felony such as robbery or arson will not support a felony murder charge without proof of an additional element, the homicide itself. These courts apply the rule that the proof of either crime charged must be sufficient to sustain a convic-

30. State v. Barton, 5 Wash. 2d 234, 105 P.2d 63 (1940).

31. FLA. STAT. § 782.04 (1965), for example, requires that the killing must have occurred during the *perpetration* or *attempted perpetration* of one of the specified felonies.

32. People *ex rel.* Santangelo v. Tutuska, *supra* note 23.

33. See text accompanying note 16 *supra*.

34. State v. Ragan, 123 Kan. 399, 256 Pac. 169 (1927); State v. Moore, 326 Mo. 1199, 33 S.W.2d 905 (1930); Warren v. State, 79 Neb. 526, 113 N.W. 143 (1907).

35. Warren v. State, 79 Neb. 526, 531, 113 N.W. 143, 145 (1907).

tion under the other charge, and therefore hold that the latter action is not barred.[36]

C. *Application of the Minority Rule*

The minority position, that the second prosecution should be barred under principles of double jeopardy, was stated by a New Jersey Court utilizing the same transaction test. In *State v. Greely*,[37] the court held that the accused had, in an earlier felony murder prosecution, been acquitted of a crime in which the felony charged in the instant prosecution was an essential ingredient. The felony murder charge had included a prosecution for the felony. The *Greely* court pointed out that in felony murder there is essentially no difference between the underlying felony and the homicide, "it is really the part that jeoparized him for the whole, a feature of the problem which cannot for a moment be overlooked."[38]

Some courts have rejected this position, because they reject in principal the same transaction test.[39] It is held by the majority of jurisdictions that the phrase "same offense" encompasses only the same crime, not necessarily the same acts, circumstances, or situation out of which the crime arises, and the rule against double jeopardy does not bar a subsequent prosecution for a different crime resulting from the same acts.[40] A single act can be violative of more than one criminal statute, and can be prosecuted under each, so long as one is not an included offense of the other.[41] This seems unjust, since it can allow harassment of a defendant by multiple trials for a single act, one of the evils sought to be prevented by the rule against double jeopardy,[42] but it is the law. Indeed, if such prosecutions were forbidden, the problem dealt with by this paper would be eliminated, since those jurisdictions allowing prosecution of a felony after a felony murder action, do so primarily on the ground that although the same act is involved, more than one offense or crime has been com-

36. See text accompanying note 15 *supra*.

37. 30 N.J. Super. 180, 103 A.2d 639 (Hudson County Ct. 1954).

38. *Id.* at 185, 103 A.2d, at 642.

39. People v. Johnson, Cal. App. 2d 195, 153 P.2d 784 (Ct. App. 1944); and cases cited *supra* note 34.

40. *E.g.* State v. Bowden, *supra* note 12; State v. Moore, *supra* note 34.

41. Florida, with the majority, rejects the same transaction test, as illustrated in State v. Bacom, 159 Fla. 54, 30 So.2d 744 (1947), in which it was held that a conviction on a charge of operating an automobile while under the influence of intoxicating liquor could not be used to bar a subsequent prosecution for manslaughter by the culpably negligent operation of an automobile, although the latter charge grew out of the same occurrence as the former.

42. This is suggested in Harrison, *op. cit. supra* note 11, at 331:

> [T]he state prosecutor should be required to bring all his theories of the crime in one trial, because one of the major reasons for the proscription against double jeopardy is to prevent harrassment of the individual by confronting him with the prospect of multiple trials.

Kirchheimer, *op. cit. supra* note 10, at 534-42, advocates the concentration of all proceedings for one act in the same trial by the replacement of the same evidence test with a modified version of the same transaction rule, and provides a well-reasoned view of the problems involved in such an approach.

mitted. The point frequently overlooked by the courts is that the same transaction test is only one of several rationales employed by those courts holding with the minority. Totally apart from any stand the courts may have taken against the same transaction rule as it applies to the doctrine of former jeopardy generally, the second action may be barred *under existing law* in those jurisdictions prohibiting subsequent prosecutions for offenses necessaily included in an offense adjudicated at an earlier trial.

D. *A Suggested Approach*

This survey of the broad differences in approach to this problem by the several jurisdictions indicates that some area of common ground or a single test should be extracted from the cases if possible, to help clarify the law on this point. It is suggested that whatever the test used to determine identity of offenses, as a practical matter the problem of a plea of former jeopardy should essentially draw into issue the question whether under the murder indictment as it was drawn, the defendant could have been found guilty of the underlying felony, i.e., whether he was in fact put in jeopardy for that offense. Indeed, the cases, although emphasizing one or another of the tests described, often at some stage of the opinion do phrase the question in terms of the possibility of conviction for the felony under the terms of the earlier indictment. The Supreme Court of Georgia, in a well-reasoned opinion,[43] discussed the same evidence test, noting that its inadequacy to meet all possible contingencies has caused the courts to develop exceptions to the rule. One such exception, universally accepted under both presently used rules, provides that regardless of whether a particular test is satisfied, when a previous trial was for a major offense but under the indictment in that case the defendant could have been convicted of the minor offense charged in the second indictment, the second action should be barred as a violation of the prohibition against double jeopardy. This is true even though proof of some additional element may be required in either of the two actions.[44] The court went on to adopt a form of the same transaction test to be used by Georgia courts, defining it in a helpful manner. Recognizing that the words "same transaction" alone are of little help in an effort to define the term "same offense," as it occurs in the double jeopardy clauses, the court stated that this test as it applies to double jeopardy[45] contains two facets: the transaction must be the same as a matter of fact and of law. For purposes of this discussion, the court's discussion of identity as a matter of law is important, and in part is as follows:

Accordingly, even where the two transactions are the same in

43. Harris v. State, 193 Ga. 109, 17 S.E.2d 573 (1941).

44. *Id.* at 116, 17 S.E.2d, at 578.

45. The court's treatment of the test for purposes of a plea of res judicata will be discussed *infra.*

> fact, it is also necessary for the defendant to plead and prove; either (a) that the transaction charged in the second indictment is an offense which is identical in law with that charged in the first indictment, or else that under the actual terms of the first indictment proof of the second offense was made necessary as an essential ingredient of the offense as first charged; or (b) that the transaction charged in the second indictment is an offense which represents either a major or minor grade of the same offense, *of which the defendant might be convicted under an indictment for the major offense.*[46]

The question thus becomes simply a matter of ascertaining whether under the terms of a particular indictment for felony murder, as interpreted under the law of the jurisdiction involved, the defendant could have been convicted of the felony with which he is later sought to be charged.[47] This should be the essential inquiry, rather than the reciprocal query of whether the proof required under the second indictment would sustain a conviction under the first, which lacks any logical basis as a criterion for a successful plea of double jeopardy.[48] Florida Statute 919.16 provides that "upon an indictment or information for any offense the jurors may convict the defendant . . . of any offense which is necessarily included in the offense charged."[49] Therefore, if the underlying felony in a felony murder charge is a lesser included offense of the crime of felony murder, the defendant in such a situation has certainly been in jeopardy once for that offense.

In *People ex rel. Santangelo v. Tutuska*[50] the court recognized the importance of this question. While acknowledging that in a felony murder case all of the ingredients of the underlying felony must be proved, the court defended its decision of allowing the second action by pointing out that in New York the defendant in such a homicide case could not be convicted of the independent underlying felony. This was because the underlying felony was not required to be charged or mentioned in the first degree murder indictment under the felony murder statute, and in that case had not been so charged or mentioned. Obviously, said the court, the defendant could not be tried for crimes not charged in the indictment. And according to the reasoning of the court, the underlying

46. Harris v. State, *supra* note 43, at 118, 17 S.E.2d, at 579. (Emphasis added.)

47. Harrison, *op. cit. supra* note 11, at 339 reviews the Model Penal Code § 108(2)(b) (Tent. Draft No. 5, 1956), and suggests that under that provision of the Code, all necessarily included offenses must be tried in a single prosecution. Citing State v. Mowser, *supra* note 17, the author then offers the felony in a felony-murder prosecution as an example of a necessarily included offense.

48. See text accompanying notes 16, 34, 35 and 36 *supra*.

49. For a discussion of the distinction between lesser included offenses and lesser degrees of an offense divided into degrees, and the confusion arising from the failure of some courts to distinguish the two, see Note, *Lesser Included Offenses in Florida*, 16 U. FLA. L. REV. 341, 345-46 (1963).

50. People *ex rel.* Santangelo v. Tutuska, *supra* note 23.

felony is not an element of the crime of felony murder, so that it is not a lesser included offense of which the defendant might have been convicted under a felony murder charge. If the defendant could not have been convicted of the felony under the earlier indictment, there is no double jeopardy upon a subsequent trial for that felony.[51] In rejecting the lesser included offense theory, the *Santangelo* court relied in part on a line of decisions[52] advocating the doctrine of allocation, which provides that in order to support a felony murder charge, the felony must be separate from the homicide to the extent that it cannot merge therein. If it were not for this limitation, all felonious assaults producing death would become felony murder, that is, first degree murder.[53] According to this reasoning, the felony, "must be so distinct from that of the homicide as not to be an ingredient of the homicide, indictable therewith or convictable thereunder."[54] It is for this reason that the *Santangelo* court felt compelled to argue that the felony is not a generic part of the felony murder, but rather is merely a condition necessary to be proved in order to show the essential felonious intent, or characterize the degree of the crime.[55] The logical conclusion from this analysis is that when a crime is so distinct from a simple assault on the homicide victim that it will support a felony murder charge, then it is too distinct to be a lesser included crime within the principal of double jeopardy. It is submitted that this analysis at best could be valid only in those jurisdictions whose law will support its basic premise —that if the underlying felony were not considered substantively different from the crime of felony murder, that *all* felonious assaults resulting in death would be felony murder. In many states there is no such requirement, since the crimes upon which a felony murder prosecution can be based are specified by statute,[56] and only those offenses will support such a charge.[57] But even under the statutes couched in more general terms, it would seem that the New York analysis approaches the problem in reverse. As suggested in the opening lines of this article, the felony murder concept was originated to provide heightened penalties for those who commit crimes of violence; underlying felonies were not created to provide the intent element necessary for a first degree murder prosecution. If anything, the homicide characterizes the "degree" of the felony, rather than the converse. Certainly, when the defendant did not

51. *Ibid.*

52. People v. Nichols, 230 N.Y. 221, 226, 129 N.E. 883, 884 (1921); People v. Lytton, 257 N.Y. 310, 314-15, 178 N.E. 290, 292 (1931); People v. Huther, 184 N.Y. 237, 244, 77 N.E. 6, 8 (1906); Buel v. People, 18 Hun. 487, 493 (1879), *aff'd.*, 78 N.Y. 492 (1879).

53. Note, *Criminal Law—Felony Murder—Former Jeopardy*, 26 Brooklyn L. Rev. 299, 300 (1960).

54. People *ex rel.* Santangelo v. Tutuska, *supra* note 23.

55. See text accompanying note 35 *supra.*

56. *Supra* note 6.

57. The Florida Supreme Court has recently pointed out the inapplicability of this aspect of the New York position to a jurisdiction with a statute specifying particular felonies. Robles v. State, 188 So.2d 789 (Fla. 1966).

do the actual killing, not only is the felony an essential part of the offense, it *is* the offense, raised to the level of a capital crime by a showing that homicide was committed during its perpetration.

In *State v. Calvo*, a Louisana court stated that it deemed the true test to be . . . whether on the former trial the accused could have been convicted of the crime charged against him on the second trial,"[58] but held that the offences of conspiracy to commit robbery, and the crime of robbery itself are not the same as a matter of law, and are not necessarily included in the crime of felony murder. On a felony murder indictment, said the court, a jury is powerless to return a verdict of guilty of robbery or of criminal conspiracy.

The rationale in the *Calvo* decision appears to be based on the premise that the facts which will justify charges of criminal conspiracy and robbery are distinct from those which will support a charge of murder, and that the three crimes are therefore not identical, nor are the former two merely lesser grades of the latter. This is certainly true, and pinpoints a major stumbling block in the path of any attempt to bar a felony prosecution after a felony murder action. It is a truism that *all* felonies which will satisfy the statutory crime of felony murder are factually very distinct from the crime of first degree murder, making it appear that they are always offenses separate and apart from that crime. Under our present pleading practices, it is only required that the state charge the defendant with an unlawful homicide with a premeditated design, without mentioning the felony,[59] which may subsequently be introduced into evidence to show the intent requisite to sustain the offense charged. It is submitted that this is poor procedure. The charge should be felony murder, since the defendant often has had nothing to do with the actual killing. His only crime was his participation in the felony, but because a homicide occurred during the fracas, that homicide is alleged to heighten the level of his crime, or, as previously suggested, to characterize the degree of the felony. If the indictment were required to specify felony murder, it would become more manifest that the facts required to support a charge for the felony are necessarily included in the facts required to support a charge of felony murder.

In contrast to the *Santangelo* and *Calvo* decisions, the *Greely* court seemed to recognize the proper function of a felony murder statute and was not troubled by the lack of a robbery count:

> Could [the defendant], under the indictment for murder and regardless of its lack of a robbery count, have been convicted of the robbery? Most certainly he could have been, for, . . . a conviction for the murder would of necessity have been a con-

58. 240 La. 75, 78, 121 So.2d 244, 248 (1960).
59. *Supra* note 26.

> viction for the robbery, essentially and ingrediently. There simply could have been no conviction for murder without the jury's finding that defendant had perpetrated a robbery or had been in the act of doing so.[60]

The Supreme Court of Michigan has indicated in strong obiter dictum[61] that if presented with a proper factual situation, it would hold in accord with the position taken in *Greely*. The court stated that the underlying felony is an essential ingredient of the class of first-degree murder defined in Michigan's felony murder statute. The felony and the murder are considered a single act, and therefore an acquittal of either the felony or the murder would bar a conviction for the other.

If the test of former jeopardy is to be whether the defendant could have been convicted of the presently charged offense upon an earlier indictment or information, then the Florida courts have a preliminary question to answer before arriving at a solution to the problem of a felony trial after a felony murder prosecution. Is the underlying felony a lesser included offense of felony murder? Florida has not taken a definitive position on any criteria which may be used in determining just what offenses will be treated as lesser included offenses of a given crime.[62] Thus far, Florida courts have been content to approach the problem on an *ad hoc* basis. Tests which on occasion have been used by the Florida Supreme Court are whether "without the commission of the lesser offense the greater cannot be committed,"[63] and, more recently whether the greater offense cannot be proved unless the lesser is proved.[64] Either of these would be satisfied by the underlying felony of a felony murder charge, indicating that a felony murder defendant in Florida could be convicted of the felony on which the murder charge is based, regardless of whether or not that felony is specifically charged in the indictment.[65] More specifically, in *State v. Glenn*, the Third District Court of Appeal stated unequivocally that "prosecution of [the defendant] on the larger crime *included and involved* trying him for the robbery offense."[66] The court suggested the simple argument advocated by this paper, that because the killing was not done by the defendant, his guilt or innocence and therefore his jeopardy on the murder charge hinged on the outcome of trial of the included offense of the felony. In such a fact pattern it seems most unjust to allow the second action. The question left open by

60. *Supra* note 37, at 186, 103 A.2d, at 643.

61. People v. Miccichi, 264 Mich. 581, 250 N.W. 316 (1933).

62. For an excellent consideration of this aspect of the problem, see Note, *Lesser Included Offenses in Florida, op. cit. supra* note 49.

63. Sanford v. State, 75 Fla. 393, 397, 78 So. 340, 341 (1918).

64. State v. Harris, 136 So.2d 633 (Fla. 1962).

65. Fla. Stat. § 919.16 (1965):

> Upon an indictment or information for any offense the jurors may convict the defendant . . . of any offense which is necessarily included in the offense charged.

66. State *ex rel.* Glenn v. Klein, 184 So.2d 904, 905 (Fla. 3d Dist. 1966). (Emphasis added.)

the court, concerning whether a subsequent prosecution should be allowed following conviction under the felony murder statute of one who, while engaged in robbery committed the homicide, is more difficult. Here it is more tenable that two separate offenses, the murder and the felony, have been committed. It is true that in Florida, for purposes of former jeopardy, the words "same offense" mean the same crime, not merely the same act or set of acts out of which a crime arose.[67] The state could, if it chose, prosecute the defendant for murder,[68] and subsequently charge him with felony, regardless of the outcome of the first trial.[69] But when the crime alleged is felony murder, that is, when the state relies on proof of a felony rather than proof of premeditation, the determining factor is the participation in the felony, and when that issue has been once litigated, with the defendant in peril of a conviction for that offense, it is difficult to understand upon what basis a further adjudication of that question could be justified. If it is allowed, then the state, by carefully selecting its method of procedure, can circumvent the constitutional prohibition against double jeopardy.

Because the state will normally charge the defendant with the most serious offense of which it has evidence, the felony murder prosecution will usually precede any attempt to prosecute the felony alone. But should the prosecution for the felony occur first, or should there be a trial for the felony before the victim dies as a result of the crime, thus raising its level to felony murder, the same problem will exist in reverse. It would seem that although it is arguable that this sequence is more offensive to a sense of justice, since the defendant has never been in danger of a first degree murder conviction, still his crime, namely participation in the felony, has already been adjudicated, and the second prosecution, necessarily hinging upon that participation, should be barred.[70]

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67. State v. Bowden, 154 Fla. 511, 18 So.2d 478 (1944), *aff'd*, 156 Fla. 113, 22 So.2d 581 (1945).

68. First degree murder in Florida is defined either in terms of felony-murder, or as "the unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being . . .", FLA. STAT. § 782.04 (1965). There is nothing to bar the state from trying the murder without invoking the felony-murder portion of the statute. Of course, the state may not wish to do this when it is unable to prove just which of the defendants committed the actual homicide.

69. Florida has no bar to prosecution of two separate and distinct crimes committed by the same acts. This is illustrated by King v. State, 145 Fla. 286, 199 So. 38 (1940), which held that an acquittal on charges of aiding, counseling, and procuring a principal to burn a building, under a statute defining the offense of first degree arson, was not a bar to a prosecution on charges of causing, aiding, counseling and procuring burning of buildings with intent to injure the insurer thereof, under a statute defining the offense of burning to defraud insurer.

70. State v. Mowser, 92 N.J.L. 474, 106 Atl. 416 (Ct. Err. & App. 1919), barring a prosecution for felony murder on the ground that the defendant had already pleaded guilty to a charge of the underlying robbery; Doggett v. State, 130 Tex. Crim. Rep. 208, 93 S.W.2d 399 (Crim. App. 1935) holding that under a felony murder statute a conviction of robbery bars a subsequent prosecution for a murder committed in the perpetration of the robbery; State v. Cooper, 13 N.J.L. 361, 25 Am. Dec. 490 (1833), holding that conviction of arson of a dwelling house bars a later prosecution for the murder of one burned in the house.

The Florida Supreme Court has held[71] that the state is prohibited "from first prosecuting the lower offense necessarily included in a higher and then prosecuting the higher."[72] The Court stated that to hold otherwise would violate the rule against double jeopardy, by allowing the state to prosecute for each of the lesser offenses included in a higher offense, progressively on up to the highest, thus placing the accused in jeopardy repeatedly for one or more of the lesser included offenses.[73] Therefore, if the *Glenn* rationale is followed, and the supporting felony is held to be a lesser included offense in felony murder, there is precedent to bar a felony murder action following a trial of the felony.

The *Greely* court was unequivocal on this point, arguing that because the felony and the homicide are essentially the same crime, former jeopardy is applicable whether the lesser crime is first prosecuted and the defendant is later indicted for the homicide,[74] or whether the homicide is first disposed of, and the lesser offense is later charged.[75] The court stated:

> The mere order of events, that is whether the accused is first put in jeopardy for the whole or for the part of the total offense charged against him, can be of no moment . . . . The decisions in this State put it beyond question that what violates the immunity is the separation into its components, for the purpose of separate prosecution, of an episode that constitutes a single criminal act; that is, plural prosecution for a single offense.[76]

In addition to the inquiry concerning whether it makes any practical difference which of the two prosecutions occurs the first in time, is the similar question of whether there should be any distinction, for former jeopardy purposes, between a verdict of guilty or one of not guilty in the earlier action. It has been said that,

> A *conviction or acquittal* of any given offense should bar a subsequent prosecution for any lesser included offense. And if the

71. Sanford v. State, *supra* note 63.

72. *Id.* at 401, 78 So., at 342.

73. This position is advocated in Note, *Lesser Included Offenses in Florida, op. cit. supra* note 49, at 349 which states in part:

> Two types of situations exist in which the use of a defense of former jeopardy should be considered. A conviction or acquittal of any given offense should bar a subsequent prosecution for any lesser included offense. *And if the given offense is itself a lesser included offense of some more serious crime, then a subsequent prosecution for that greater offense should be barred.* (Emphasis added.)

74. In State v. Mowser, *supra* note 70, a prosecution for murder allegedly committed during a robbery was barred on the ground of double jeopardy because the accused had earlier pleaded guilty to the robbery.

75. In State v. Cosgrove, 103 N.J.L. 412, 135 Atl. 871 (Ct. Err. & App. 1927), the accused had been prosecuted for a homicide which had resulted from his operation of a motor vehicle in a criminal manner. Subsequently, the state sought to prosecute the defendant for an atrocious assault and battery committed upon a second victim of the same criminal act. Applying the same transaction test, the court refused to allow the second action.

76. State v. Greely, *supra* note 37, at 184-85, 103 A.2d, at 642.

> given offense is itself a lesser included offense of some more serious crime, then a subsequent prosecution for that greater offense should be barred.[77]

Most of the decisions pertaining to this point actually deal with crimes divided into degrees. If a defendant is tried on an indictment charging the highest degree of an offense, and is convicted of the degree charged or of a lower degree of that crime, the judgment will bar any further action both for higher[78] and lesser[79] degrees of the crime. If the verdict is for acquittal, such acquittal is of the highest degree and all lesser degrees.[80] A felony, of course, is not a lesser degree of the crime of felony murder; it is presented by this paper as a lesser included offense of that crime. But analogizing from the well developed law surrounding crimes statutorily divided into degrees, it would seem that if the felony murder action is prosecuted first, and if in fact the felony is a lesser included offense, so that the defendant is in jeopardy of a conviction for that offense, then regardless of whether the verdict is for conviction or acquittal, the subsequent action should be barred.

If a defendant is tried on an indictment charging a lesser degree of a crime, and is convicted of that degree or a lower degree, that conviction would bar a subsequent prosecution for that degree, a lower degree,[81] or a higher degree,[82] and an acquittal would bar a prosecution for that degree or a higher degree.[83] Thus it will be seen, again analogizing from crimes of degrees, that if the underlying felony is first tried, the defendant should be able to plead that judgment to bar a subsequent action for felony murder, regardless of the verdict in the first action.

In addition to the provisions barring multiple jeopardy, some states also prohibit multiple punishment for a single offense.[84] This further confuses the felony murder imbroglio. In Florida, a court may not inflict

77. Note, *Lesser Included Offenses in Florida, op. cit. supra* note 49, at 349. (Emphasis added.)

78. State *ex rel.* Landis v. Lewis, 118 Fla. 910, 160 So. 485 (1935).

79. Note, *Criminal Law: Double Jeopardy in Florida*, 2 U. FLA. L. REV. 250, 254 (1949); See generally 22 C.J.S. *Criminal Law* § 283(b) (1961).

80. Note, *Lesser Included Offenses in Florida, op. cit. supra* note 49, at 349. This is because FLA. STAT. § 919.14 (1965) provides that the judge must charge the jury that it may return a verdict of guilty of any lesser degree of the crime charged. Logically then, an acquittal in Florida is an acquittal of the degree charged and all lesser degrees; *contra*, Note, *Criminal Law: Double Jeopardy in Florida, op. cit. supra* note 80, at 254, suggesting that an acquittal of murder in Florida will not bar a prosecution for a lesser degree of crime in the same category.

81. Note, *Criminal Law: Double Jeopardy in Florida, op. cit. supra* note 80, at 254; See generally 22 C.J.S. *Criminal Law* § 283(b) (1961).

82. Sanford v. State, *supra* note 63.

83. *Ibid.*

84. *E.g.*, NEW YORK PENAL LAW, § 1938 (1944):

> An act or omission which is made criminal and punishable in different ways, by different provisions of law, may be punished under any one of those provisions, but not under more than one; and a conviction or acquittal under one bars a prosecution for the same act or omission under any other provision.

two punishments for the same offense.[85] This would suggest that, having been tried for felony murder and subsequently indicted for the underlying felony, the accused could rely on the rule against multiple punishment in addition to, or as an alternative to, the prohibition against double jeopardy. On the other hand, this rule does not apply where more than one crime is committed in the same affray.[86] Therefore, the defendant must hurdle the same legal barriers regardless of which of these two defenses he attempts to avail himself. A jurisdiction that considers the underlying felony a separate offense for purposes of double jeopardy is most likely to do the same with regard to the rule against multiple punishment.[87]

Certainly, the pressing concern which has caused so many courts to strain for a rationale which will permit prosecutions which are at best open to attack under well developed principles of double jeopardy, is the cogent fear that criminals will go unpunished, and the desire to protect society from those injustices which sometimes occur when skilled defense attorneys find loopholes. The *Greely* court acknowledged these fears, but reasoned that in the tradition of our constitutional system occasional injustice must be tolerated to insure the security afforded by safeguards such as the prohibition against double jeopardy. The court phrased this proposition well:

> Though the immunity against double jeopardy is universally recognized as fundamental, constitutionally and at common law, it can in truth be fundamental only as it is fundamentally applied. Its ideal, like that of all the great guarantees, including the right of trial by jury itself, is to be found in its salutary design and in its equal availability to all men. The immunity is not ordained to achieve a uniformity of moral perfection in its results. Its operation is not contingent upon a relation to happy circumstance. It is not designed to work poetic justice in particular cases, but rather to restrain the sovereign power in all cases. And if upon occasion it works to suppress a criminal prosecution and so, as it might be, results in a disedifying frustration in whole or in part of punishment for crime . . . it is because the lesser evil is to conserve the great institute by having it rule the case, rather than to repudiate it by permitting the reverse. The suppression of prosecution is necessarily the protective function of the guarantee. The incomparably greater evil would be in the larger frustration, which it is the solemn duty of the court to prevent. Compromising and adaptive decisions might forestall the occasional use of this ancient safeguard for the complete or partial defeat of a culprit's penalty,

85. *Ex parte* Bosso, 41 So.2d 322 (Fla. 1949).

86. Blitch v. Buchanan, 100 Fla. 1242, 132 So. 474 (1931).

87. This is discussed in Note, *Double Jeopardy: Prosecution for Underlying Felony Following Acquittal for Felony Murder*, 9 BUFFALO L. REV. 378, 381 (1960).

> but not without so transforming or reducing the safeguard as to permit the sovereign power in this matter of double jeopardy to be and become a standing and established menace to all.[88]

It is important to note that the *Greely* court made these remarks in justification of the inequity which had resulted from the application of the principle of double jeopardy on behalf of the defendants in cases decided earlier in that jurisdiction. In none of these cases was the principle sought to be applied to prevent prosecution of the underlying felony after a felony murder prosecution, but rather, the cases cited by the court dealt either with an earlier prosecution for the felony, and a barring of the later attempted felony murder prosecution,[89] or with the barring of a prosecution for an assault upon a person who had been injured by the defendant's operation of a motor vehicle in a criminal manner, where the defendant had earlier been tried for homicide for the death of another victim of the same criminal act.[90] Had the state wished a first degree murder conviction in the first two cases, it could have prosecuted the defendants under the felony murder statute in the first instance, rather than seeking to divide what was essentially one criminal act into two separate crimes. The situation in the third decision discussed by the court could similarly have been avoided by prosecution of all aspects of the crime in the first action. But the court felt that even these fact patterns, and the resulting possible injustice, must be tolerated to preserve the inestimably valuable safeguard against double prosecution for the same offense. Surely it is much easier to understand the application of the principle to a situation when the exact act, i.e., the participation in a felony, has been once prosecuted.

III. Res Judicata

The foregoing discussion points up a related problem, yet to be considered. Does the felony murder indictment in fact call into issue the exact questions which would be considered in a trial for the felony alone? If so, there is a second safeguard available to the defendant, that of res judicata. Indeed, some courts faced with this kind of situation have taken this second route, or have discussed both former jeopardy and res judicata in resolving the question. The doctrine of res judicata is sometimes either overlooked in criminal actions, or is swallowed up in a general consideration of the broader doctrine of former jeopardy, and therefore inadequately explored. Despite this general neglect, the doctrine is unquestionably available in criminal trials.[91]

In its broadest form, res judicata covers the same area already ade-

88. State v. Greely, 30 N.J. Super. 180, 191, 103 A.2d 639, 645 (Hudson County Ct. 1954).
89. State v. Mowser, *supra* note 70; State v. Cooper, 13 N.J.L. 361 (Sup. Ct. 1833).
90. State v. Cosgrove, *supra* note 75.
91. United States v. Oppenheimer, 242 U.S. 85 (1916).

quately protected in criminal actions by the principle of former jeopardy. That is, where the same offense already once litigated is charged against the defendant for the second time, he may interpose a plea in bar either of former jeopardy or res judicata. But the doctrine of former jeopardy can only be used to bar a second trial for the same offense. Collateral estoppel, on the other hand, applies equally to separate and distinct offenses, or causes of action. Therefore, in those jurisdictions holding that in felony murder the murder and the felony are separate offenses, making former jeopardy inapplicable, collateral estoppel, an aspect of res judicata, may be used to block the second action by showing that one or more issues drawn in question by the charges were in fact necessarily litigated and decided by the court in the former action.[92] The problem presented when this kind of analysis is made is caused by the use of general verdicts in criminal actions. When a general verdict of guilty is returned, it indicates that all issues have been decided in favor of the prosecution. But when the verdict is not guilty, it is difficult to establish which of the essential elements were not sufficiently established by the prosecution.[93]

A well-reasoned Georgia opinion, *Harris v. State*,[94] with a factual situation similar to *Santangelo* and *Greely* reached the conclusion that the second action should be barred, as in *Greely*, but confined its discussion to the doctrine of res judicata. The court rejected former jeopardy as a rationale for its decision because it felt, in line with the majority of jurisdictions, that the offenses of murder, even under a felony murder statute, and of a separate felony, are not the same as a matter of law, and that the indictment charging only murder under such a statute does not make proof of the felony an actual ingredient of the crime of murder. Because of this, and because a conviction for robbery could not have been secured under the felony murder indictment in Georgia, the court reasoned that the doctrine of former jeopardy was not applicable.[95] Instead, it turned to collateral estoppel, and cited Freeman's work on Judgments to the effect that when the crimes charged are different, rendering a plea of former jeopardy unavailable, a prior criminal judgment is nevertheless res judicata on every matter which was in issue and actually or necessarily determined by the court. And although an acquittal may have been returned under an indictment charging an apparently different offense, still that judgment may be used to sustain a plea of

92. RESTATEMENT, JUDGMENTS § 68(1) (1942):

Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action . . .

See generally, Annot., 147 A.L.R. 991, 997-98 (1943).

93. Note, *Felony Murder Acquittal Held Not To Bar Subsequent Prosecution For Underlying Robbery*, 59 COLUM. L. REV. 816, 818 (1959) provides a discussion of these principles.

94. *Supra* note 43.

95. *Id.* at 119, 17 S.E.2d, at 580.

former acquittal by evidencing that the defendant could not be guilty of the crime presently charged without having been guilty of the offense for which he was acquitted.[96] This, reasoned the court, could be applied to provide for the situation resulting when the law of the jurisdiction would preclude a conviction for the felony alone under a felony murder charge. Applying the doctrine of collateral estoppel to the facts of the *Harris* case, the court summarized its decision:

> In the former trial for murder there was not the slightest pretense of justification on the part of the defendant. The whole contention in that case centered upon the one single question whether the defendant participated with another in the murder and robbery of the deceased. If he did, he was necessarily guilty of murder. By acquitting him the jury necessarily found that he did not participate in the transaction. *This was the sole issue that was tried and determined. It is now sought, after such a solemn determination, to test again the same issue*, and to undo the necessary effect of the former judgment by adjudicating that the defendant did in fact participate in the robbery and murder, from which the jury has already absolved him. Since it undisputably appears that the defendant could not be guilty of the present charge without also being guilty of the crime of which he has been tried and acquitted, he cannot now be put in jeopardy for the purpose of again adjudicating the issue which has already been determined in his favor.[97]

Some courts, however, reject this theory when the verdict in the felony murder trial was for acquittal, even though the only defense offered by the defendant in that trial was an alibi.[98] One such opinion is *State v. Barton*,[99] decided by the Supreme Court of Washington. In that case, the defendant had been acquitted in a trial for felony murder of a death occurring during the course of a robbery, and he entered a plea of former acquittal. In rejecting his contention the court reasoned that:

> In the murder prosecution, the appellant's defense of alibi and the various related matters of fact . . . were not actually or necessarily adjudicated, nor can it be said that the issues were limited, as appellant contends. Every material allegation of the information was placed in issue by the appellant's plea of not guilty, and the state had the burden of proof beyond reasonable doubt.[100] It is not possible to determine whether the jurors

96. 2 FREEMAN, JUDGMENTS, § 648, at p. 1364 (5th ed. 1925).

97. *Supra* note 43, at 121, 17 S.E.2d, at 581. (Emphasis added.); *accord*, People v. Grzesczak, 77 Misc. 202, 137 N.Y.S. 538 (1912).

98. It should be noted, however, that in the *Harris* case, *supra* note 43, the jury had returned an acquittal, and the only defense offered had been an alibi.

99. 5 Wash. 2d 234, 105 P.2d 63 (1940).

100. This is supported by State v. Orth, 106 Ohio App. 35, 38, 153 N.E.2d 394, 398 (1957), *appeal dismissed*, 167 Ohio St. 388, 148 N.E.2d 917 (1958):

The record is silent as to the issues upon which the murder case was tried. How-

> returned a verdict of acquittal because they credited the testimony in support of appellant's alibi, or for the reason that they found the state's evidence insufficient as to one or more essential elements of the offense charged. They could have utterly disregarded all of the testimony adduced by the appellant in his defense and yet have returned a verdict of not guilty. The verdict and the judgment based thereon were not, therefore, *res judicata* as to appellant's alibi, nor as to any other particular fact. They were *res judicata* only as to the ultimate fact that appellant was not guilty of the crime of which he was accused.[101]

This argument has merit, since it is indeed impossible to determine from a general verdict of acquittal just which were the deciding issues, and collateral estoppel requires that the facts to which the doctrine is applied must not only 1) have been at issue in a former trial, but must have been 2) determined by that tribunal, and 3) necessarily so determined in order for the court to reach its decision.[102] The first requirement is easily met in the situation in question, but after an acquittal it is impossible to know whether the second has been met, since the verdict may have been based not on the jury's finding that the defendant did not participate in the felony, but rather on their belief that although he did participate in the felony a murder was not committed in the perpetration of that felony,[103] or possibly their belief that the felony itself had not been sufficiently proved. And, since it cannot be known whether the second requirement is met, a fortiori the third is not satisfied, as the decision could have been made without any determination on the issue of alibi. In a jurisdiction following this reasoning a formidable barrier is raised in the way of the defendant.

It is possible, however, to have a factual situation in which it *can* be shown that the jury in the first action resolved the crucial issue of the defendant's participation in the felony in his favor. This is the case when there are multiple defendants and one is found guilty and another found innocent. This can easily occur, since in many felony murder actions there are multiple offenders, only one of whom did the actual killing, while the others are being tried for murder solely because the state alleges their presence and participation at the scene of the crime. This

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ever, the nature of the charge involved a number of essential elements constituting the crime of murder while in the perpetration of a robbery, which the state was required to prove beyond a reasonable doubt. Failure upon the part of the state to prove any one of the essential elements required a verdict of acquittal. *Failure of the defendant to deny or dispute any of the issues involved would not relieve the state from the necessity to prove all the essential elements constituting the crime beyond a reasonable doubt.* (Emphasis added.)

101. State v. Barton, 5 Wash. 2d 234, 240-41, 105 P.2d 63, 67 (1940).

102. Annot., 147 A.L.R. 991 (1943).

103. This is pointed out in Note, *Felony Murder Acquittal Held Not To Bar Subsequent Prosecution For Underlying Robbery*, *op. cit. supra* note 93, at 820.

is illustrated by *State v. Ragan*,[104] a Kansas case, in which one defendant was found guilty of murder committed in the perpetration or attempted perpetration of a robbery, and a second defendant, was acquitted on the basis of his defense that he had fled the scene before the murder was committed. Upon his subsequent indictment for robbery, the second defendant pled his former acquittal in bar. Although the ultimate issue of former jeopardy was resolved against the defendant, the court stated that the jury in the murder case had resolved the questions of fact as to the defendant's presence and connection with the murder in his favor. This is easily understood, since the jury must have believed that a murder had been committed in the perpetration or attempted perpetration of a robbery, or they could not have convicted the first defendant, and believing that, the only way they could have justified an acquittal of the second defendant was by deciding that he had in fact not been present at the time of the murder. This would indicate that collateral estoppel might have at least limited application even in those jurisdictions which normally reject it on the rationale of the *Barton* decision.

IV. CONCLUSION

The law in this area is clearly unsettled. This is true partly because the mandate against double jeopardy contained in the Fifth Amendment to the United States Constitution[105] has not yet been held to be incorporated in the Fourteenth Amendment,[106] which does not itself expressly contain such an injunction. Thus there is a complete lack of uniformity among the jurisdictions, with the majority holding that a trial for the underlying felony is not barred by former jeopardy when the defendant has been previously tried for felony murder. However, res judicata is a distinct rule of law, universally recognized, and not dependent upon any constitutional mandate. One aspect of that doctrine, collateral estoppel, has been held by some jurisdictions to bar the second action.[107] It is submitted that the Third District Court of Appeal is to be commended for reaching a just conclusion in *State ex rel. Glenn v. Klein*.[108] Regardless of what rationale is chosen by a court, it would seem that only by a strained and technical legal contrivance can such an action be permitted. Manifestly, the occurrence upon which both actions must be based is one and the same, and as the steady movement toward the complete revision of pleading and practice in the courts of this country[109] indicates, and as

104. 123 Kan. 399, 256 Pac. 169 (1927).

105. "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

106. Palko v. Connecticut, 302 U.S. 319 (1937).

107. The availability of res judicata as a separate rule of law applicable to this problem is well expressed in State v. Orth, 106 Ohio App. 35, 47, 153 N.E.2d 394, (1957) (dissent), *appeal dismissed*, 167 Ohio St. 388, 148 N.E.2d 917 (1958).

108. *Supra* note 66.

109. A concise summary of this reform process is provided in WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS §§ 66-68 (1963).

our crowded dockets urge, it is socially desirable to insure that all legal questions involved in a single event are decided by a single court with all of the facts surrounding that occurrence before it.[110] And surely it is morally desirable to insure that no man must answer to the law twice for what is essentially a single offense.

110. This is advocated in Note, *Double Jeopardy: Prosecution for Underlying Felony Following Acquittal for Felony Murder*, *op. cit. supra* note 87, at 382.