

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: February 19, 1998 Revised: \_\_\_\_\_

Subject: Felony Offenses/Bodily Injury

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Gomez</u>	<u>Miller</u>	<u>CJ</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>WM</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

First degree felony murder is the unlawful killing of a human being when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any of a number of felony offenses listed in section 782.04(1)(a)2., F.S. Examples of some of the offenses listed include: sexual battery, burglary, and robbery. In *State v. Gray*, 654 So. 2d 552 (Fla. 1995), the Florida Supreme Court held that the offense of attempted felony murder did not exist and reversed prior case law which recognized attempted felony murder in Florida. The Court had previously recognized and defined the crime of attempted felony murder as “the perpetration of or the attempt to perpetrate an enumerated felony, together with an intentional overt act ... which could, but does not cause the death of another.”

Responding to *Gray*, the 1996 Legislature created new offenses entitled “felony causing bodily injury” in section 782.051, F.S. These new felony offenses were designed to revive the crime of attempted felony murder previously recognized. This CS amends section 782.051, F.S., by changing the name of the offenses constituting “felony causing bodily injury” to “attempted felony murder.” The CS also changes the elements of the “felony causing bodily injury” offenses, by deleting the requirement that an offender cause an injury to another and by requiring an intentional act which could, but does not cause the death of another. These changes will make the offenses similar to the attempted felony murder offense recognized prior to *Gray*.

This CS shall take effect on October 1, 1998.

This CS substantially amends the following sections of the Florida Statutes: 782.051 and 921.0022.

## II. Present Situation:

### A. First Degree Murder (Capital Murder) / Felony Murder

There are two distinct types of first degree murder offenses, both are capital offenses, punishable by the death penalty. The first type is classic *premeditated murder*. It is 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.

The second type of first degree murder is *felony murder*. Felony murder has been characterized as a “legal fiction” because it implies the defendant’s malice aforethought to commit certain felonies. That is, “the felon is said to have the intent to commit the death—even if the killing was unintended.” *State v. Gray*, 654 So. 2d 552 (Fla. 1995).

In Florida, first degree felony murder is the unlawful killing of a human being when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any of the following:

- ▶ Trafficking offense prohibited by s. 893.135(1)
- ▶ Arson
- ▶ Sexual battery
- ▶ Robbery
- ▶ Burglary
- ▶ Kidnapping
- ▶ Escape
- ▶ Aggravated child abuse
- ▶ Aggravated abuse of an elderly person or disabled adult
- ▶ Aircraft piracy
- ▶ Unlawful throwing, placing, or discharging of a destructive device or bomb
- ▶ Car jacking
- ▶ Home-invasion robbery
- ▶ Aggravated stalking

§ 782.04(1)(a)2., F.S. Also, first degree felony murder includes the unlawful killing of a human being:

Which resulted from the unlawful distribution of any substance controlled under s. 893.03(1), cocaine as described in s. 893.03(2)(a)4., or opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user.

§ 782.04(1)(a)3., F.S.

“The purpose of the felony murder statute is to protect the public from inherently dangerous situations caused by the commission of the felony.” *Parker v. State*, 641 So. 2d 369 (Fla. 1994).

In order to obtain a conviction for felony murder, the state must prove causation, i.e., that the homicide occurred as a consequence of and while the defendant was engaged in the perpetration of the felony. *Allen v. State*, 690 So. 2d 1332 (Fla. 2d DCA 1997). Further, a killing during flight from the commission of a felony constitutes felony murder, even though the felony was complete at the time of the killing. *E.g., Parker, supra*. “In the absence of some definitive break in the chain of circumstances beginning with the felony and ending with the killing, the felony, although technically complete, is said to continue to the time of the killing.” *Mills v. State*, 407 So. 2d 218, 221 (Fla. 3d DCA 1981).

### **B. Second Degree Murder / Felony Murder**

There are two distinct types of second degree murder offenses, both are first degree felonies, punishable by life imprisonment. The first type is classic *depraved mind murder*. It is the unlawful killing of a human being “when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual.” § 782.04(2). F.S.

Another type of second degree murder is *second degree felony murder*. This type of felony murder is proven when the offender commits one of the felonies on the bullet list on page 2, but a person is killed by a person other than the offender engaged in the perpetration of or in the attempt to perpetrate such a felony. An example is where an offender is engaged in a robbery and the robbery victim takes out a gun and shoots and kills another.

### **C. Third Degree Murder / Felony Murder**

Unlike first and second degree murder, third degree murder may be proven in only one way. Third degree murder may best be characterized as *residual felony murder*, because it includes *any felony* not listed under first degree felony murder (the felonies on the bullet list on page 2). For example, if an offender “hot wires” a car and in his attempt to escape pursuing officers, he kills a pedestrian, he would be guilty of third degree murder. Third degree murder is a second degree felony.

### **D. Attempted Felony Murder**

In *State v. Gray*, 654 So. 2d 552 (Fla. 1995), the Florida Supreme Court held that the offense of attempted felony murder did not exist and reversed prior case law which recognized attempted felony murder in Florida. The Court had previously recognized and defined the crime of attempted felony murder as “the perpetration of or the attempt to perpetrate an enumerated felony, together with an intentional overt act ... which could, but does not cause the death of another.” *Amlotte v. State*, 456 So. 2d 448 (Fla. 1984).

The Court in *Amlotte* stated:

We recognized that “[a]n ‘attempt’ consists of two essential elements: (1) a specific intent to commit the crime, and (2) a separate overt, ineffectual act done towards its commission.” 374 So. 2d at 955 (citations omitted). We further noted that “[a]ny homicide committed

during the perpetration or *attempted* perpetration of a felony constitutes first degree murder. State of mind is immaterial for the felony is said to supply the intent.” *Id.* at 956 n. 1 (emphasis added). Although “the offense of attempted first degree murder requires a premeditated design to effect death,” we concluded that “where the alleged ‘attempt’ occurs during the commission of a felony . . . the law presumes the existence of premeditation, just as it does under the felony murder rule. *Id.* at 956 (citations omitted). We find that whenever an individual perpetrates or attempts to perpetrate an enumerated felony, and during the commission of the felony the individual commits, aids, or abets a specific overt act which could, but does not, cause the death of another, that individual will have committed the crime of attempted felony murder. Because the attempt occurs during the commission of a felony, the law, as under the felony murder doctrine, presumes the existence of the specific intent required to prove attempt.

*Amlotte*, 456 So. 2d at 449.

Thus, while the definition of “attempt” requires specific intent to commit the death, in the case of attempted felony murder, intent is supplied by the commission of the underlying felony, or attempt to commit the felony (which is, itself, a felony offense), together with the overt act which could, but does not, cause the death of another.

The *Amlotte* Court also found its conclusion consistent with its earlier decision in *Gentry v. State*, 437 So. 2d 1097 (Fla. 1983), in which the Court held that “there are offenses that may be specifically prosecuted as an attempt without proof of a specific intent to commit the relevant completed offense.” Further, the *Gentry* Court determined that “[i]f the state is not required to show specific intent to successfully prosecute the completed crime [of felony murder] it will not be required to show specific intent to successfully prosecute an attempt to commit the crime.” *Gentry*, 437 So. 2d at 1099. Because the appellant’s conviction in that case was for attempted second degree murder, which does not require specific intent, the Court reasoned that there was logic in its approach and that it comported with legislative intent.

In Justice Overton’s dissenting opinion in *Amlotte*, he argued that the crime of attempted felony murder was logically impossible and without basis in law. Justice Overton adopted the reasoning of Judge Cowart who, in his dissenting opinion in the district court’s opinion in *Amlotte v. State*, 453 So. 2d 249 (Fla. 5th DCA 1983), argued that the *Amlotte* holding creates a “crime requiring one to intend to do an unintended act which is a logical absurdity and certainly an inadequate basis for something that needs to be as clear and understandable as do the elements of a felony crime.” *Amlotte*, 453 So. 2d at 450.

In Justice Overton’s view, “the crime of felony murder is based upon a legal fiction which implies malice aforethought from the actor’s intent to bring about the death even if the killing was

unintended.” *Amlotte*, 456 So. 2d at 451. Justice Overton did not find his views incompatible with the *Gentry* decision, where he voted in the majority, “because the completed crime in *Gentry*, which was second degree murder, did not require proof of specific intent, as does first degree murder.” In its *Gray* decision, the Florida Supreme Court adopted Judge Overton’s reasoning.

Responding to *Gray*, the 1996 Legislature created new offenses entitled “felony causing bodily injury” in section 782.051, F.S. § 1, ch. 96-359, Laws of Fla. These new felony offenses were designed to revive the crime of attempted felony murder previously recognized by the Florida Supreme Court. *Senate Staff Analysis and Economic Impact Statement*, CS/SB 2712, April 10, 1996, p. 1.

Section 782.051(1), makes it a first degree felony punishable by life imprisonment for a person to cause bodily injury to another during the commission of a felony enumerated under the felony murder statute, *e.g.*, robbery. Section 782.051(2), makes it a first degree felony for a person to cause bodily injury to another during the commission of a felony not enumerated under the felony murder statute, *e.g.*, theft. Finally, section 782.051(3), makes it a second degree felony for a person to commit a felony enumerated under the felony murder statute, and during its commission someone other than the felony perpetrator injures another.

Subsection (2) of section 782.051, F.S., creates an anomaly. As stated above, subsection (2) makes it a *first degree felony* for a person to cause bodily injury to another during the commission of a felony not enumerated under the felony murder statute. However, if a person causes the death of another during the commission of a felony not enumerated by the felony murder statute, the offense is third degree felony murder which is a *second degree felony*. Thus, under current law the offense is greater for causing injury than it is for causing death.

As stated above, the crimes contained in section 782.051 were designed to capture most acts previously recognized as attempted felony murder. However, attempted felony murder did not require that the act committed in the course of the felony cause an injury, only that the act could have but did not cause a death. Further, the offenses in section 782.051 require only an injury thereby potentially capturing more than what was previously captured by attempted felony murder.

### III. Effect of Proposed Changes:

This CS amends section 782.051, F.S., by changing the name of the offenses constituting “felony causing bodily injury” to “attempted felony murder.” The CS also changes the elements of the “felony causing bodily injury” offense, by creating two classes of attempted felony murder. The elements of the first class of attempted felony murder, (created in subsection (1) of section 782.051, F.S.), are as follows:

- ▶ Perpetration of, or an attempt to perpetrate any *felony enumerated* in section 782.04(3), F.S., (section 782.04(3), contains the underlying felony offenses which can serve as the basis for a felony murder charge, *e.g.*, burglary, sexual battery), and who;

- ▶ Commits, aids, or abets an *intentional act*, that is not an essential element of the felony; and
- ▶ The intentional act *could*, but does not, cause the death of another.

The elements of the second class of attempted felony murder, created in subsection (2) of section 782.051, F.S., are as described above, except that the first element requires perpetration of a felony not enumerated in section 782.04(3), F.S.

A person who violates subsection (1) of attempted felony murder (by committing an enumerated felony during the intentional act) commits a felony of the first degree, punishable by imprisonment for a term of years not exceeding life. A person who violates subsection (2) of attempted felony murder (by committing a felony, not enumerated, during the intentional act) commits a felony of the first degree.

The effect of these changes is to delete a current requirement that the offender caused bodily injury. Although the new attempted felony murder offense does not require bodily injury, it does require an “intentional act ... that could, but does not cause the death of another.” Neither an intentional act nor a showing that the act could have caused death are required under the current statute.

The CS ranks violations of subsection (1) in level 9; violations of subsection (2) in level 8; and, violations of subsection (3) in level 7.

The CS amends section 921.0022, F.S., by placing the attempted murder offenses within the offense severity ranking chart of the Criminal Punishment Code.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

**V. Economic Impact and Fiscal Note:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

None.

## C. Government Sector Impact:

The Criminal Justice Estimating Conference considered the prison bed impact of this CS on February 13, 1997. The Conference determined that this CS would have an indeterminate impact. Prior to the Court's opinion in *Gray*, there were 42 prison admissions per year for attempted felony murder.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

This CS readopts a potentially anomalous result which exists in current law. Subsection (2) of section 782.051, makes it a *first degree felony* for a person to cause bodily injury to another during the commission of a felony not enumerated under the felony murder statute. However, if a person causes the death of another during the commission of a felony not enumerated by the felony murder statute, the offense is third degree felony murder which is a *second degree felony*. Thus, under current law the offense is greater for causing injury than it is for causing death. Under the CS this same anomalous result occurs; that is, while an intentional act which could but does not cause the death of another is a *first degree felony*, causing a death is punished as a *second degree felony*.

**VIII. Amendments:**

None.