

# Felony Murder

Part I: Liability

Part II: Capital Punishment

Lecture adapted from: G. Binder, *Making the Best of Felony Murder* (2011). Boston University Law Review, Vol. 91, p. 403, 2011; Binder, Fissell, & Weisberg, *Capital Punishment for Unintentional Felony Murder*, Notre Dame Law Review (Forthcoming).

# Real Life

- Has anyone tried a felony murder case?
- What were the facts?

# Part I: Liability

# Traditional “Murder” Grading

- The most severe grade of “homicide,” which is killing another person.
- Homicide grades, based on mental state with respect to victim’s death:
  - Negligent: “involuntary manslaughter”
  - Reckless: “involuntary manslaughter”
  - Extreme Indifference to Human Life: **Murder**
  - Intentional:
    - Intentional w/ excuse/mitigatory – “voluntary manslaughter”. Mitigated by provocation, or unreasonable self-defense.
    - Intentional: “second degree **murder**”
    - Intentional w/ premeditation/deliberation – “first degree **murder**”
- The implication of “murder” – capital punishment. *Kennedy v. Louisiana*.
- Outside of traditional schema: **felony murder**

# Culpability Refresher -- MPC

## (2) Kinds of Culpability Defined.

### (a) **Purposely.**

A person acts purposely with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
- (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

### (b) **Knowingly.**

A person acts knowingly with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
- (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

### (c) **Recklessly.**

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

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### (d) **Negligently.**

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

# Element Analysis

- Mental Element
  - Purpose, Knowledge, Recklessness, Negligence
- Conduct Element (act, omission)
- Circumstance Element (e.g., victim police officer)
- Result Element

# Felony Murder – A Pure Definition

- Result element: victim's death
- Conduct element: participation in felony
- Mental element: intent with respect to participation in felony
- **“Murder” where the intent required is with respect to the commission of a felony, and not the causation of death.**
- Ex: Illinois

“(a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:

(1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

...

(3) he is attempting or committing a forcible felony..”

Traditional  
Murder –  
intentional  
killing

720 Ill. Comp. Stat. Ann. 5/9-1

# Functional Definition

- “A felony murder rule is any rule reducing the culpability with respect to death required for a particular grade of murder when committed in the course of certain felonies.” –G. Binder
  - “aggravates an unintended killing to murder on the basis of committing or attempting a felony”
  - NOTE: But even with intentional killings, can still charge FM for ease of proof.
    - Proof of intent to kill is sometimes hard, and messy.
    - Our study of felony murder cases show that this is a common tactic.
- 45/53 jurisdictions have FM.



# Predicate Felonies

- Enumerated vs. Unenumerated.
- 39 jurisdictions: arson, burglary, rape, robbery, and kidnapping
  - Many also list flight from custody
  - Various others
    - Elder or Child Abuse
    - Drug offenses
    - Political offenses (treason)

# UCMJ Homicide

- Article 119 “Manslaughter”:

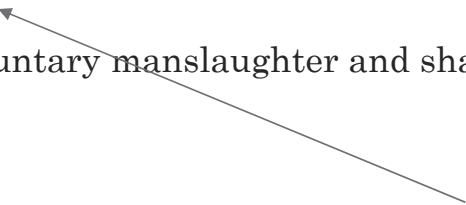
(a) Any person subject to this chapter who, with an intent to kill or inflict great bodily harm, unlawfully kills a human being **in the heat of sudden passion caused by adequate provocation** is guilty of voluntary manslaughter and shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who, without an intent to kill or inflict great bodily harm, unlawfully kills a human being--

(1) by culpable **negligence**; or

(2) while perpetrating or attempting to perpetrate an offense, other than those named in clause (4) of section 918 of this title (article 118), directly affecting the person;

is guilty of involuntary manslaughter and shall be punished as a court-martial may direct



This may be seen as a  
“misdemeanor manslaughter”  
rule

-typical before Model Penal  
Code  
-now very unusual

# UCMJ Homicide

- Article 118 “Murder”;

Any person subject to this chapter who, without justification or excuse, **unlawfully kills a human being**, when he--

(1) has a premeditated design to kill;

(2) intends to kill or inflict great bodily harm;

(3) is engaged in an act which is inherently dangerous to another and evinces a wanton disregard of human life; or

(4) **is engaged in the perpetration or attempted perpetration** of burglary, forcible sodomy, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of a child, robbery, or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct

# MCM on Felony Murder

“(5) During certain offenses.

(a) In general. The commission or attempted commission of any of the offenses listed in Article 118(4) is **likely to result in homicide**, and when an unlawful killing occurs as a consequence of the perpetration or attempted perpetration of one of these offenses, the killing is murder. **Under these circumstances it is not a defense that the killing was unintended or accidental.**”

# Discussion

# Origins

- Blackstone: “involuntary killing” in furtherance of felony was murder.
  - Predicate: “an unlawful act against the king’s peace, of which the probable consequence might be bloodshed”
  - Thus, justified by foreseeability.
- Note: at time, “murder” did not require intent to kill, only “malice” that was presumed from a “killing.”
- “Killing” then meant not just causing death, but causing death by wounding or striking person with weapon.
  - Hale: “death without the stroke or other violence makes not the homicide.”
- Early American courts called FM a “legal fiction.”
  - KY (1943): “The intent to perpetrate a different felony . . . *supplies* the elements of malice and intent to murder although the death is actually against the original intention of the party.”

# Traditional justifications

- Commission of felony demonstrates culpable mental state of at least reckless indifference to human life, which is enough for murder even independent of a felony.
  - Wrong: most only establish negligence [discuss later].
- Deters from committing felonies.
  - Prob: punishment lottery. Most felonies don't result in death, and punishment lotteries have been found to be ineffective at deterrence (certainty of punishment deters more than severity).
- Encourages felons to commit felonies very safely.
  - Prob: subset of population that will likely not respond to such incentives. Not risk-averse.

# Objections

- Wechsler: “rationally indefensible.”
- I. “Double punishment” for assaults?
- II. “Strict liability” for death.
  - Traditional responses:
    - 1. Malice= felonious purpose (transferred intent); or
    - 2. Malice=Danger of felony (per se recklessness or negligence)
    - 3. Combination
- III. Punishes accomplices for deaths (excessive vicarious liability)



# Absurd Cases

Absurd cases (from G. Binder, *Felony Murder*):

“1. Seven months after stealing a car, James Colenburg, a Missouri man, was driving down a residential street when an unsupervised two-year-old suddenly darted in front of the stolen car. The toddler was struck and killed. Colenburg was convicted of felony murder predicated on theft.

2. Jonathan Miller, a fifteen-year-old Georgia youth, punched another boy in a schoolyard dispute. The second boy suffered a fatal brain hemorrhage. Miller was convicted of felony murder, predicated on the felonies of assault with a deadly weapon and battery with injury.

3. Suspecting Allison Jenkins of drug possession, an Illinois police officer chased him at gunpoint. As the officer caught him by the arm, Jenkins tried to shake free. The officer tackled Jenkins and fired the gun as they fell, killing his own partner. Jenkins was convicted of felony murder, predicated on battery of a police officer. No drugs were found.”

# Absurd Cases

“4. Jonathan Earl Stamp robbed a California bank at gunpoint. Shortly thereafter, one of the bank employees had a fatal heart attack. Stamp was convicted of felony murder.

5. New York burglar William Ingram broke into a home, only to be met at the door by the homeowner, brandishing a pistol. The homeowner forced Ingram to lie down, bound him, and called the police. After police took Ingram away, the homeowner suffered a fatal heart attack. Ingram was convicted of felony murder.

6. Also in New York, Eddie Matos fled across rooftops at night after committing a robbery. A pursuing police officer fell down an airshaft to his death. Matos was convicted of felony murder.”

# Absurd Cases

“7. John Earl Hickman was present when a companion overdosed on cocaine in Virginia. He was convicted of felony murder predicated on drug possession.

8. John William Malaske, a young Oklahoma man, got a bottle of vodka for his underage sister and her two friends. One of the friends died of alcohol poisoning. Malaske was convicted of felony murder predicated on the felony of supplying alcohol to a minor.

9. Ryan Holle, a young Florida man, routinely loaned his car to his housemate. At the end of a party, the housemate talked with guests about stealing a safe from a drug dealer’s home, maybe by force. The housemate asked Holle for the car keys. Holle, tired, drunk, and unsure whether the housemate was serious, provided the keys and went to bed. The housemate and his friends stole the safe and one clubbed a resisting resident to death. Holle was convicted of felony murder and sentenced to life without parole.”

# Absurd Cases

“10. Bernard Lambert, a Pennsylvania man who regularly gave rides to a friend, drove the friend to a home where he claimed someone owed him money. The friend broke in and shot a resident in the head. Lambert was convicted of felony murder predicated on burglary.

11. North Carolina college student Janet Danahey set fire to a bag of party decorations as a prank in front of the door of her ex-boyfriend's Apartment. To Danahey's surprise, the building caught fire and four people died in the blaze. Danahey pled guilty to four counts of felony murder.”

“Solutions” to these Problems

# Merger Rule – Preventing “Double Punishment”

- “independent felony requirement” – the predicate felony must endanger some other interest than the physical life of the victim.
  - i.e., manslaughter, or aggravated assault would “merge” with the homicide. Not independent.
- If every homicide committed during a felony were murder, this would collapse grading distinctions in homicide law.
- Recall the schoolboy fight – illustrates probs of jurisdictions without merger rule.

# Variations of Merger Rule

- Homicide test—excludes all homicide offenses below murder
- Lesser included offense test—excludes felonies that share the same elements as homicides below murder
- Independent act test—excludes felonies unless they have some act beyond what is required for homicide
- Independent interest test—excludes felonies that do not endanger interests other than victim's health/life
- Independent culpability test—excludes felonies unless they involve culpability with respect to other interest than life/health
  - Most common. Independent felonious “purpose”

# Modifiers to Strict Liability -- Culpability

- Minority of jurisdictions require culpability with respect to death of the victim in their felony murder statutes.
- Almost half of jurisdictions.
- Alabama: requires at least negligence.
- New Hampshire: requires extreme indifference to human life, and applies rebuttable presumption when causing death with deadly weapon during certain felonies



# Modifiers to Strict Liability – Dangerousness of Felony (inherently, or as committed)

- Can restrict to certain predicate felonies that are inherently dangerous.
- Recall predicate felonies...how dangerous?
- “Dangerous”
  - Probability? No.
  - Only 22% of shootings are fatal.
  - Risk of death in unresisted robbery is .2%; resisted robbery is 3%.
  - Arson: 1 death per 100.
  - Must be much lower threshold than 51%.

# Difficult Case: Burglary

- Most planned to avoid confronting inhabitants.
- .02% mortality rate.
- Potential solution: burglary often requires further unlawful act while inside, this could be used as a predicate.
- But problem of groups of burglars – one person subdues inhabitant (“robbery”), others unaware.
  - WV case *State v. Tesack*: lookout and getaway drivers convicted of murder when other burglars shot inhabitants that they were not aware were present.

# Issues

- Responding Policemen – can be liable for killing police and also for those police kill
- State v. Chambers (Wisconsin, 1994): burglar is caught, co-burglar flees scene and kills police officer during chase. Original burglar convicted of FM.
- People v. Hickman (Illinois 1973): police officer responding to burglarly accidentally shoots another officer. Unarmed burglar convicted of FM.
  - “There should be no doubt about the ‘justice’ of holding a felon guilty of murder who engages in a robbery followed by an attempted escape and thereby inevitably calls into action defensive forces against him, the activity of which results in the death of an innocent human being.”

# Jurisdictions that do not enumerate— Courts must ensure “dangerousness” limitation

- 20 jurisdictions do not exhaustively enumerate predicate felonies.
- 6 of these do not enumerate at all.
- Ex. Delaware: “While engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any felony...”
- Courts determine if felony was dangerous, either inherently or as committed.
- Risk: result of death leads to automatic assumption of dangerousness.
- Miller v. State (GA, 2002) – schoolboy fight noted earlier. Fists found to be “deadly” weapons, allowing assault to be upgraded to FM.

# Modifiers to Strict Liability – Causation

- Causal link between act and death; causal link between felony and the death in general.
- Here, causation ensures some minimum level of culpability. Can be seen as “stand in” for culpability requirement.
- Courts impose requirement of “reasonable foreseeability,” direct agency, or both.
  - Majority (32/45) require foreseeability

# Causation – Agency Test

- Restricts liability to deaths directly caused by defendant.
- Emphasis on physicality.
- Phillips v. State (Alaska, 2003): police officer has heart attack while struggling with defendant. Court affirmed conviction, but opined that had death occurred during a chase and not a physical struggle, there would be no liability.
- Excludes actors not party to felonies (esp. police officers)
- Problem: some direct applications of force cause unexpected deaths.
  - State v. Gorman (Minnesota 1995): Defendant punches victim, victim falls and head is split by hard floor.

# Causation – Proximate Cause (Foreseeability)

- Restricts liability to foreseeably caused deaths.
- Think proximate cause in torts.
- Effectively imposes negligence requirement
- **Inherently** foreseeable: Ex. State v. Kalathakis (LA 1990): Court overturned conviction for FM when co-felon was killed by police. Predicate felony was drug manufacturing. Court held that this death was not foreseeable from that felony.
- **Foreseeably** dangerous as committed: Ford v. State (GA, 1992): death during accidental discharge during cleaning of gun possessed illegally. Not foreseeably dangerous as committed.

# Modifiers to Excessive Vicarious Liability -- Accomplices

- Punishment of accomplices for deaths is the other major criticism of FM (beyond strict liability for death).
- Problem of automatic punishment of those whose co-felons kill unexpectedly.
  - Recall case of Ryan Holle – loaned car to friends for safebreaking.
- Note: Most jurisdictions do not punish accomplices through FM rules; only punish direct killer.
  - These jurisdictions can punish accomplices through complicity statutes, but these require intent. Thus, offer protections against unintentional killing by co-felon.



# Accomplices – “in furtherance of” and “foreseeable”

- Some (substantial minority) jurisdictions punish co-felons in their FM statutes. “Collective liability jurisdictions.”
  - Punish FM as causing death “by means of” a felony (3 jurisdictions) OR
  - Punish FM by participating in felony in which another person causes death
    - This includes unforeseeable deaths caused by co-felon.
    - 12 jurisdictions.
  - *Military is a collective liability jurisdiction (to discuss next)*
- Solution to narrow liability in most jurisdictions: accomplice liable if killer’s fatal acts were **in furtherance of felony** and **foreseeable**.
  - Some other formulations: “natural and probable consequence.”
- Limits the scope of the risk that the co-felon agrees to.
- Ex. U.S. v. Heinlein, 490 F.2d 725, 736 (D.C. Cir. 1973): gang rape, one person unexpectedly pulls out knife and stabs victim. Court remands for jury to consider “Whether the slaying occurred within the scope of the felony which the parties undertook to commit, or in furtherance of their common plan or purpose to commit it.”
  - Note: here scope can be either felony in general, or plan agreed to by felons.

# Military Felony Murder – Judicial Interpretations

- *U.S. v. Jefferson*, 22 M.J. 315 (C.M.A. 1986).
- The Government's case against appellant for felony-murder was based primarily on the testimony of Specialist Four (SP4) Anthony Marable. He testified that appellant approached him during the night of May 6 and asked him if he wanted to rob a cab driver. Specialist Marable eventually agreed to participate, and appellant handed Marable a bag containing a handgun which he assumed was loaded. All that was said about the planned robbery was that SP4 Marable and appellant would ride in the selected cab and another soldier, Specialist Four (SP4) Adolphus Morris, would follow in another car. There was no discussion about how the handgun was to be used.
- According to SP4 Marable, he and appellant entered a taxicab at a cab stand. Jefferson sat in the front seat while SP4 Marable sat in the back seat with the handgun. At one point during the ride, appellant accused the cab driver, Mr. Walla, of going the wrong way and charging them too much. Walla stopped the cab and turned on the interior light. Specialist Marable testified that he saw Walla pull out what he (Marable) later determined to be “a toy gun” and began struggling with appellant. Specialist Marable shot Walla in the head twice at close range “[t]o stop all of this struggling and ... get it all over with.” Specialist Marable could not recall what, if anything, appellant said to prompt Mr. Walla to reach for the toy gun.
- Appellant agreed to engage in robbery, but not in a murder. Co-felon escalated situation.

# Military Felony Murder – Judicial Interpretations

- Recall FM statute: “Any person subject to this chapter who, without justification or excuse, **unlawfully kills** a human being, when he [is engaged in felony]...”
- Problem: seems to apply only to killer, not co-felons. Court solves with expansive understanding of “causation”.
- “[B]ecause of the danger to life inherent in the commission of any of the five felonies specified in Article 118(4), Congress intended to establish a rule of law that engaging in one of these felonies must be conclusively presumed to be a cause of any death that occurs while the felony is being perpetrated or attempted. Under this construction of the Code, if an accused has engaged in the perpetration or attempted perpetration of one of the felonies specified by Article 118(4), then he must be considered to have caused the death of anyone who dies in the course of the felony. Thus, even if Marable pulled the trigger of the gun which fatally wounded Mr. Walla, Jefferson was also the “killer” for purposes of Article 118. Having satisfied the prefatory language in that Article, Jefferson would also fulfill the requirements of Article 118(4), if he was participating in a robbery of Walla when the homicide occurred.”
- Thus, military is a “collective liability” jurisdiction, but has no rules limiting scope of vicarious liability (i.e., no “in furtherance of” requirement, or foreseeability requirement).
  - Court seemed aware of this limitation in *conspiracy* law, but did not apply it here. [IS THIS RIGHT?]

# Part II: The Death Penalty for Felony Murder

- Eighth Amendment limits capital punishment to homicide crimes (except certain political crimes). *Kennedy v. Louisiana*.
- Capital sentencing schemes must rationally select most severe offenders, *Zant v. Stephens*, on the basis of greatest culpability. See, e.g., *Roper v. Simmons*.
- How select felony murderers most culpable / worthy of punishment?
- Two cases: *Enmund v. Florida* (1982); *Tison v. Arizona* (1987)

# Enmund v. Florida (1982)

- Facts: getaway driver, accomplices unexpectedly kill burglary victims outside house.
- Court: death penalty for felony murder violates Eighth Amendment unless defendant “killed or attempted to kill,” or “intended or contemplated that life would be taken.”
  - Kill
  - Attempt to kill (implies intent)
  - Intend to kill
  - Contemplate death (category not later used)

# Tison v. Arizona (1987)

- Facts: criminal gang, two members stand by while motorist (marine) and his family are gunned down.
- Court: lowers threshold to recklessness
  - “reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account”
  - Also, “major participation” in felony

# Unanswered: Non-Accomplices (Actual Killers)

- Both *Enmund* and *Tison* were accomplice cases, but do their mens rea requirements apply across the board?
- Unanswered: actual killers who may kill with a mental state less than recklessness.
  - Negligent or accidental killers
- Recall examples earlier. The schoolyard fight. The heart attack cases.
- Of the 18 jurisdictions that have addressed question, 12 have held that actual killers can act without any mental state with respect to death.
- Reason: read “kill” in *Enmund* as a sufficient condition for capital punishment.
  - Workman v. Mullin (OK, 2003): “Workman’s crime falls into the category of cases under *Enmund* in which a felony murderer has ‘actually killed’ his victim....The significance of falling into *Enmund*’s category of when a felony murderer has ‘actually killed’ his victim is that the Eighth Amendment’s culpability determination for imposition of the death penalty has then been satisfied.”
  - Prob: Ignores whole point of Eighth Amendment “rational selection” – culpability, purposes of punishment.

# One Court's Response: CAAF

- Loving v. Hart, 47 M.J. 438 (1998) (Gierke): accused shot cab driver in the head **twice**.
- Appellant argued that military death penalty for FM was unconstitutional because did not require intent to kill ( “actual perpetrator of the killing” aggravator did not require intent to kill)
- Rational narrowing requires considering culpability: “The requirement of Zant, 462 U.S. at 877, 103 S.Ct. at 2742, to “genuinely narrow the class of persons eligible for the death penalty” is met in felony-murder cases only if there is a rational connection between the level of culpability and the narrowing process. In short, only the most culpable should be death eligible.”
- Court noted “anomaly” of being intentional but unpremeditated murderer under Art. 118(2) being not death eligible vs. “accidental killer” eligible under Art. 118(4).
- Court: irrational selection. [Note: Court still upheld sentence, because members in this case believed they made a finding of intentional killing]



# Evolving Standards of Decency— Method

- New Eighth Amendment rules can be created by jurisdictional legislation and practice coalescing into consensus. *See, e.g., Kennedy v. Louisiana* (no capital punishment for rape of a child) (2008).
- First, count jurisdictions with legislative rule prohibiting capital punishment for a certain offense or offender.
- Next, see how often the jurisdictions that allow the punishment actually carry it out.

# Evolving Standards of Decency -- Results

- RESULTS

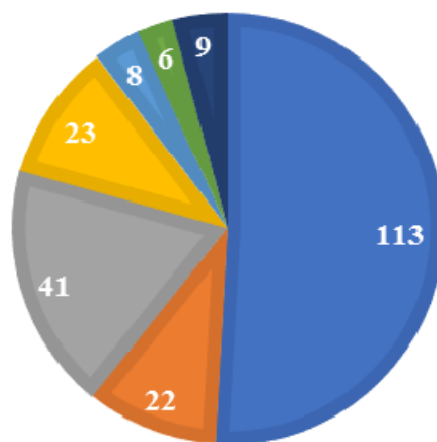
- Legislation: 35/53 jurisdictions prohibit capital punishment of inadvertent actual killers: **66%**

Case	Punishment Practice	Jurisdictions Prohibiting	Percentage
<i>Kennedy v. Louisiana</i> , 554 U.S. 407, 425 (2008)	Offense: child rape	45/53	85%
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005)	Offender: juvenile <18	31/51	61%
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002)	Offender: mentally disabled	30/52	58%
<i>Thompson v. Oklahoma</i> , 487 U.S. 815, 829 (1988)	Offender: juvenile <16	32/51	63%
<i>Ford v. Wainwright</i> , 477 U.S. 399, 409 (1986)	Offender: insane	53/53	100%
<i>Enmund v. Florida</i> , 458 U.S. 782 (1982)	Offense: vicarious felony murder	44/52	85%
<i>Coker v. Georgia</i> , 433 U.S. 584 (1977)	Offense: adult rape	52/53	98%

# State Practice -- Results

## EXECUTIONS FOR FELONY MURDER (ACTUAL KILLERS)

■ Firearm      ■ Bludgeon      ■ Blade  
■ Strangulation      ■ Suffocation      ■ Other  
■ Weaponless Beatings



# State Practice -- Results

- Practice: Only five executions, at most, have been carried out for this conduct since *Furman*.
  - Ex. People v. Babbitt (CA 1988) (executed in 1999): “According to the pathologist, [the victim] died from a heart attack brought on by a severe beating and possible suffocation. She also showed signs of possible rape. Her body had suffered numerous lacerations and abrasions. Had [the victim] not suffered from coronary disease, and had she not experienced physical and psychological stress caused by fright, the struggle, and pain from her wounds, the physical blows she received would not of themselves have proved fatal.”

End