STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee

v

CURTIS LEE HAMPTON
Defendant-Appellant.

No. 159676

Macomb CC: 2015-001559-FC
COA No. 338418

BRIEF BY PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF PEOPLE OF THE STATE OF MICHIGAN

Filed under AO 2019-6

MATT J. WIESE
President
Prosecuting Attorneys
Association of Michigan

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JON P. WOJTALA
Chief, Research, Training, and Appeals

TIMOTHY A. BAUGHMAN (P 24381)
Special Assistant Prosecuting Attorney
11TH Floor
Detroit, Michigan 48226
Phone: (313) 224-5792

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Statement of the Question

I.

When the words of a statute are unambiguous, the judicial inquiry is complete. MCL 750.316(1) provides that a person who commits murder in the perpetration of, or attempt to perpetrate, child abuse in the first degree is guilty of 1st-degree murder. Is the statute unambiguous, so that judicial inquiry is complete?

Amicus answers: YES

Statement of Facts

Amicus joins the statement of facts supplied by the People.

Argument

I.

When the words of a statute are unambiguous, the judicial inquiry is complete. MCL 750.316(1) provides that a person who commits murder in the perpetration of, or attempt to perpetrate, child abuse in the first degree is guilty of 1st-degree murder. The statute is unambiguous, and thus judicial inquiry is complete.

Introduction

The Court has directed that the parties file supplemental briefs addressing:

- whether the Legislature intended to elevate to felony-murder those instances of first-degree child abuse in which the only act of abuse is the child's murder. See MCL 750.316(1).

Amicus answers:

- The question of that which the Legislature intended is not different from the question of that which the Legislature enacted. And so amicus examines whether the Legislature in MCL 750.316(1) included as a predicate act for 1st-degree murder an act of 1st-degree child abuse where the only act of abuse is the child's murder, and answers yes.

Standard of Review

The proper construction of a statute is a question of law, reviewed de novo.[1]

Discussion

> [We] ask, not what this [legislature] meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used. . . . We do not inquire what the legislature meant; we ask only what the statute means.[2]

A. The task of statutory construction is to determine the objectified intent of the legislature; that is, that which a reasonable person would gather from the text of the law, placed in its proper context

Both the United States Supreme Court and this Court have made plain that the lodestar of construction of a statute is the text itself, and, where that text is not ambiguous, the text is not only the beginning but also the end of the court's inquiry. It is the text, after all, which is enacted into law. The United States Supreme Court has said, for example, that "[a]s with any other question of statutory interpretation, we begin with the text of the [statute] . . . ('The task of resolving the dispute over the meaning of [a statutory text] begins where all such

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[1] People v. Feeley, 499 Mich. 429, 434 (2016).

[2] Oliver Wendell Holmes, Jr., "The Theory of Legal Interpretation," 12 Harv. L. Rev. 417, 417–419 (1899). See also A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 56 (2012) ("The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means").

inquiries must begin: with the language of the statute itself')."[3] Indeed, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"[4] And this Court has said that "[w]e first examine the language of the statute and if it 'is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written.'"[5] Also, "[w]here the language of the statute is unambiguous, the plain meaning reflects the Legislature's intent and this Court applies the statute as written. Judicial construction under such circumstances is not permitted. . . . Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to determine legislative intent."[6]

What is sought by the reviewing court, then, is "a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus

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[3] Nebraska v. Parker, –U.S.–, 136 S. Ct. 1072, 1079, 194 L. Ed. 2d 152 (2016) (second brackets in the original).

[4] Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253–254, 112 S. Ct. 1146, 1149, 117 L. Ed. 2d 391 (1992).

[5] Martin v. Beldean, 469 Mich. 541, 546 (2004).

[6] People v. Borchard-Ruhland, 460 Mich. 278, 284 (1999); Pohutski v. City of Allen Park, 465 Mich. 675, 683 (2002) ("Where the language is unambiguous, 'we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written'").

juris.[7] As Bishop's old treatise nicely put it, elaborating upon the usual formulation: '[T]he primary object of all rules for interpreting statutes is to ascertain the legislative intent; or exactly, the meaning which the subject is authorized to understand the legislature intended.'"[8]

When a court undertakes to "effect the intent of the legislature," then, what is it the court is attempting to do? The process is one of discovery, not creation, revision, or amendment; it is to discover what a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris. Judge Easterbrook has written that "intent is empty."[9] By this he meant not that the legislature is not the lawgiver, with the role of the court to discover what law it is the legislature has enacted, but that there is no collective subjective legislative intent: "Peer inside the heads of legislators and you find a

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[7] See Lawson v. FMR LLC, 571 U.S. 429, 459–60, 134 S. Ct. 1158, 1176–77, 188 L. Ed. 2d 158 (2014) (Scalia, J., concurring in principal part, and concurring in the judgment) ("Reliance on legislative history rests upon several frail premises. First, and most important: That the statute means what Congress intended. It does not. Because we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended, the sole object of the interpretative enterprise is to determine what a law says. Second: That there was a congressional 'intent' apart from that reflected in the enacted text. On most issues of detail that come before this Court, I am confident that the majority of Senators and Representatives had no views whatever on how the issues should be resolved—indeed, were unaware of the issues entirely" (emphasis supplied).

[8] Antonin Scalia, A Matter of Interpretation 17 (emphasis in the original). And see Felix Frankfurter, "Some Reflections on the Reading of Statutes," 47 COLUM. L. REV. 427, 538 (1947)(quoting Justice Holmes as saying, with regard to legislative intent, "I don't care what their intention was. I only want to know what the words mean").

[9] Frank Easterbrook, "Text History, and Structure in Statutory Interpretation," 17 Har. Jrnl L. & Pub. Policy 62, 68 (1994).

hodgepodge. . . . Intent is elusive for a natural person, fictive for a collective body."[10] When a court looks to determine "what the law is" when the law is a statute, it is more precise to say the court should attempt to ascertain the "expressed" intent of the legislature, which naturally leads one to the public expression of intent; namely, the text of the statute.[11] The law is what the "objective indication of the words" of the statute, in their context, including that of the statutory scheme, mean.[12] And when necessary to the task—but only then—aids to construction may be employed, such as established canons of construction, and even legislative history, where it exists, and where it is helpful—and it often is not.

Returning, then, to the principles of statutory construction as oft-stated by this Court, they may be stated as follows:

- The primary aim of construction is to effect the "intent of the Legislature" in the sense that its intent was objectified by the legislature in a written text.
- A court examines the language of the statute, and if a reasonable person would gather a particular meaning from the words of the statute as used in the

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[10] Id. See also United States v. Mitra, 405 F.3d 492, 495 (CA 7, 2005) (the legislature is "a 'they' and not an it' . . . . Legislation is an objective text approved in constitutionally prescribed ways; its scope is not limited by the cerebrations of those who voted for or signed it into law").

[11] See Lawrence H. Tribe in A Matter of Interpretation 65, 66 ("I never cease to be amazed at the arguments of judges, lawyers, or others who proceed as though legal texts were little more than interesting documentary evidence of what some lawgiver had in mind. . . . it is the text's meaning, and not the content of anyone's expectations or intentions, that binds us as law") (emphasis in original).

[12] Scalia, A Matter of Interpretation at 29.

ordinary sense, placing the statute in context with the rest of the statutory scheme, it enforces that understanding, and its inquiry is at an end.

- Where a reasonable person could gather multiple meanings from the words of the statute as used in the ordinary sense, placing the statute in context with the rest of the statutory scheme, then other objective indicators of understanding are employed to the extent they are helpful, such as canons of construction and legislative history.

Because the People are sovereign in our constitutional democracy,[13] and because the constitutional system put in place by the People delegates the law making authority to the legislative branch, with law to be enacted in a prescribed manner, including the assent of the governor unless his or her veto is overridden, the task of the judiciary in a case or controversy involving application of a statute is to enforce the law that the legislature enacted, discovering that law by reviewing the meaning of the statutory text as a reasonable person would gather it from the words employed, placed in proper context.[14]

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[13] Mich. Const. 1963, Art. I, § 1: "All political power is inherent in the people."

[14] Context, of course, matters. "If you tell me, 'I took the boat out on the bay,' I understand 'bay' to mean one thing; if you tell me, 'I put the saddle on the bay,' I understand it to mean something else." Scalia, A Matter of Interpretation 26.

B. Defendant seeks amendment of the statute, not construction, as the text is unambiguous[15]

The statute provides:

> (1) Except as provided in sections 25 and 25a of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.25 and 769.25a, a person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life without eligibility for parole:
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> *****
>
> (b) Murder committed in the perpetration of, or attempt to perpetrate, arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, kidnapping, vulnerable adult abuse in the first or second degree under section 145n, torture under section 85, aggravated stalking under section 411i, or unlawful imprisonment under section 349b.[16]

Defendant quickly gives the game away that his "construction" of the statute is a revision. He says that "[t]he child-abuse form of felony murder encompasses murders that culminate from a course of abuse or a series of

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[15] One might ponder the appropriate standard for statutory ambiguity. As Justice Viviano very recently pointed out in concurring to an order denying leave to appeal, the current threshold for statutory ambiguity is that "a provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision, or when it is equally susceptible to more than a single meaning," which Justice Viviano suggests may—or may not—be too stringent. *Griffin v. Swartz Ambulance Service*, 947 N.W.2d 826, 832 (2020). The Reading Law treatise defines ambiguity as an "uncertainty of meaning based not on the scope of a word or phrase but on a semantic dichotomy that gives rise to any of two or more quite different but almost equally plausible interpretations." Reading Law, supra, at 425. Amicus submits that under any reasonable standard, no ambiguity threshold is met here, and so no searching inquiry on the point is appropriate in this case.

[16] MCL 750.316 (emphasis supplied).

abusive actions."[17] And so defendant would revise the statute to read: "a person who commits any of the following is guilty of first degree murder . . . Murder committed in the perpetration of, or attempt to perpetrate, . . . child abuse in the first degree where the murder is the culmination of a course of abuse or series of acts of abuse of the child." But that is not the statute written by the legislature, and defendant's revision runs afoul of the principle – embraced by this Court – that "[s]tatutory construction must begin with the language employed by [the legislature] and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose,"[18] for the task of the court is to "attempt to give effect to the legislative purpose and intent of a statute, as determined by the ordinary meaning of its text, rather than seek to alter or amend it."[19] Defendant wishes the Michigan legislature had promulgated the statute that the Minnesota legislature did, as that state's 1st-degree murder statute provides that one is guilty of 1st-degree murder for causing the death of a minor "while committing child abuse, when the perpetrator has engaged in a past pattern of child abuse upon a child and the death occurs under circumstances manifesting an extreme indifference to human life."[20] But that is not the Michigan statute, and,

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[17] Defendant's brief, p. 7 (emphasis supplied)..

[18] Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194, 105 S. Ct. 658, 661, 83 L. Ed. 2d 582 (1985); Michigan Gun Owners, Inc. v. Ann Arbor Pub. Sch., 502 Mich. 695, 706 (2018).

[19] State v. Hawk, 170 S.W.3d 547, 551 (Tenn., 2005).

[20] Minn. Stat. Ann.§ 609.185(a)(5) (emphasis added).

as Justice Christiancy said for this Court long ago, it is the duty of a court to "give effect to [a] statute as it is, and not to amend it."[21]

1. The words of the statute as used in the ordinary sense are unambiguous

The operative words of the statute here are that one is guilty of 1st-degree murder for a "murder committed in the perpetration of, or attempt to perpetrate, child abuse in the first degree." Child abuse in the 1st-degree is committed when a person "knowingly or intentionally causes serious physical or serious mental harm to a child"[22] "Serious physical harm" is defined in the statute as "any physical injury to a child that seriously impairs the child's health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut."[23] Obviously, to cause the death of a 13-month old child is to cause the child serious physical harm.[24] Just as clearly, child abuse in the 1st degree may be committed without causing the death of the child; not every 1st-degree child abuse is a homicide. And the statute does not apply to all persons; rather, a "person" can be guilty of child abuse only if the person is "a child's parent or guardian or any other person who cares for, has custody of, or has authority over a child

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[21] Clark v. Mowyer, 5 Mich. 462, 475 (1858).

[22] MCL 750.136b(2).

[23] MCL 750.136b(1)(f).

[24] Cf. People v. Nieman, No. 339517, 2019 WL 1746211, at 11 (2019) (unpublished) (" Manual strangulation causing death clearly falls within the parameters of 'caus[ing] serious physical harm' under the vulnerable adult abuse statute").

regardless of the length of time that a child is cared for, in the custody of, or subject to the authority of that person."[25]

It is inescapable that as a matter of the text of the statute, a person – as statutorily defined; that is, a parent, guardian, or custodian of a child – who knowingly or intentionally causes serious physical harm to a child, under circumstances where he or she "intended to kill . . . intended to do great . . . or . . . knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of his [or her] actions"[26] is guilty of murder in the 1st degree where that serious physical harm causes death.[27] As the Florida Supreme Court said, considering a statute providing that 1st-degree murder includes a murder "[w]hen committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any ... [a]ggravated child

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[25] MCL 750.136b(1)(d).

[26] See M Crim JI 16.4, which the jury was given in this case. T 3-22, 182.

[27] The jury was instructed that the prosecution was required to prove malice beyond a reasonable doubt in the 1st-degree felony-murder instructions:

> First, that the defendant caused the death of Carmon Rakowski by a stab wound to the chest with perforation of the heart and lung; second, that the defendant had one of these three states of mind, he intended to kill, he intended to do great bodily harm to Carmon Rakowski, or he knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of his actions; third, that when he did the act that caused the death of Carmon Rakowski the defendant was committing or attempting to commit the crime of first-degree child abuse. T 3-22, 182.

The court continued on to instruct on the elements of child abuse in the 1st-degree as part of the 1st-degree felony-murder instruction. See T 3-22, 182-183.

abuse....",[28] "the plain language of the felony-murder statute makes no distinction between cases involving single or multiple acts of aggravated child abuse."[29] The statute simply does not say, as defendant wishes it did, that a 1st-degree murder is a murder "committed in the perpetration of, or attempt to perpetrate, child abuse in the first degree where the murder is the culmination of a course of abuse or series of acts of abuse of the child."

2 The statutory context does not alter the meaning of the unambiguous text

Defendant appears to make something of a contextual argument, arguing essentially that the statute could have been written differently to encompass murders of children. But that the legislature could have proceeded differently is at best a literary criticism, and does not change the meaning of that which the legislature did enact. And the literary criticism made is itself mistaken. Defendant says that the legislature included "special victims"—police and corrections officers—in paragraph (1)(c) of the statute, and thus the legislature could have placed children and vulnerable adults in this paragraph so as to include them within the reach of the statute when murdered in a single act rather than a course of conduct. But the statutory prohibition is not one which includes all children and all vulnerable adults. Rather, the statute reaches the crimes of child abuse in the 1st-degree and vulnerable adult abuse in the 1st-and 2nd-degree. These offenses have certain predicates; as noted, child abuse in the 1st-degree can be committed only by a parent, guardian or custodian. Vulnerable adult abuse in the 1st and 2nd-degrees can only be

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[28] Fla. Stat. § 782.04(1)(a).

[29] State v. Sturdivant, 94 So. 3d 434, 439-40 (Fla. 2012). See further discussion, infra, at.

committed by a "caregiver" or other person with authority over a vulnerable adult; that is either "an individual who directly cares for or has physical custody of a vulnerable adult," or "a person with authority over a vulnerable adult in that part of a hospital that is a hospital long-term care unit, but does not include a person with authority over a vulnerable adult in that part of a hospital that is not a hospital long-term care unit."[30] And so the legislature could have created in MCL 750.316 provisions replicating those provisions from the child abuse and vulnerable adult abuse statutes; instead, it did so by including as predicate crimes child abuse in the 1st-degree and vulnerable adult abuse in the 1st and 2nd-degree, with their elements laid out in those statutes. Perhaps defendant would have proceeded differently, but there is no basis on which the statutory text can be amended to require multiple acts of child abuse before it can be applied. Defendant is seeking simply to "create ambiguity where none exists"[31] to avoid the straightforward meaning of the statute.

C. Cases from other jurisdictions do not support judicial amendment of the statute, nor does any doctrine of "merger"

1. Michigan has no felony-murder rule

Michigan no longer has a felony-murder rule in its law of homicide. Although the term "felony murder" is often used colloquially, or as a shorthand expression, for 1st-degree murder on the theory of murder during the course of a statutorily enumerated offense, this is not the

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[30] MCL 750.145n; MCL 750.145m(c); MCL 750.14m(k).

[31] Castro v. United States Dep't of Homeland Sec., 835 F.3d 422, 431 (CA 3, 2016).

felony-murder rule. As the inestimable Judge Charles Moylan of the Court of Special Appeals of Maryland well put it:

> It is sometimes falsely asserted that [the murder statutes] constitute the felony-murder doctrine . . . . That is not true. The felony-murder doctrine . . . is the common-law rule—defining one of the at-least three varieties of implied malice—which raises a homicide resulting from the perpetration or attempted perpetration of a felony to the murder level generally. It is only at that point, after the felony-murder rule has already operated, that [the murder statutes] come into play to provide further that in the case of certain designated felonies, the already established murder shall be punished as murder in the first degree.[32]

At the common law, then, "malice was implied as a matter of law in cases of homicide arising while the defendant was engaged in the commission of some other felony; such a killing was murder whether death was intended or not."[33] It is this that is the felony-murder rule; the statute, MCL 750.316, then raised the degree of the murder to 1st-degree murder. But Michigan now has no rule that a homicide during the course of a felony is murder; it did, but the statute was judicially amended in 1980 in People v. Aaron.[34] There the Court held not that Michigan did

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[32] Evans v. State, 349 A.2d 300, 330 (1975), aff'd, 362 A.2d 629 (1976) (emphasis added).

[33] Clark & Marshall, A Treatise on the Law of Crimes (7th ed.) § 19.07, p. 656.

[34] People v. Aaron, 409 Mich. 672 (1980).

Because the legislature used without alteration a term in the 1st-degree murder statute—murder—that had an understood meaning at the common law, the legislature enacted that understood meaning into law, and the abrogation of the felony-murder rule was not development of the common law, but an amendment of the statute. See Baughman, "Michigan's 'Uncommon Law' of Homicide," 7 Cooley L Rev 1 (1990); People v. Hall, 499 Mich. 446, 456 (2016) ("When a statute uses a general common law term to describe an offense, the statutory crime is defined as at common law"); People v. Riddle, 467 Mich. 116,

not recognize the common-law felony-murder rule, but that though Michigan did have such a rule, the Court was abrogating it. The Court determined to "abolish the rule which defines malice as the intent to commit the underlying felony" because it believed it "no longer acceptable to equate the intent to commit a felony with the intent to kill, intent to do great bodily harm, or wanton and willful disregard of the likelihood that the natural tendency of a person's behavior is to cause death or great bodily harm."[35] And so in Michigan there is no longer a felony-murder rule, where any homicide during the perpetration of a felony is murder, with the degree 1st-degree murder if the felony is one enumerated by MCL 750.316; rather, in all cases, "malice is the intention to kill, the intention to do great bodily harm, or the wanton and willful disregard of the likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm," so that "malice is an essential element of any murder, as that term is judicially defined, whether the murder occurs in the course of a felony or otherwise."[36]

2. The "merger rule" applies only to common-law felony-murder even in jurisdictions which maintain common-law felony murder, but does not apply to statutory 1st-degree murder

Many jurisdictions maintain the common-law felony-murder rule, which is a form of 2nd-degree murder, and in those that apply a "merger" rule to that doctrine, merger is not applied to statutory 1st-degree murder committed in the perpetration or attempted perpetration of a statutorily

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125 (2002) ("Where a statute employs the general terms of the common law to describe an offense, courts will construe the statutory crime by looking to common-law definitions").

[35] Id., at 727-28.

[36] Id., at 728.

enumerated felony. The common-law felony-murder rule, as stated, is that malice is implied as a matter of law in cases of homicide arising while the defendant was engaged in the commission of some other felony, so that the killing is murder whether death was intended or not, without the need for the prosecution to prove malice as traditionally understood. As the law developed, this led to harsh results, and threatened also to displace the offense of manslaughter if any assaultive felony where death resulted were considered to constitute murder. Some jurisdictions thus limited operation of the common-law felony-murder rule in certain circumstances, generally where the underlying felony was assaultive itself, as exemplified by a California decision:

> The defendant in Ireland shot and killed his wife over an array of marital issues. The court concluded that an assault-with-a-deadly-weapon felony could not serve as the predicate felony for a [second-degree] felony-murder conviction. In so holding, the court provided a key description of the merger limitation: "[A] second degree felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included in fact within the offense charged. Under the merger limitation, a defendant is only guilty of felony murder if the underlying felony is independent from the resultant killing.[37]

But note that this merger principle was applied to the common-law felony-murder rule that made any killing during the course of a felony 2nd-degree murder. Where the legislature specifies certain felonies during the perpetration or attempted perpetration of which a murder constitutes

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[37] Douglas Van Zanten, "Felony Murder, the Merger Limitation, and Legislative Intent in State v. Heemstra: Deciphering the Proper Role of the Iowa Supreme Court in Interpreting Iowa's Felony-Murder Statute," 93 IOWA L. REV. 1565, 1574 (2008), explaining People v. Ireland, 450 P.2d 580 (Cal. 1969).

1st-degree murder, even jurisdictions maintaining a common-law felony-murder rule implying malice from the commission of a felony – which Michigan does not – do not apply the merger rule.

The issue arose in a number of jurisdictions where 1st-degree murder was charged for a killing during the course of a burglary, with burglary a statutorily specified predicate felony, where the felonious intent with which the defendant broke and entered the premises was the intent to assault the murder victim. California again provides an example. The California Supreme Court had held that the merger rule applies in this circumstance,[38] but revisited that holding and overruled it in People v. Farley.[39] Noting that the 1st-degree murder statute provided that "All murder which is ... committed in the perpetration of, or attempt to perpetrate, [certain enumerated felonies, including] burglary, ... is murder of the first degree," and that it is the duty of a court "in construing a statute to ascertain and give effect to the intent of the Legislature," the court found "no ambiguity" in the language of the statute.[40] In enacting the statute, the court said, the legislature "did not limit the definition of burglary, or exclude burglaries based upon an intent to assault. Rather, [the statute] applies the felony-murder rule to all burglaries. . . . Thus, nothing in the language of [the statute] supports the application of the merger doctrine to its terms."[41] Because, then, "the power to define crimes and fix penalties is vested exclusively in the legislative branch," there was, the court concluded, "no room for

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[38] People v. Wilson, 462 P.2d 22 (Cal., 1969).

[39] People v. Farley, 210 P.3d 361 (Cal., 2009).

[40] Id., at 408-09.

[41] Id., at 409.

interpretation when the Legislature has defined first degree felony murder to include any killing "committed in the perpetration of, or attempt to perpetrate, . . . burglary."[42] Oregon[43] and Nevada[44] supply similar examples.

So also with any statutory predicate offense for 1st-degree murder (and even more so in Michigan, where malice is not implied from the commission of any felony, but must be proven beyond a reasonable doubt). This includes child abuse, as jurisdictions with child abuse as a

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[42] Id. (emphasis supplied).

See also People v. Powell, 422 P.3d 973, 989 (Cal., 2018) (holding merger inapplicable to the predicate offenses of torture and mayhem, saying "In the context of first degree felony murder . . . there is no need for interpretation of the Legislature's clear language. . . .[we have held that] there is no room for interpretation when the Legislature has defined first degree felony murder to include any killing 'committed in the perpetration of, or attempt to perpetrate, ... burglary.' . . . The rationale of Farley requires us to reject defendant's argument. Although Farley was concerned with felony murder based on burglary, its rationale applies equally to all of the predicate felonies expressly listed in [the statute]. Even prior to Farley, we had never applied the merger doctrine to first degree felony murder premised on a predicate crime other than burglary") (emphasis supplied).

[43] See State v. Dasa, 227 P.3d 228, 237) (Or. Ct. App., 2010) ("the merger exception applie[s] solely in the context of a second-degree felony murder case, i.e., when a killing occurred during the commission of a felony not enumerated in former ORS 163.020. . . . a felony murder conviction is appropriate where—as here—a defendant commits burglary with the intent to assault or kill a particular person and then assaults or kills that person").

[44] See State v Contreras, 46 P.3d 661, 664 (Nev., 2002) ("We do not believe it is appropriate to apply the merger doctrine to felony murder when the underlying felony is burglary, regardless of the intent of the burglary. The legislative language is clear, and we are not persuaded that any policy considerations should override the legislature's determination that burglary should be one of the enumerated felonies appropriate to elevate a homicide to felony murder").

predicate felony have held. In People v Godsey[45] the defendant argued that he could not be convicted of 1st-degree murder where the predicate offense was aggravated child abuse because, as in the claim here, "the acts constituting the aggravated child abuse upon which the felony-murder conviction [was] based [were] the same acts that caused the victim's death."[46] The Tennessee Supreme Court rejected the argument, saying that the merger doctrine "has been applied largely in those states where the felony murder statute fails to specifically list the felonies capable of supporting a felony murder conviction," but "[w]here a "legislature explicitly states that a particular felony is a predicate felony for felony-murder, no 'merger' occurs."[47] Because, then, the legislature had through the statute "expressed an unmistakable intent to have aggravated child abuse qualify as a felony capable of supporting a conviction of first degree felony murder," the "merger doctrine should not be applied to preclude a conviction for first degree felony murder, even though death is the consequence of an aggravated child abuse."[48]

Similarly, in State v. Lopez[49] the defendant made the same claim. The Arizona Supreme Court rejected it, saying that "[e]ven those states that follow the merger doctrine recognize that, if the legislature explicitly states that a particular felony is a predicate felony for felony-murder, no 'merger' occurs. . . . Lopez has directed us to no impediment, nor can we conceive of any precluding the legislature from classifying child abuse

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[45] People v. Godsey, 60 S.W.3d 759 (Tenn., 2001).

[46] Id., at 774.

[47] Id., at 774-75.

[48] Id., at 775.

[49] State v. Lopez, 847 P.2d 1078 (Az., 1993).

that results in the death of the child as a predicate felony that triggers the felony-murder statute."[50] And in United States v. Smallbear[51] the defendant was charged under 18 U.S.C. § 1111, which provides that "every murder . . . committed in the perpetration of, or attempt to perpetrate. . . , child abuse . . . is murder in the first degree," with child abuse defined as "intentionally or knowingly causing death or serious bodily injury to a child." He argued that the doctrine of merger precluded conviction where, as here, the act of child abuse was the act causing death. The court rejected the argument, holding that "where, as here, the legislature has specified felony child abuse as an appropriate act, the doctrine of merger, lacking a constitutional foundation, would not apply."[52]

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[50] Id., at 1089. See also State v. Martinson, 384 P.3d 307, 312 (Ariz. Ct. App., 2016) ("if the legislature explicitly states that a particular felony is a predicate felony for felony-murder, no 'merger' occurs. . . . [no] precedent stands for the proposition that a predicate felony committed with the intent to kill merges into felony murder").

See also Slaughter v. State, 439 P.3d 955 (Nev., 2019) (table) ("Appellant contends her conviction, as a matter of law, may not be supported by an act of child abuse when the act of child abuse was murder. She claims that her act of child abuse merges with the act of killing such that child abuse cannot provide the predicate felony for application of the felony-murder rule . . . . As this court has not adopted the use of the merger doctrine for first-degree felony murder and as appellant has not presented any compelling reason for this court to diverge from the above logic and conclusions, we reject this argument by appellant"). And see Cotton v. Commonwealth, 546 S.E.2d 241 (Va. Ct. App., 2001).

[51] United States v. Smallbear, 368 F.Supp.2d 1260 (D.N.M., 2005).

[52] Id., at 1264.

People v. Heemstra, 721 N.W.2d 549 (Iowa, 2006) is something of an outlier, but is distinguishable. There the predicate offense under the statute was simply a "forcible felony," and so the shooting of the victim by the defendant was the predicate offense, in a jurisdiction with a common-law felony-murder rule, so that malice was implied from the commission of the

3. The few Michigan cases that have discussed merger have rightfully rejected application of the doctrine

Several Michigan cases have rejected attempts to apply the merger doctrine to statutory 1st-degree murder. In People v. Densmore[53] defendant forced the victim into the trunk of a car, and then set the car on fire, the fire causing the victim's death. He was convicted of both 1st-degree premeditated murder and 1st-degree murder during the perpetration of an arson, and argued that because the arson was the assault that caused the death of the victim, it could not be the predicate for 1st-degree murder, under a theory of merger. The Court of Appeals rejected the argument, saying that "[t]aken to its logical conclusion, defendant's argument would confine first-degree felony murder to cases where death was not intended by the arsonist. This result would be illogical and has no support in case law or statutory enactment."[54] In People v. Jones[55] the argument was that breaking and entering cannot serve as the predicate for 1st-degree murder during the perpetration of a breaking and entering where the breaking and entering was with the intent to assault the murder victim, defendant relying on the California

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felony. The court held that if the act causing willful injury is the same act that causes the victim's death, it cannot serve as the predicate for 1st-degree murder, or the distinction between 1st-degree and 2nd-degree murder would disappear. Id., at 557–58. Iowa's statute has since been amended, and now includes that 1st-degree murder is committed when a person "kills a child while committing child endangerment under section 726.6, subsection 1, paragraph "b", or while committing assault under section 708.1 upon the child, and the death occurs under circumstances manifesting an extreme indifference to human life," and so the result in Heemstra likely would not apply with a child-abuse predicate. Iowa Code Ann. § 707.2.

[53] People v. Densmore, 87 Mich. App. 434 (1978).

[54] Id., at 440.

[55] People v. Jones, 209 Mich. App. 212 (1995).

Wilson case that the California Supreme Court later overruled.[56] But California has a common-law felony-murder rule, and Michigan does not, which the Court of Appeals found dispositive: "Unlike the common-law felony-murder rule at issue in Wilson, our felony-murder statute requires proof of malice aforethought and is not meant to deter negligent or accidental killings. Rather, it is merely a degree-raising device for certain types of second-degree murders. . . . Given our requirement that first-degree felony murder requires an additional mens rea besides the intent to commit the underlying felony, we conclude that defendant's reliance on [the later overruled] Wilson is misplaced."[57] Moreover, the court continued on to find that because "the language used in the statute is clear and unambiguous, we apply its plain and ordinary meaning. On its face, the statute clearly allows all murder committed in the perpetration or attempted perpetration of the enumerated felonies to be treated as first-degree murder. . . . . the statute makes no distinctions for the commission of enumerated felonies with assaultive intent against the murder victim."[58] Nor does the statute require repeated acts of child abuse, ultimately causing the death of the child.

Finally, in People v. Magyar[59] the Court of Appeals considered the merger doctrine in the context of the predicate offense of child abuse, defendant claiming that his conviction for 1st-degree murder was improper "because his conviction of murder and the predicate felony, in this case first-degree child abuse, arise out of the same act – a blow to the

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[56] See discussion of People v. Farley, supra.

[57] Jones, at 215.

[58] Id.

[59] People v. Magyar, 250 Mich. App. 408 (2002).

skull of Crystal Goble, who was 3 ½ years old when she died as a result of bleeding and swelling in her brain."[60] The court found Jones fully applicable.

> Michigan's felony-murder statute serves to raise an established murder to first-degree murder and "makes no distinctions for the commission of enumerated felonies with assaultive intent against the murder victim." . . . the jury must have concluded that defendant acted with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm was the probable result. . . . The jury was thus satisfied that defendant had acted with malice. Moreover, the jury convicted defendant of felony murder, which required it to find that defendant had committed first-degree child abuse. That crime requires that a defendant knowingly or intentionally causes a child serious physical harm. . . . Thus, the jury's verdict supports the conclusion that defendant committed murder while perpetrating one of the enumerated felonies in the statute.[61]

So also here. Magyar is correct, and this Court should thus decline defendant's invitation to overrule it.

Conclusion: the statute means what it says

Defendant appears to believe the legislature intended to enact something other than what it did. But if it did, "'then it should amend the statute to conform it to its intent.' In the meantime, we must abide by the clear and unambiguous statutory language."[62] And there is no reason here to believe that the legislature did not enact precisely that which it

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[60] Id., at 410.

[61] Id., at 412-13.

[62] Facebook, Inc. v. Windy City Innovations, LLC, 973 F.3d 1321, 1338 (Fed. Cir,. 2020).

intended. In any event, the statutory text does not support defendant's attempt to rewrite it to limit child abuse as a predicate offense for 1st-degree murder to those situations where the death of the child was the result of a course of abusive conduct, rather than a single incident of abuse.[63] A reasonable person would gather from the text of the law, placed in its proper context, that the perpetration, or attempt to perpetrate, child abuse in the 1st-degree is a predicate offense for 1st-degree murder.

[63] And the logic of defendant's revision could not be limited to child abuse and vulnerable adult abuse. What of arson, in a case the purpose of which was to cause death or great bodily harm (or was committed with wanton and wilful disregard of these possibilities?). Or a home invasion with the same intent? Or an act of torture that causes death? Do all these require instead a course of conduct? And must that course of conduct occur in separate incidents? Would multiple stab wound causing death here have been an appropriate course of conduct under defendant's revision? What of multiple acts the same day? These are all issues for the legislature, should those interested see fit to move for some amendment to the present statute.

Relief

WHEREFORE, the amicus joins the People's request that this Honorable Court affirm the Court of Appeals.

Respectfully submitted,

MATT J. WIESE
President
Prosecuting Attorneys Association
Of Michigan

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JON P. WOJTALA
Chief of Research, Training, and Appeals

/s/ Timothy A. Baughman

TIMOTHY A. BAUGHMAN (P24381)
Special Assistant Prosecuting Attorney
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
(313) 224-5792

Dated:

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with AO 2019-6. The body-text font is 12 point Century Schoolbook set to 150% line spacing. This document contains 6875 countable words.