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## LAW SUMMARY

# The Missouri Felony Murder Rule's Merger Limitation: A Doctrine in Limbo

JARED GUEMMER\*

### I. INTRODUCTION

American criminal law is riddled with peculiarities that are decidedly “American” in nature. The United States plots its own course while other common law countries, like England, abolish certain forms of criminal liability<sup>1</sup> and punishments,<sup>2</sup> or establish mandatory protocols for criminal interrogations.<sup>3</sup> Among the most prominent of America’s legal eccentricities is its continued use of the felony murder rule. It casts a broad shadow over America’s criminal justice system by drastically increasing the punishment for criminal activity that is often less culpable than other offenses not prosecuted under the felony murder rule.<sup>4</sup> Many see it as a form of strict liability when a death results in the course of one’s felonious activities.<sup>5</sup>

Historically, the felony murder rule was unnecessary under common law felonies because all felonies were punishable by death.<sup>6</sup> As justice systems

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\* B.A., Saint Louis University, 2013; J.D. Candidate, University of Missouri School of Law, 2016; Lead Articles Editor, *Missouri Law Review*, 2015–2016. Two people were vital to writing this Note. First, Elizabeth A. Guemmer, a former paralegal for the Missouri State Public Defender, first discovered a conflict in the law years ago and directed me to the issue. Second, Carl D. Kinsky, Prosecutor for Ste. Genevieve County, Missouri, recognized this possible unresolved conflict in the law and concluded the merger doctrine could remain viable. Mr. Kinsky graciously provided suggestions, drawing from decades of criminal law experience, which were helpful beyond measure. I would like to express my gratitude to them for their insight, guidance, and assistance as I confronted the challenges of writing this Note.

1. In 1957, England eliminated the felony murder rule from its criminal justice system, which disparagingly called it “constructive murder.” WAYNE R. LAFAVE, *CRIMINAL LAW* 764 (4th ed. 2003).

2. In 1965, England abolished capital punishment for murder, and it later ended the use of the punishment for all crimes in 1998. Frederick C. Millett, *Will the United States Follow England (and the Rest of the World) in Abandoning Capital Punishment?*, 6 *PIERCE L. REV.* 547, 550 (2008).

3. In 1984, England mandated that all police interrogations must be electronically recorded. Laurel LaMontagne, *Children Under Pressure: The Problem of Juvenile False Confessions and Potential Solutions*, 41 *W. ST. U. L. REV.* 29, 51 (2013).

4. See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 524 (5th ed. 2009).

5. Compare *id.* at 522, with GUYORA BINDER, *FELONY MURDER* 23 (2012) (asserting that felony murder is a form of negligence liability).

6. LAFAVE, *supra* note 1, at 744 n.5.

migrated away from that blanket form of punishment, it was important to recognize when a killing was a murder, and thus punishable through the harshest means available under the law.<sup>7</sup> The felony murder rule developed as a means to effectively punish those who caused another's death during the course of a felonious action.<sup>8</sup> The rationale was that those who caused a death while committing a felony should face greater punishment for their wrongful conduct than those who commit felonies without causing a death.<sup>9</sup>

This new rule presented a problem. One who kills another person under the influence of a sudden heat of passion commits a felony: manslaughter.<sup>10</sup> Thus, the wrongdoer caused a death while committing a felony.<sup>11</sup> Therefore, felony murder must apply.<sup>12</sup> Under this interpretation, felony murder risks obliterating the crime of manslaughter because all manslaughter becomes punishable as felony murder.<sup>13</sup> As a result, the felony murder rule had to be limited in some manner.<sup>14</sup> The courts rapidly recognized the flaw and made it clear that such an absurd result could not stand: the crime of manslaughter would "merge" with the killing.<sup>15</sup> For the same reasons, a lesser degree of murder could not serve as the felony upon which a charge of felony murder was predicated.<sup>16</sup> Thus, the merger limitation of the felony murder rule was born, but felony murder continued to have a broad hold on punishments for killings other than murder.

Imagine a circumstance where a man finds his wife in bed with another man. Distraught, and unable to think clearly, he grabs a heavy object from the dresser and bludgeons both of them to death in the heat of passion. Every first-year law student recognizes this as manslaughter.<sup>17</sup> But, what if the prosecutor chooses to not charge it as manslaughter?<sup>18</sup> What if, instead, the prosecutor charges the defendant with a non-killing felony, such as assault with a deadly weapon?<sup>19</sup> Now, a killing occurred during the course of a felony other than manslaughter – the underlying felony is the assault, not the killing itself.<sup>20</sup> Can the defendant who committed a textbook manslaughter

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7. See Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 64 (2004).

8. See *id.* at 94–95.

9. DRESSLER, *supra* note 4, at 524.

10. *Id.* at 528.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *People v. Rector*, 19 Wend. 569, 592–93 (N.Y. Sup. Ct. 1838).

16. See *id.* at 593.

17. In fact, it is similar to examples provided in first-year textbooks and supplements. See, e.g., DRESSLER, *supra* note 4, at 528.

18. *Id.*

19. *Id.*

20. *Id.*

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instead be charged with murder via the felony murder rule? In the vast majority of states, the answer is, “No.”<sup>21</sup>

Most states, almost since the emergence of the felony murder rule, have limited by statute what felonies may serve as predicate – or underlying – felonies.<sup>22</sup> Some states limit the application of felony murder to those felonies inherently “dangerous to life,” or they limit them to an enumerated list of felonies.<sup>23</sup> In many states, the merger doctrine applies to “assaultive” felonies and prevents application of the felony murder rule to killings that occur in the course of an assaultive felony.<sup>24</sup> The merger doctrine requires the actor have an independent, felonious purpose, other than causing bodily harm or death to the victim.<sup>25</sup>

Unfortunately, recent case law in Missouri obliterated the merger doctrine.<sup>26</sup> This Note aims to expose the faulty reasoning applied by Missouri courts in abrogating the merger doctrine. In Part II, this Note will summarize the history of the merger doctrine, both generally and in Missouri. Then, Part III highlights the recent developments in Missouri law regarding felony murder and the merger doctrine. In Part IV, this Note discusses the purpose of the merger doctrine, the rules of interpretation regarding Missouri’s felony murder provision, and why Missouri courts incorrectly decided the merger doctrine no longer functions as a valid legal theory in Missouri. Finally, Part V concludes this Note with a short discussion about the future of the merger doctrine and the role the Supreme Court of Missouri must play in that future.

## II. LEGAL BACKGROUND

The merger doctrine was recognized even before the founding of our nation.<sup>27</sup> In America, it first developed in New York,<sup>28</sup> and Missouri followed only a few decades later.<sup>29</sup> This Part will discuss the merger doctrine’s development, which gives context to the role of the merger doctrine in our criminal justice system.

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21. *Id.* at 527–28.

22. LAFAVE, *supra* note 1, at 744.

23. *Id.*

24. DRESSLER, *supra* note 4, at 528–29.

25. *People v. Rector*, 19 Wend. 569, 592–93 (N.Y. Sup. Ct. 1838); BINDER, *supra* note 5, at 164.

26. *See infra* Part III.

27. BINDER, *supra* note 5, at 231.

28. *Id.* at 232.

29. *Id.*

### A. Historical Development of the Merger Doctrine

One commentator noted that “[t]he merger problem was recognized as soon as felony murder rules were first proposed.”<sup>30</sup> In 1716, more than one hundred years before New York established the first merger limitation in the United States,<sup>31</sup> William Hawkins wrote that a killing committed in the course of a felony was murder only if it occurred during “the execution of an unlawful action principally intended for some other purpose, and not to do a personal injury to [the victim] who happens to be slain.”<sup>32</sup> Though not binding, the history of New York’s merger doctrine is useful in understanding the significance of the doctrine. New York was the first state to establish the limitation, and its reasoning reflects many of the core principles and exposes the absurdities of a criminal justice system without a merger limitation.

In 1838, New York courts recognized the first merger limitation on felony murder in the United States.<sup>33</sup> At the time, New York statutory law dictated that an unlawful killing was murder if it was “perpetrated without any design to effect death, by a person engaged in the commission of *any* felony.”<sup>34</sup> New York adopted the merger limitation in *People v. Rector*,<sup>35</sup> where the court held that the underlying – or “predicate” – felony must have a purpose independent of the victim’s death or serious injury.<sup>36</sup> The facts of that case showed the killing to be, by statutory definition, manslaughter.<sup>37</sup> The New York court rejected the contention that manslaughter could act as the predicate felony for a felony murder charge.<sup>38</sup> Without such a limitation in place, manslaughter would cease to exist because it is a felony from which a killing results – “ergo it is murder.”<sup>39</sup> The court refused to allow this absurd result.<sup>40</sup>

In 1872, New York implicitly extended the merger limitation to felonious assaults<sup>41</sup> but explicitly rejected the application of a merger limitation to

30. *Id.* at 231.

31. *Id.* at 232.

32. *Id.* at 231 (quoting WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 83 (1716)).

33. *Id.* at 232.

34. *Id.* at 163 (emphasis added) (quoting N.Y. REV. STAT. pt. 4, ch. 1, tit. 1, § 5 (1829)).

35. 19 Wend. 569, 592–93 (N.Y. Sup. Ct. 1838); BINDER, *supra* note 5, at 164.

36. BINDER, *supra* note 5, at 164.

37. *Rector*, 19 Wend. at 592–93. The defendant struck the victim with a single blow, which was not fatal in itself. *Id.* at 592. Thus, the attack was a misdemeanor. *Id.* The attack ultimately resulted in death. *Id.* at 571. By statute, a killing that occurred in the course of a misdemeanor was manslaughter. *Id.* at 592.

38. *Id.*

39. BINDER, *supra* note 5, at 164 (quoting *Rector*, 19 Wend. at 593).

40. *Rector*, 19 Wend. at 593.

41. *Foster v. People*, 50 N.Y. 598 (N.Y. 1872), *accord* *People v. Huter*, 184 N.Y. 237, 243–44 (N.Y. 1906); BINDER, *supra* note 5, at 232. In *Foster*, the court noted

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rape in 1879.<sup>42</sup> In 1906, the Court of Appeals of New York made explicit what it implied in 1872. It held that assaultive felonies merge into the resulting homicide<sup>43</sup> when it overturned the murder conviction of a defendant who resisted an officer's lawful arrest and the officer died as a result of that resistance.<sup>44</sup> The court held that violence may be part of the underlying felony, but the "other elements constituting the felony in which [the defendant was] engaged must be so distinct from that of the homicide as not to be an ingredient of the homicide."<sup>45</sup> Crimes that did not meet this standard merged with the homicide and could not support a felony murder charge.<sup>46</sup> The New York court notably added that the act causing the death need not be separate from the act performed in committing the underlying felony, stating that "if the act causing the death be committed with a collateral and independent felonious design it is sufficient."<sup>47</sup> Thus, in order for a felony to underlie a felony murder charge, the elements of the underlying felony must provide a "purpose independent of the homicide."<sup>48</sup>

To summarize, New York concluded that manslaughter may not act as the underlying felony in *Rector*<sup>49</sup> and, in *Huter*, that an assaultive felony may not act as the underlying felony when that felony's sole purpose is to inflict harm or death upon the victim.<sup>50</sup> In felony murder cases, a felony could serve as the underlying felony only if it was committed with a "felonious design" that was independent of the intent to assault the victim.<sup>51</sup> For example, rape does not merge with a homicide because it has a motive beyond inflicting harm.<sup>52</sup> These principles are key to understanding the merger doctrine, and understanding them begins to shed light regarding why the merger doctrine

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that the defendant committed a felonious assault if he struck the victim with the intent of inflicting personal injury but without the intent of killing him. 50 N.Y. at 602. The defendant was charged with first-degree murder for striking a man upon the head with intent to kill. *Id.* at 604. The defendant sought an instruction for second-degree murder, claiming that his actions constituted a felony – assault and battery with intent to maim, but without intent to kill – during which a killing occurred. *Id.* at 600. The court refused the defendant's position, holding that such a felony merged with the killing and no instruction should be granted. *Id.* at 609.

42. *Buel v. People*, 78 N.Y. 492, 497 (N.Y. 1879); BINDER, *supra* note 5, at 232. In *Buel*, the defendant argued that rape was not "separate and distinct" from the killing. 78 N.Y. at 494.

43. *Huter*, 184 N.Y. at 243 (noting that "whether the felony in which [the defendant] was engaged at the time of the killing is merged" with the killing was a "much mooted question").

44. *Id.* at 244.

45. *Id.*

46. *Id.*

47. *Id.*; BINDER, *supra* note 5, at 232.

48. BINDER, *supra* note 5, at 232.

49. *People v. Rector*, 19 Wend. 569, 593 (N.Y. Sup. Ct. 1838).

50. *Huter*, 184 N.Y. at 244.

51. *Id.*

52. *See Buel v. People*, 78 N.Y. 492, 497 (N.Y. 1879).

plays an important role in ensuring that defendants are punished in accordance with their culpability.

### *B. Development of the Merger Doctrine in Missouri*

Missouri was among the earliest adopters of the merger limitation in felony murder cases.<sup>53</sup> In 1845, Missouri's murder statute adopted language that aggravated second-degree murder to murder in the first degree if it was committed in the attempt of any felony.<sup>54</sup> Technically speaking, this was not a true felony murder statute. This statute merely aggravated a murder from second degree to first degree if the murder was committed in the course of another felony.<sup>55</sup> It did not establish any killing in the course of a felony as murder.<sup>56</sup> This distinction should not lead to confusion: the merger limitation analysis applies just the same.

The Supreme Court of Missouri applied this aggravating statute in a handful of cases.<sup>57</sup> In an 1853 case, *State v. Jennings*, the Supreme Court of Missouri approved a jury instruction stating: "If . . . it was not the intention of those concerned in lynching [the victim] to kill him, but that they did intend to do him great bodily harm, and that in so doing death ensued, such killing is murder in the first degree, by the statute of this State."<sup>58</sup> Four years later, the court approved a similar jury instruction in *State v. Nueslein*.<sup>59</sup> The Supreme Court of Missouri later went on to say that any killing in the course of a felony was murder.<sup>60</sup> Thus, a true felony murder rule was born.

53. *See id.*

54. *Id.* at 165. This statute adopted a modified version of the Pennsylvania murder statute. *Id.* The Pennsylvania statute aggravated murder to first-degree murder if the murder occurred in the course of attempting an enumerated felony. *Id.*

55. *State v. Shock*, 68 Mo. 552, 559 (1878) (quoting WAG. STAT. (1872) c. 42, art. 2, § 1, p.445) ("Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or *other felony*, shall be deemed murder in the first degree.").

56. *Id.*

57. *See* BINDER, *supra* note 5, at 166–67.

58. 18 Mo. 435, 441, 444 (1853), *overruled by Shock*, 68 Mo. 552. Inflicting "great bodily harm" on another was deemed to be a crime for which the punishment was imprisonment. *Id.* at 444. Thus, it was a felony. *Id.*

59. 25 Mo. 111, 121 (1857), *overruled by Shock*, 68 Mo. 552. ("If you believe that defendant . . . did willfully strike and wound deceased as described . . . and that he did so without the specific intent to kill her, but with the intent to inflict upon her great bodily harm, and deceased came to her death by wounds inflicted under such circumstances, then defendant is guilty of murder in the first degree . . .").

60. *State v. Weiners*, 66 Mo. 13, 22 (1877) ("If one in perpetrating or attempting to perpetrate a felony, kill a human being, such killing is murder, although not specifically intended, for the law attaches the intent to commit the other felony to the homicide. The law conclusively presumes the intent to kill.").

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In 1878, the Supreme Court of Missouri reversed course in *State v. Shock* and held that assaultive felonies merged into a homicide and could not underlie a felony murder charge.<sup>61</sup> *Shock* was a child abuse case.<sup>62</sup> The defendant beat a young child with a fishing pole, went outside, obtained a grapevine, and used the vine to beat the child.<sup>63</sup> The child died several days later.<sup>64</sup>

The trial court gave the following jury instruction regarding murder in the first degree: “To constitute murder in the first degree, it is not necessary that the fatal beating, wounding or striking be given with the specific intent to kill; it is sufficient if it be given willfully and maliciously, and with the intent to inflict great bodily harm, and death ensue.”<sup>65</sup>

On appeal, the Supreme Court of Missouri rejected the trial court’s jury instruction regarding murder in the first degree.<sup>66</sup> The court closely examined the statute, which in relevant part said: “Every murder . . . which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or *other felony*, shall be deemed murder in the first degree.”<sup>67</sup> In examining the meaning of the statute, and the term “other felony,” the court recognized the same absurd result the New York courts saw thirty years earlier – allowing *any* felony to act as the predicate felony for a felony murder conviction would permit charging murder for those killings that constitute manslaughter.<sup>68</sup> Therefore, the Supreme Court of Missouri announced a new rule:

We are of the opinion that the words “other felony” used in [the statute] refer to some collateral felony, and not to those acts of personal violence to the deceased which are necessary and constituent elements of the homicide itself, and are, therefore, merged in it, and which do not, when consummated, constitute an offense distinct from the homicide.<sup>69</sup>

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61. 68 Mo. 552; *see also* BINDER, *supra* note 5, at 166–67.

62. *Shock*, 68 Mo. at 557.

63. *Id.*

64. *Id.*

65. *Id.* at 558. The trial court also gave the following instruction, as to a finding of guilt: “If the jury believes, from the evidence, that it was not the intention of the defendant to kill the child . . . by whipping him, but that he did intend to do him great bodily harm, and in so whipping him, death ensued, he is guilty of murder in the first degree.” *Id.*

66. *Id.* at 561–62.

67. *Id.* at 559 (emphasis added) (quoting WAG. STAT. (1872) c. 42, art. 2, § 1, p.445).

68. *See id.* at 561.

69. *Id.* at 561–62 (citing FRANCIS WHARTON, *A TREATISE ON THE LAW OF HOMICIDE IN THE UNITED STATES* §§ 55, 56, 57, 58, 62 (1855)).

In *Shock*, the court utilized its prior reasoning in a misdemeanor manslaughter<sup>70</sup> case that the underlying misdemeanor must be “some other misdemeanor than that which is an ingredient in the imputed offense . . . where an act becomes criminal from the perpetration or the attempt to perpetrate some other crime, it would seem that the lesser could not be a part of the greater offense.”<sup>71</sup> In essence, the *Shock* court held that an assault, being an act of personal violence against the deceased that is necessary in order to effect the homicide, merges with the homicide and is not a distinct offense from the homicide.<sup>72</sup> Thus, the assault cannot serve as a felony that aggravates a killing to first-degree murder. In so holding, the court in *Shock* explicitly overruled both *Jennings* and *Nueslein*.<sup>73</sup> Shortly after the decision in *Shock*, the Missouri legislature amended the murder statute by explicitly limiting predicate felonies to a short list of enumerated felonies.<sup>74</sup>

Throughout the more than one hundred years following the decision in *Shock*, very little was said in Missouri regarding the merger doctrine. The Supreme Court of Missouri has not directly addressed the validity of the merger doctrine since that case.<sup>75</sup> More recently, the Missouri Court of Appeals indicated its belief that the merger doctrine has been statutorily abrogated.<sup>76</sup>

### III. RECENT DEVELOPMENTS

The Missouri criminal code was heavily revised in 1979.<sup>77</sup> In the following years, felony murder in the first degree and its enumerated predicate felonies were repealed.<sup>78</sup> Felony murder continued to exist in the second-degree murder statute.<sup>79</sup> The murder statutes currently in effect remain identical.<sup>80</sup>

Missouri Revised Statutes Section 565.021.1(1) states: “A person commits the crime of murder in the second degree if he [k]nowingly causes the

70. Misdemeanor manslaughter is a concept fundamentally similar to felony murder. See JOSHUA DRESSLER & STEPHEN P. GARVEY, *CASES AND MATERIALS ON CRIMINAL LAW* 336 (2012). One who causes a death in the course of committing a misdemeanor may be charged with manslaughter. *Id.*

71. *Shock*, 68 Mo. at 563 (citing *State v. Sloan*, 47 Mo. 604 (1871)).

72. *Id.* at 561–62.

73. *Id.*

74. Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 528–29 (2011). “Every murder . . . which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or mayhem, shall be deemed murder in the first degree.” MO. REV. STAT. § 1232 (1879).

75. See BINDER, *supra* note 5, at 167.

76. See Part III.A–C.

77. Joseph J. Simeone, *Duty, Power, and Limits of Police Use of Deadly Force in Missouri*, 21 ST. LOUIS U. PUB. L. REV. 123, 166 (2002).

78. See MO. REV. STAT. § 565.020 (1986).

79. See *id.* § 565.021.

80. See MO. REV. STAT. §§ 565.020–.021 (2000).

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death of another person or, with the purpose of causing serious physical injury to another person, causes the death of another person.”<sup>81</sup> Subsection 2 states that the defendant is guilty of second-degree murder if he “[c]ommits or attempts to commit *any felony*, and . . . another person is killed as a result.”<sup>82</sup> Additionally, Section 565.021.2 states: “Murder in the second degree is a class A felony, and the punishment for second degree murder shall be in addition to the punishment for commission of a related felony or attempted felony, *other than murder or manslaughter*.”<sup>83</sup>

The Supreme Court of Missouri has been silent regarding the merger doctrine for over one hundred years.<sup>84</sup> More recently, however, the Missouri Court of Appeals has addressed the issue. In 1987, the Missouri Court of Appeals for the Eastern District noted the application of the merger limitation.<sup>85</sup> Since then, the tide of court decisions has pushed back against the merger limitation.<sup>86</sup> Most notably, the Missouri Court of Appeals for the Western District completely abrogated the merger limitation.

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81. *Id.* § 565.021.1(1). This particular subsection is key to the later analysis of this issue. That is because this provision enumerates a specific felony that may underlie a felony murder charge – acting “with the purpose of causing serious physical injury to another person.” *Id.* The enumerated felony is Section 565.050: assault in the first degree. *Id.* § 565.050.

82. *Id.* § 565.021.1(2). In *Bouser*, the Western District Court of Appeals relied on this “any felony” language to claim abrogation of the merger limitation. *See infra* Part III.A.

83. § 565.021.2 (emphasis added).

84. No cases address the validity or invalidity of a merger doctrine. Reference to the “merging” of crimes is made in a handful of cases, but those references were made in the context of double jeopardy arguments. *See State v. Overstreet*, 551 S.W.2d 621, 630 (Mo. 1977) (en banc); *see also State v. Chambers*, 524 S.W.2d 826, 831 (Mo. 1975) (en banc). The defendant in *Overstreet* claimed “merger” occurred between a charge of robbery and felony murder, and that he could not be charged with both without being subjected to multiple punishments for a single offense. *Overstreet*, 551 S.W.2d at 630. This is a clear reference to the concept of lesser included offenses under the *Blockburger* double jeopardy analysis and has nothing to do with the felony murder merger limitation. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932).

85. *State v. Hanes*, 729 S.W.2d 612, 617 (Mo. Ct. App. 1987) (“The felony-murder doctrine does not apply where the felony is an offense included in the charge of homicide. The acts of assault merge into the resultant homicide, and may not be deemed a separate and independent offense which could support an instruction for felony murder.”).

86. *See, e.g., State v. Simino*, 397 S.W.3d 11 (Mo. Ct. App. 2013); *State v. Gray*, 347 S.W.3d 490 (Mo. Ct. App. 2011); *State v. Gheen*, 41 S.W.3d 598 (Mo. Ct. App. 2001); *State v. Williams*, 24 S.W.3d 101 (Mo. Ct. App. 2000); *State v. Bouser*, 17 S.W.3d 130 (Mo. Ct. App. 1999); *State v. Rogers*, 976 S.W.2d 529 (Mo. Ct. App. 1998).

*A. The Western District*

The Missouri Court of Appeals for the Western District is Missouri's leader in the push to eliminate the merger limitation. In 2000, its decisions explicitly announced a statutory abrogation of the merger limitation,<sup>87</sup> and it has stuck to that decision ever since.<sup>88</sup>

The first indication of reluctance within the Western District to continue to apply the merger limitation arose in 1998.<sup>89</sup> In *State v. Rogers*, Rogers was charged with felony murder.<sup>90</sup> The underlying felony was Unlawful Use of a Weapon under Missouri Revised Statutes Section 571.030.1(4).<sup>91</sup> Rogers fired a gun into the air to "scare" a crowd of people across the street.<sup>92</sup> Rogers then pointed the gun at the ground as a woman from the crowd approached.<sup>93</sup> She told Rogers that he "didn't have the balls to shoot that gun."<sup>94</sup> Rogers fired the gun toward the ground in front of him, but the bullet ricocheted and struck the woman in the chest.<sup>95</sup> She later died from her injuries.<sup>96</sup>

Rogers argued the unlawful use of a weapon charge merged into the killing and thus could not underlie a felony murder conviction.<sup>97</sup> Rogers relied on a case from 1977, *State v. Cook*, which held that the felony of Unlawful Use of a Weapon merged into the killing when a defendant began brandishing a firearm out of the window of his car, and it discharged and killed the victim.<sup>98</sup>

The *Rogers* court distinguished *Rogers* from *Cook* by holding that the initial shot fired into the air was the underlying felony and that it did not merge with the killing because it was a separate and distinguishable act.<sup>99</sup> The *Rogers* court did not hold that merger ceased to be a valid limitation, but instead stated that the merger limitation would govern if the only shot fired were the killing shot.<sup>100</sup> However, because two shots were fired, one that

87. *Williams*, 24 S.W.3d at 117.

88. *See Gheen*, 41 S.W.3d at 605.

89. *See Rogers*, 976 S.W.2d 529.

90. *Id.* at 530.

91. *Id.* Under Section 571.030.1(4), "A person commits the crime of unlawful use of weapons if he or she knowingly . . . [e]xhibits, in the presence of one or more persons, any weapon readily capable of lethal use in an angry or threatening manner . . ." MO. ANN. STAT. § 571.030.1(4) (West 2015).

92. *Rogers*, 976 S.W.2d at 531.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* (citing *State v. Cook*, 560 S.W.2d 299, 302 (Mo. Ct. App. 1977), *abrogation recognized by State v. Dudley*, 303 S.W.3d 203, 207 (Mo. Ct. App. 2010)).

99. *Id.* at 532.

100. *Id.*

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merged with the killing and one that did not, the shot that did not merge could underlie the felony murder conviction.<sup>101</sup>

In the words of Professor Guyora Binder, the *Rogers* court's rationale was "almost comically strained."<sup>102</sup> The *Rogers* rationale fails completely, and it demonstrates the court's desire to evade the merger limitation at almost any cost. The felony with which Rogers was charged involved "exhibiting," or brandishing, the firearm; firing the gun had nothing to do with the felony.<sup>103</sup> Rogers could have fired ten shots, and he would still have committed only one felony under Section 571.030.1(4). This would be a different discussion if Rogers had been charged under a different provision within the unlawful use of a weapon statute – one that tied the crime to the firing of the gun.<sup>104</sup> However, that was not the case. Thus, the merger limitation should have been applied under the *Cook* rationale and overturned the felony murder conviction.

Over the next three years, the Western District issued decisions announcing the statutory abrogation of the merger doctrine.<sup>105</sup> In *State v. Bouser*, the Western District began dismantling the merger limitation.<sup>106</sup> It did so in two stages: first, it attacked the applicability of *Shock* to modern felony murder interpretation on the basis that *Shock* interpreted a law drastically different from the modern felony murder formulation.<sup>107</sup> Second, it considered the modern legislative intent regarding the statutory language utilized in the current felony murder provision within the second-degree murder statute.<sup>108</sup>

Regarding *Shock*'s continued applicability, the *Bouser* court said: "The *Shock* court's analysis was conducted within a much different legal context and interpreted very different criminal statutes than exist today and accordingly is of little value in our case."<sup>109</sup> One aspect of the *Bouser* analysis emphasized that the felony murder provision in *Shock* differentiated between a "homicide" and a "murder."<sup>110</sup> It focused on the notion that the felony murder provision in *Shock* only aggravated those killings that constituted "mur-

101. *Id.*

102. BINDER, *supra* note 5, at 238.

103. See MO. ANN. STAT. § 571.030.1(4) (West 2015) ("A person commits the crime of unlawful use of weapons if he or she knowingly . . . [e]xhibits, in the presence of one or more persons, any weapon readily capable of lethal use in an angry or threatening manner . . .").

104. See, e.g., *id.* § 571.030.1(3).

105. See, e.g., *State v. Gheen*, 41 S.W.3d 598 (Mo. Ct. App. 2001); *State v. Williams*, 24 S.W.3d 101 (Mo. Ct. App. 2000); *State v. Bouser*, 17 S.W.3d 130 (Mo. Ct. App. 1999).

106. 17 S.W.3d 130.

107. *Id.* at 136–37.

108. *Id.* at 138–40.

109. *Id.* at 136.

110. *Id.* (citing *State v. Shock*, 68 Mo. 552, 559–60 (1878)).

der.”<sup>111</sup> Additionally, *Bouser* noted a 1983 Supreme Court of Missouri case that discussed the operation of the second-degree felony murder provision in effect at the time – a statute that remained unchanged since 1835 – and the fact that the Supreme Court of Missouri did not note a merger limitation for second-degree felony murder.<sup>112</sup> Because *Shock* only considered the first-degree felony murder provision, it considered *Clark* to be the authority on second-degree felony murder,<sup>113</sup> and, because it made no mention of the merger limitation, it concluded that there was no such limitation for second-degree felony murder.<sup>114</sup>

The *Bouser* court then turned to the legislature’s intent in formulating the modern second-degree murder statute, which includes the felony murder provision.<sup>115</sup> It noted that *Clark* made no mention of a merger limitation and that the statute does not enumerate a list of potential underlying felonies.<sup>116</sup> Further, the *Bouser* court took special note of, and ultimately relied on, the fact that the felony murder provision uses the words “*any felony*” in reference to a killing that occurs during the commission of a felony.<sup>117</sup> The *Bouser* court held that this modification in statutory language, combined with the elimination of first-degree felony murder, indicated the legislature’s intent to eradicate limitations on felony murder, and thus any felony, even one assaultive in nature, could underlie a felony murder conviction.<sup>118</sup>

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111. *Id.* (citing *Shock*, 68 Mo. at 559–60). It should be noted that *Shock* was not analyzing a pure felony murder statute, but a statute that aggravated second-degree murder to first-degree murder. *See id.* at 135 (quoting WAG. STAT. (1872) c. 42, art. 2, § 1, p.445) (“Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or *other felony*, shall be deemed murder in the first degree.”).

112. *Id.* (citing *State v. Clark*, 652 S.W.2d 123, 127 (Mo. 1983) (en banc)) (stating that “homicides committed in the perpetration of . . . *any felony* other than the five listed in the first[-]degree murder statute” could underlie a second-degree felony murder conviction). The statute in effect at the time stated: “All other kinds of murder at common law, not herein declared to be manslaughter or justifiable or excusable homicide, shall be deemed murder in the second degree.” MO. REV. STAT. § 565.004 (1978). The first-degree murder statute enumerated the five felonies that would underlie a first-degree felony murder charge. *Id.* § 565.003 (“Any person who unlawfully kills another human being without a premeditated intent to cause the death of a particular individual is guilty of the offense of first[-]degree murder if the killing was committed in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary or kidnapping.”).

113. *Bouser*, 17 S.W.3d at 136 (citing *Clark*, 652 S.W.2d at 127).

114. *Id.*

115. *Id.* at 138.

116. *Id.* at 136, 138.

117. *Id.* at 138–39.

118. *Id.* at 140.

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In *State v. Williams*, the Western District modified its rationale and departed from *Bouser*.<sup>119</sup> *Williams* is interesting because *Williams* and *Bouser* were decided only five months apart, yet *Williams* made no reference to *Bouser*.<sup>120</sup> Additionally, *Williams* essentially rejected the *Bouser* court's rationale that the language "any felony" eliminated the merger limitation.<sup>121</sup>

The *Williams* court was more methodical than *Bouser*. Additionally, it showed a greater degree of deference to *Shock* in that it saw no difference between the statute interpreted by *Shock* and the modern second-degree murder statute which utilized the language "any felony."<sup>122</sup> It noted that other, more recent cases, including *Clark*,<sup>123</sup> *Cook*,<sup>124</sup> *Hanes*,<sup>125</sup> and *Rogers*,<sup>126</sup> all relied on an understanding of second-degree felony murder that permitted any felony to underlie the felony murder conviction, but that felony murder was nonetheless limited by the merger doctrine announced in *Shock*.<sup>127</sup> Thus, the *Williams* court concluded that the addition of the language "any felony" to Section 565.021.1(2) could not be the source of the abrogation of the merger doctrine, because the legislature merely continued to use language understood by the courts for over a century to be limited by the merger doctrine.<sup>128</sup>

Instead, the *Williams* court turned to Section 565.021.2 for the language it claimed abrogates the merger limitation for felony murder.<sup>129</sup> That section states: "Murder in the second degree is a class A felony, and the punishment for second degree murder shall be in addition to the punishment for commission of a related felony or attempted felony, *other than murder or manslaugh-*

119. *State v. Williams*, 24 S.W.3d 101, 116–17 (Mo. Ct. App. 2000).

120. *See Bouser*, 17 S.W.3d 130; *Williams*, 24 S.W.3d 101.

121. *Williams*, 24 S.W.3d at 116.

122. *Id.* at 115–16. The *Williams* court concluded that the statute at issue in *Shock* extended felony murder to "any felony" because it did not expressly exclude any felonies. *See id.*

123. *State v. Clark*, 652 S.W.2d 123, 127 (Mo. 1983) (en banc) (stating that "homicides committed in the perpetration of . . . any felony other than the five listed in the first[-]degree murder statute" could underlie a second-degree felony murder conviction).

124. *State v. Cook*, 560 S.W.2d 299, 302 (Mo. Ct. App. 1977) (holding the merger doctrine precluded a second-degree felony murder conviction when the underlying felony was unlawful use of a weapon that discharged and killed the victim), *abrogation recognized by State v. Dudley*, 303 S.W.3d 203, 207 (Mo. Ct. App. 2010).

125. *State v. Hanes*, 729 S.W.2d 612, 617 (Mo. Ct. App. 1987) ("The felony-murder doctrine does not apply where the felony is an offense included in the charge of homicide. The acts of assault merge into the resultant homicide, and may not be deemed a separate and independent offense which could support an instruction for felony murder.").

126. *State v. Rogers*, 976 S.W.2d 529 (Mo. Ct. App. 1998) (holding that the merger doctrine precluded the second, killing, shot from serving as the underlying felony of a felony murder conviction).

127. *Williams*, 24 S.W.3d at 115.

128. *Id.* at 116.

129. *Id.* at 117.

ter.”<sup>130</sup> The *Williams* court interpreted this provision to mean that the legislature intended to exclude the felonies of murder and manslaughter from acting as the underlying felonies for felony murder.<sup>131</sup> Further, the *Williams* court said this exclusion served to fulfill one of the primary purposes of the merger limitation – preventing felony murder from “swallowing up” murder and manslaughter and the gradations of those crimes.<sup>132</sup>

The *Williams* court then turned to whether the legislature intended to exclude felonies other than murder and manslaughter from serving as underlying felonies for felony murder.<sup>133</sup> Applying the maxim *expressio unius est exclusio alterius* – “the mention of one thing implies the exclusion of another thing”<sup>134</sup> – the *Williams* court concluded that the explicit statutory language excluding murder and manslaughter from serving as underlying felonies thereby prevented the courts from reading further exclusions into the statute.<sup>135</sup> Thus, the merger limitation was abrogated, and truly *any* felony, except murder and manslaughter, could serve as an underlying felony for a felony murder conviction.

One year later, in *State v. Gheen*, the Western District put the final nail in the merger doctrine’s coffin: “Applying this court’s decisions in both *Bouser* and *Williams*, we hold that the merger doctrine, under the current Missouri statutory scheme, is no longer a viable theory.”<sup>136</sup> More recently, the Eastern and Southern Districts have looked to the Western District to analyze the continuing validity of the merger doctrine.

### B. The Eastern and Southern Districts

The Missouri Court of Appeals for the Eastern District has not explicitly ruled on the validity of the merger doctrine since the Western District decided *Bouser* and *Williams*. In 2011, the Eastern District made its only reference to the issue in *State v. Gray*.<sup>137</sup> The Eastern District simply noted that “modern precedent suggests that the merger doctrine has been abrogated” and cited *Williams* for this proposition.<sup>138</sup> However, the court briefly entertained the idea that the merger doctrine remained viable, but it ultimately stated that it would be inapplicable to the facts of the case: “Assuming *arguendo* that the merger doctrine is still viable, it is not applicable to the case *sub judice*.”<sup>139</sup>

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130. *Id.* (emphasis added) (quoting MO. REV. STAT. § 565.021.2 (2000)).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Kan. City v. J. I. Case Threshing Mach. Co.*, 87 S.W.2d 195, 205 (Mo. 1935) (citation omitted).

135. *Williams*, 24 S.W.3d at 117.

136. 41 S.W.3d 598, 605 (Mo. Ct. App. 2001).

137. 347 S.W.3d 490 (Mo. Ct. App. 2011).

138. *Id.* at 508 (citing *Williams*, 24 S.W.3d at 117).

139. *Id.* The defendant in *Gray* was convicted under 565.021.1(1) and was not convicted under the traditional felony murder provision. *Id.*

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The Missouri Court of Appeals for the Southern District has decided only a single case regarding the merger doctrine's validity since *Williams*, but it expressed its views far more explicitly than the Eastern District.<sup>140</sup> In *State v. Simino*, the Southern District adopted the Western District's reasoning in *Williams* and held that "[t]he express language of the felony-murder statute abrogated the common law doctrine of merger."<sup>141</sup>

It is unfortunate that the Eastern and Southern Districts did not consider the issue to a greater degree. The Western District's rationale for abrogation remains unchallenged in the Missouri Court of Appeals, and the Supreme Court of Missouri has not granted transfer to any case to rule on the issue itself. The issue now remains uncertain. One commentator has noted that "it is unclear whether or not Missouri retains a merger doctrine."<sup>142</sup>

#### IV. DISCUSSION

This Note's objective is to closely examine the merger doctrine and determine whether it remains a legally viable doctrine in Missouri. Toward that end, this Part will first discuss the purpose of a merger limitation on felony murder. It will demonstrate the dangers posed to society that are present when the applicability of felony murder is left to the whims of prosecutors. This Part will then consider the rules of statutory interpretation that are relevant to this examination. Finally, this Part will address the rationales utilized by the Western District Court of Appeals. Ultimately, it will discuss how the statutes should be interpreted in light of the rules of statutory interpretation and the language of the relevant provisions.

##### A. *The Purpose of the Merger Limitation*

Felony murder is a reviled principle of American law.<sup>143</sup> Scholars almost unanimously denounce it as morally indefensible.<sup>144</sup> It has been said that "[p]rincipled argument in favor of the felony-murder doctrine is hard to find,"<sup>145</sup> and that "[c]riticism of the rule constitutes a lexicon of everything that scholars and jurists can find wrong with a legal doctrine."<sup>146</sup> It authorizes punishment for an accidental death equal to that of a planned killing.<sup>147</sup>

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140. See *State v. Simino*, 397 S.W.3d 11, 24–25 (Mo. Ct. App. 2013), *abrogated on other grounds by State v. Sisco*, 458 S.W.3d 304, 311 (Mo. 2015) (en banc).

141. *Id.* at 25.

142. BINDER, *supra* note 5, at 238.

143. See *id.* at 3.

144. *Id.*

145. DRESSLER, *supra* note 4, at 558 (quoting AMERICAN LAW INSTITUTE, Comment to § 210.2, at 37).

146. *Id.* (quoting Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine of Constitutional Crossroads*, 70 CORN. L. REV. 446, 446 (1985)).

147. *Id.* at 557 & n.108.

This revulsion, directed at a barbaric and arcane form of assigning blame, led courts and scholars to find ways to limit its application and make it more palatable.<sup>148</sup> Early felony murder statutes often limited felony murder by enumerating the felonies permitted to serve as predicates for felony murder, which explains why so few cases in the nineteenth century addressed the issue of the merger limitation.<sup>149</sup> However, those states that codified a felony murder provision without limits suffered from the “merger problem.”<sup>150</sup>

The merger problem has two forms. The first is that lesser degrees of homicide are felonies in themselves.<sup>151</sup> In those cases, a felony is committed and a killing results in the course of its commission.<sup>152</sup> Without a merger limitation, the State can charge a defendant with felony murder, with the underlying felony being involuntary manslaughter.<sup>153</sup> Such a rule would bypass the legislature’s and society’s beliefs that certain types of killings should be punished differently.<sup>154</sup> Thus, one necessary merger limitation is intended to prevent the use of lesser forms of homicide as the predicate felony for a felony murder charge.<sup>155</sup>

The second form seeks to bypass the first merger limitation. Imagine that *A* is roused to anger by *B* on the street because *B* made a profane comment about *A*’s girlfriend. *A* lashes out with a single punch to *B*’s head. *B* strikes his head on concrete and dies. At worst, *A* committed voluntary manslaughter.<sup>156</sup> However, it is more likely that *A* committed involuntary manslaughter.<sup>157</sup> Assume that manslaughter is not permitted to act as the predicate felony for felony murder. The State may bypass this limitation by charging *A* with assault in the second degree;<sup>158</sup> this then serves as the predicate felony for felony murder. Now, the felonious assault serves to turn what should be an involuntary manslaughter conviction, which may be punished by up to four years imprisonment, into a felony murder conviction, which is punishable by ten to thirty years or life imprisonment.<sup>159</sup>

148. BINDER, *supra* note 5, at 3–4.

149. *Id.* at 232.

150. *Id.*

151. *Id.* at 227.

152. *See id.*

153. *Id.*

154. *Id.*

155. *See id.*

156. A person commits voluntary manslaughter by causing the death of another person “with the purpose of causing serious physical injury” while acting under the influence of sudden passion arising from adequate cause. MO. REV. STAT. § 565.023.1(1) (2000).

157. A person commits involuntary manslaughter by “[r]ecklessly caus[ing] the death of another person.” MO. REV. STAT. § 565.024.1(1) (Cum. Supp. 2013).

158. The State could charge *A* with assault in the second degree because he “recklessly cause[d] serious physical injury to another person.” MO. REV. STAT. § 565.052.1(3) (2000).

159. *See id.* §§ 565.021, .024, 558.011.

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To make matters worse for *A*, the felony murder rule in this situation eases the State's burden of proof.<sup>160</sup> In order to prove that *A* committed felony murder, the State must merely prove that *A* recklessly caused serious physical injury to *B* – the underlying felony – and that *B* died as a result of *A* committing the underlying felony.<sup>161</sup> The State can obtain a thirty-year or life sentence by barely lifting a finger, whereas normally it would be required to prove intent to kill without the influence of sudden passion.<sup>162</sup>

The merger doctrine prohibits these results. The merger doctrine requires there be some felonious intent or purpose that is separate and distinguishable from the act of causing physical injury or death.<sup>163</sup> If the killing and the felony are indistinguishable from one another, except insofar as a death occurred, then the felony merges into the killing and cannot serve as an underlying felony for felony murder.<sup>164</sup>

For example, if a young man punches another in the head, and the victim dies after his head strikes the ground, the felonious assault and killing are indistinguishable from one another.<sup>165</sup> There was no independent felonious intent or purpose other than to cause physical injury or death.<sup>166</sup> Thus, if the defendant was acting coolly and rationally, and intended the victim's death, he may be charged with conventional murder.<sup>167</sup> If the defendant acted under the influence of sudden passion, he may be charged with voluntary manslaughter.<sup>168</sup> If he did not intend the victim's death, but did intend to cause physical injury, he may be charged with involuntary manslaughter or some lesser homicide.<sup>169</sup> The defendant may not, however, be charged with felony murder.<sup>170</sup>

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160. See DRESSLER, *supra* note 4, at 525.

161. See *id.* at 522.

162. See MO. REV. STAT. §§ 565.021, 565.023, 558.011 (2000).

163. *People v. Huter*, 77 N.E. 6, 8 (N.Y. 1906); see also *State v. Shock*, 68 Mo. 552, 561–62 (1878).

164. *Huter*, 77 N.E. at 8.

165. BINDER, *supra* note 5, at 4.

166. See *id.*

167. See MO. REV. STAT. § 565.021.1 (2000).

168. See *id.* § 565.023.1(1).

169. See *id.* § 565.024.1(1) (Cum. Supp. 2013).

170. Note, however, that certain crimes that may appear assaultive in nature do not merge with a homicide. See DRESSLER, *supra* note 4, at 529. For example, rape does not merge with a homicide if a killing occurs in the course of a rape. See *Buel v. People*, 78 N.Y. 492, 497 (N.Y. 1879). One who commits a rape commits a felony with a purpose other than physical injury or death. See *id.* Thus, if the victim dies during the course of the rape, the defendant may be charged with felony murder. See *id.* at 499.

### B. Rules of Statutory Interpretation

A series of related statutory provisions reside at the core of this issue. How a court interprets Section 565.021 defines the result. Thus, rules of statutory interpretation are a major factor in the analysis of the continued existence of the merger limitation in Missouri. Two major rules influence how this statute should be interpreted, and each is fairly simple.

The first rule was utilized by the Western District in *Williams*: *expressio unius est exclusio alterius* – “the mention of one thing implies the exclusion of another thing.”<sup>171</sup> When a statute expressly mentions something, the omission of similar things is presumed intentional.<sup>172</sup> Thus, if Missouri’s homicide provisions enumerate an assaultive felony as an underlying felony, the omission of other assaultive felonies should be presumed intentional.

The second rule is that “[i]t is presumed that in the enactment of laws, the legislature does not intend to enact absurd laws. Statutory construction is favored that avoids unjust or unreasonable results.”<sup>173</sup> This rule serves an important purpose because it may assist in eliminating what is otherwise a valid interpretation of the statute. The Supreme Court of Missouri has stated, “This Court is obligated to ascertain the intent of the legislature from the language used and to give effect to that intent without arriving at an absurd result. The law favors statutory construction that harmonizes with reason and that tends to avoid absurd results.”<sup>174</sup> Ultimately, this rule will help divine the proper interpretation of whether the merger limitation continues to exist in Missouri.

### C. The Western District’s Folly

The Western District incorrectly held the merger limitation was abrogated by Sections 565.021.1(2) and 565.021.2. In each case, *Bouser*<sup>175</sup> and *Williams*,<sup>176</sup> the court’s analysis failed in very different ways. The *Bouser* court’s analysis was flawed because it failed to properly consider the contextual reality in which the past cases, such as *Shock*, resided.<sup>177</sup> The *Williams* court failed for an even more fundamental reason: its own rule of statutory interpretation works against its conclusions, and it failed to consider other

171. *Kan. City v. J. I. Case Threshing Mach. Co.*, 87 S.W.2d 195, 205 (Mo. 1935) (en banc).

172. *See State v. Williams*, 24 S.W.3d 101, 117 (Mo. Ct. App. 2000).

173. *David Ranken, Jr. Technical Inst. v. Boykins*, 816 S.W.2d 189, 192 (Mo. 1991) (en banc) (citation omitted), *overruled by Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907, 911 (Mo. 1997) (en banc), *as modified on denial of reh’g* (Mar. 25, 1997).

174. *Id.*

175. *State v. Bouser*, 17 S.W.3d 130 (Mo. Ct. App. 1999).

176. *State v. Williams*, 24 S.W.3d 101 (Mo. Ct. App. 2000).

177. *Compare State v. Shock*, 68 Mo. 552, 562 (1878), *with Bouser*, 17 S.W.3d at 139.

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relevant statutory provisions. Both analyses fail because they create an absurd result. Because of these incorrect holdings, there is confusion in the law, and many criminal defendants now face uncertainty as to whether their crimes may serve as the underlying felony for felony murder.

### 1. *Bouser's* Failure to Consider Historical Context

The Western District in *Bouser* concluded the merger doctrine in Missouri ceased to function because the modern felony murder statute stated that a defendant is guilty of second-degree murder if, during the commission or attempt of "any felony," a person is killed as a result of that felony.<sup>178</sup> But, the *Bouser* court failed to give due consideration to the historical and statutory contexts of the past cases discussing felony murder and the merger doctrine.

In particular, *Bouser* directly attacked the applicability of *State v. Shock* to a modern understanding of felony murder.<sup>179</sup> In doing so, it did not consider the actual meaning of the case. Instead, it merely sought to distinguish *Shock* into irrelevance. *Shock* held that, under the felony murder statute in place at the time, "those acts of personal violence to the deceased which are necessary and constituent elements of the homicide itself" merge with the homicide.<sup>180</sup>

*Bouser* asserted that the statutory interpretation that took place in *Shock* was inapplicable because the criminal act there did not constitute a felony in the first place and thus could not underlie a felony murder conviction.<sup>181</sup> According to *Bouser*, because modern statutes consider the criminal activity in *Shock* to be a felony, *Shock's* analysis of whether the criminal assault could serve as an underlying felony is of no value.<sup>182</sup> This reasoning is flawed. *Shock's* analysis of a merger limitation was not restricted to the scenario at hand, which the *Shock* court recognized could not underlie felony murder because it was not a murder in the first place.<sup>183</sup> Rather, *Shock* went beyond the circumstances and said that even if the crime did constitute a felony, it could not underlie a felony murder charge.<sup>184</sup> *Shock's* conclusions in this regard were based on an earlier case involving the misdemeanor manslaughter rule, where the Supreme Court of Missouri held that the misdemeanor manslaughter statute:

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178. *Bouser*, 17 S.W.3d at 139.

179. *Id.* at 136–37.

180. *Shock*, 68 Mo. at 561.

181. *Bouser*, 17 S.W.3d at 136.

182. *Id.*

183. *Shock*, 68 Mo. at 562. Recall that *Shock's* felony murder statute aggravated a killing that was second-degree murder to first-degree murder; it did not take any killing and convert it to murder. *Id.* at 559.

184. *Id.* at 560.

[C]ontemplates some other misdemeanor than that which is an ingredient in the imputed offense, otherwise that part of it relating to an attempt to perpetrate a misdemeanor would be wholly nugatory; that where an act becomes criminal from the perpetration or the attempt to perpetrate some other crime, it would seem that the lesser could not be a part of the greater offense.<sup>185</sup>

The *Bouser* court also attacked *Shock* because the statute at that time required that the killing be a murder – that is, that it be done with intent to kill.<sup>186</sup> This is a trivial concern. It is true that the statutory provisions evolved over time so that intent to kill was no longer a necessary aspect of felony murder.<sup>187</sup> However, this modification did not change the plain language of *Shock*'s holding that “those acts of personal violence to the deceased which are necessary and constituent elements of the homicide itself” merge with the homicide.<sup>188</sup> This statement goes beyond the limitations the *Bouser* court set upon *Shock*'s applicability. It is a clear merger limitation for all understandings of murder, not just first-degree murder.

When *Bouser* began interpreting the legislature's intent in writing the modern second-degree murder statute and its felony murder provision, it noted that there was no mention of merger, nor were any specific felonies listed as valid underlying felonies.<sup>189</sup> Thus, according to *Bouser*, when the felony murder provision mentioned the commission of “any felony,” it truly meant it.<sup>190</sup> This argument forgets the historical context in which the statute was written. It was written in a world where the merger doctrine existed in the courts.<sup>191</sup> Further, and most importantly, it ignores a longstanding principle that legislatures are presumed to not pass laws that create an absurd, unreasonable, or unjust result.<sup>192</sup> The *Bouser* decision, if accurate, violates the most basic purpose of the merger limitation: it would permit the State to utilize manslaughter as the underlying felony for felony murder. *Bouser*'s rationale is clear: “any felony” literally means any felony.<sup>193</sup> Thus, unlike *Williams*, the *Bouser* court opened the door to a form of felony murder that was noted as absurd by New York courts in 1838. This result defies logic and cannot be correct.<sup>194</sup>

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185. *Id.* at 563.

186. *Bouser*, 17 S.W.3d at 136.

187. *Id.* at 138.

188. *Id.* at 135 (quoting *Shock*, 68 Mo. at 561).

189. *Id.* at 138.

190. *Id.* at 139.

191. *See supra* Part II.B. The statute was published in the 1986 edition of the Missouri Revised Statutes, and no court had yet claimed to overrule *Shock*. *See* MO. REV. STAT. § 565.021 (1986).

192. *See supra* Part IV.B.

193. *Bouser*, 17 S.W.3d at 139.

194. *See supra* Part II.A.

## 2. Mistaken Interpretation in *Williams*

The Western District's decision in *Williams* suffers two mistakes of interpretation. The first, and more prominent, is the same as that in *Bouser*. By recognizing a limitation on felony murder only insofar as murder and manslaughter may not act as the underlying felonies, the statute permits the absurd result that a person who commits an act constituting manslaughter may be charged with felony murder simply by citing the underlying offense as the felonious assault that led to the killing.<sup>195</sup>

The second, subtler, mistake is that the *Williams* court failed to recognize the statutory provision sitting directly in front of it. Section 565.021.1(1) states: "A person commits the crime of murder in the second degree if he . . . [k]nowingly causes the death of another person or, *with the purpose of causing serious physical injury to another person, causes the death of another person.*"<sup>196</sup> While this provision does not appear in the traditional felony murder provision, it nonetheless served the same purpose as felony murder: An unintended killing that results from an assault committed with the purpose of inflicting serious physical injury is second-degree murder. It is, quite literally, an enumerated assaultive felony that may serve as the underlying felony for felony murder.<sup>197</sup>

This fact is crucial to the analysis. If the legislature intended for all felonious assaults to function as underlying felonies for felony murder, why did the legislature pass a second-degree murder statute that explicitly stated that a killing occurring from a felonious assault is second-degree murder? The simplest answer is that it would do so only if it was aware of the merger limitation on felony murder and desired to enumerate a specific type of felonious assault that would not merge.

This does not, however, solve a prominent problem – if this assaultive felony does not merge, it may create the same absurd result that prosecutors may dodge manslaughter in favor of felony murder. Most instances of manslaughter are the result of an individual attacking another person with the purpose of causing serious physical injury. The legislature dealt with that before it ever became an issue. Missouri Revised Statutes Section 565.023.1(1), the voluntary manslaughter statute, establishes:

A person commits the crime of voluntary manslaughter if he [c]auses the death of another person under circumstances that would constitute murder in the second degree under subdivision (1) of subsection 1 of section 565.021, except that he caused the death under the influence of sudden passion arising from adequate cause.<sup>198</sup>

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195. See *Bouser*, 17 S.W.3d at 140; *State v. Williams*, 24 S.W.3d 101, 117 (Mo. Ct. App. 2000).

196. MO. REV. STAT. §565.021.1(1) (2000) (emphasis added).

197. The described conduct is classified as assault in the first degree. See *id.* § 565.050.

198. *Id.* § 565.023.1(1).

Thus, the assaultive felony that does not merge, as per Section 565.021.1(1), cannot be used to punish as murder a crime that is manslaughter, because the voluntary manslaughter statute expressly states that if the felonious assault and death occurs while the defendant is under the influence of sudden passion, the crime is manslaughter.<sup>199</sup> Therefore, the legislature's recognition of the validity of the merger doctrine was implicit in its construction of the second-degree murder and voluntary manslaughter statutes. This being the case, the Western District was plainly incorrect when it held in *Williams* that Section 565.021.2 abrogated the merger doctrine<sup>200</sup> and when it said in *State v. Gheen* that "the merger doctrine, under the current Missouri statutory scheme, is no longer a viable theory."<sup>201</sup>

### 3. Interpreting the Statutes

The Missouri General Assembly intended to maintain the merger limitation on felony murder. The statutory language, and the construction of the provisions and how they relate to one another, proves it. Section 565.021, the second-degree murder statute, states:

1. A person commits the crime of murder in the second degree if he:

(1) Knowingly causes the death of another person or, with the purpose of causing serious physical injury to another person, causes the death of another person; or

(2) Commits or attempts to commit any felony, and, in the perpetration or the attempted perpetration of such felony or in the flight from the perpetration or attempted perpetration of such felony, another person is killed as a result of the perpetration or attempted perpetration of such felony or immediate flight from the perpetration of such felony or attempted perpetration of such felony.

2. Murder in the second degree is a class A felony, and the punishment for second degree murder shall be in addition to the punishment for commission of a related felony or attempted felony, other than murder or manslaughter.<sup>202</sup>

It is incorrect to assume that felony murder only considers Section 565.021.1(2). True, it deals directly with the concept, but Section 565.021.1(1) contains its own felony murder provision: it is second-degree murder if a person "causes the death of another person" while acting "with

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199. *See id.* §§ 565.021.1(1), .023.1(1).

200. *Williams*, 24 S.W.3d at 117.

201. *State v. Gheen*, 41 S.W.3d 598, 605 (Mo. Ct. App. 2001).

202. § 565.021.1–2.

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the purpose of causing serious physical injury” to that person.<sup>203</sup> This is where another statute comes into play: assault in the first degree.<sup>204</sup>

Section 565.021.1(1) provides an *enumerated assaultive felony* that may serve as an underlying felony for a conviction of second-degree murder.<sup>205</sup> By enumerating an assaultive felony, the Missouri General Assembly signaled that the merger limitation was still valid in Missouri. If it were not valid, this enumeration would be unnecessary because assault in the first degree would fall within the meaning of Section 565.021.1(2). Furthermore, *expressio unius est exclusio alterius* applies. The inclusion of an enumerated assaultive felony precludes the use of others as predicate felonies for felony murder.<sup>206</sup>

The evidence favoring this understanding is compounded by the fact that the Missouri legislature built in a method of preventing abuse of this enumerated felony. Section 565.023, the voluntary manslaughter statute, states:

1. A person commits the crime of voluntary manslaughter if he:

(1) Causes the death of another person under circumstances that would constitute murder in the second degree under subdivision (1) of subsection 1 of section 565.021, except that he caused the death under the influence of sudden passion arising from adequate cause[.]<sup>207</sup>

Section 565.023.1(1) prevents the State from using assault in the first degree as an end-around voluntary manslaughter.<sup>208</sup> Normally, an assaultive felony as a predicate felony for felony murder would allow the prosecutor to evade manslaughter – if the act was manslaughter – by charging felony murder and utilizing the assault as an underlying felony. Assault in the first degree may be an enumerated felony for the purposes of felony murder, but even it is limited by statute. If a death occurs following an individual committing assault in the first degree, and that assault was preceded by the influence of sudden passion arising from adequate cause, the defendant should be convicted of voluntary manslaughter, not second-degree murder – i.e. felony murder.

This interpretation of the statute solves every problem created by the Western District's holdings in *Bouser* and *Williams*. It gives full consideration to all relevant statutory provisions. It recognizes the legislature's intent

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203. *Id.* § 565.021.1(1).

204. *Id.* § 565.050.1.

205. *See id.* § 565.021.1(1). Recall that felony murder is not its own crime in Missouri, but a concept of culpability under second-degree murder. *Id.* § 565.021.1(2).

206. *See Kan. City v. J. I. Case Threshing Mach. Co.*, 87 S.W.2d 195, 205 (Mo. 1935); *see also* § 565.021.1(1).

207. § 565.023.1(1).

208. *See id.*

to cut a single hole in the merger limitation. It reconciles the rest of the felony murder rule with the merger limitation. And, most importantly, it eliminates the absurd result created by both *Bouser* and *Williams*: the obliteration of homicide gradations.

## V. CONCLUSION

The Supreme Court of Missouri should end its silence on this issue. One hundred thirty-seven years since effectively weighing in on the issue of the merger doctrine's validity in *State v. Shock* is long enough.<sup>209</sup> Until the Supreme Court of Missouri weighs in, the law will remain uncertain.<sup>210</sup> This uncertainty cannot be allowed to continue.

The Western District's holdings cannot be allowed to stand. Its rationale in approaching the statute failed to recognize the clear flaw that arises when only manslaughter and murder are precluded from serving as underlying felonies. Its holdings lead only to dangerous and absurd results: an assault that leads to a death – even if committed in the heat of passion – may serve as the underlying felony of a felony murder conviction. The killing may meet the definition of manslaughter, or even a lesser degree of homicide, but may nonetheless be punished as second-degree murder. This is a perversion of the justice system.

Furthermore, the Western District's interpretation was plainly wrong. The Western District failed to recognize that Section 565.021.1(1) enumerates an assaultive felony as serving the role of an underlying felony. There would be no reason for such an enumeration if the legislature intended for truly *any* felony to function as an underlying felony. Thus, this enumeration reflects the legislature's belief that the merger limitation still applied to some felonies. Additionally, the voluntary manslaughter statute, Section 565.023, precludes this enumerated assaultive felony from creating the absurd result that the assault could serve as an underlying felony, even when the killing was itself manslaughter.

Because we assume that legislatures do not intend their legislation to have an irrational result, and the Western District's interpretation leads to an irrational result, its interpretation cannot be correct. Rather, the correct interpretation of the second-degree murder statute maintains the merger doctrine. It does so because the statute enumerates an assaultive felony that may underlie felony murder, and the legislature wrote the voluntary manslaughter statute in a manner that prevents the absurd result the merger doctrine seeks to avoid.

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209. 68 Mo. 552 (1878).

210. BINDER, *supra* note 5, at 238.