

Case No. 77767-5

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS HACHENEY,

Petitioner.

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**AMICUS CURIAE BRIEF
OF
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS**

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I. INTRODUCTION

Washington Association of Criminal Defense Attorneys (WACDL) submits this amicus brief on the issue of whether a premeditated murder occurs “in the course of” a separate felony crime when the defendant does not begin to commit that felony until after the murder.

II. STATEMENT OF THE CASE

Nicholas Hacheny was charged by information with one count of Aggravated First Degree Murder. The information alleged that Hacheny premeditated and caused the death of Dawn Hacheny. RP 2/4/02 at 37; CP 196. In addition, the information alleged that Hacheny committed the murder “in the course of” an arson. The trial court denied the State’s motion to file an amended information additionally alleging that the murder was either committed “in furtherance of” or “in immediate flight” from the arson. RP 2/15/02 at 286-87; CP 348.

The central facts presented at trial are apparently not disputed

in this direct appeal. According to the evidence, Hachenev strangled the victim, who was dead before Hachenev started the fire. In fact, the State argued, both at trial and now on appeal, that Hachenev committed the arson in an attempt to conceal his involvement in the completed murder. RP 11/25/02 at 2333-34.

It certainly appears that the jury concluded that the murder was completed before the arson was commenced. Hachenev's jury made two inquiries of the Court before they returned a verdict, asking:

Would arson be an aggravating circumstance if Dawn Hachenev was all ready [*sic*] dead...?

and

For arson to be an aggravating circumstance did the fire have to result in the injury to a living person or only related to the murder, assuming Dawn Hachenev was all ready [*sic*] dead?

CP 1358-59.

In response to both questions, the trial court refused to "provide further instructions," but rather referred the jury to "the instructions provided." CP 1360.

Hachenev was convicted and sentenced to life in prison without the possibility of release. This appeal followed.

III. SUMMARY OF ARGUMENT

In order for a premeditated murder to be committed "in the course of" an arson, the intent to commit the arson must exist either prior to or concurrent with the commission of the act causing the death. In addition, either prior to or concurrent with the murder, the accused must be engaged in some act which is required to complete the underlying felony.

This case presents an additional issue which arises from the particular jury instructions given by the trial court. Ordinarily, the aggravated murder statute does not require proof that the separate felony was a proximate cause of the murder. However, where, as here, the State successfully seeks to have the jury instructed that the arson is "causally connected" to the homicide, the State has assumed the burden of proving that causal connection. In such a case, this

Court must review the sufficiency of the evidence in light of that assumed burden.

Under either test, the evidence in this case is insufficient as a matter of law to sustain Hacheny's conviction. An arson which is an afterthought of a murder—i.e., an arson which is conceived and carried out after the homicide is completed—is not committed “in the course of” a murder. This is true even where the arson in some manner “furthers” the murder. Likewise, an arson which occurs after a murder can never be a proximate cause of that murder.

This Court should reverse and dismiss Hacheny's conviction.

IV. ARGUMENT

A defendant cannot commit a murder “in the course of” another crime unless he has begun to commit that crime.

A. Principles of Statutory Interpretation

This case requires the Court to construe the term “in the course of,” as it is used in the aggravated murder statute. The key question here is whether a murder occurs “in the course of” a felony

(here, arson) when the *mens rea* is formed and every act involved in the commission of that felony occurs after the murder is completed.¹ The quick answer is “no.” A homicide is committed in the course of a felony when it is committed after the accused has formed the requisite intent for, and while he or she is engaged in the performance of any act required for the completion of such felony.

In interpreting statutory provisions, this Court is guided by rules of construction. This Court’s primary objective is to ascertain and give effect to the intent and purpose of the Legislature. To determine legislative intent, this Court looks first to the language of the statute. *State v. Sullivan*, 143 Wn.2d 162, 174-75, 19 P.3d 1012 (2001). If a statute is clear, its meaning is derived from the plain language of the statute. Legislative definitions included in the statute are controlling, but in the absence of a statutory definition this Court will give the term its plain and ordinary meaning ascertained

¹ As noted previously, the terms “in furtherance of” and “in immediate flight from” are not in issue in this appeal because the trial court refused an amendment to add those allegations. Consequently, the jury was not instructed on either of these alternative means. To the extent that previous appellate decisions discuss all three of these phrases,

from a standard dictionary. *State v. Watson*, 146 Wn.2d 947, 954-55, 51 P.3d 66 (2002).

The phrase “in the course of” is neither novel, nor complex. In fact, this Court has previously concluded that the term is an expression “of common understanding to be given meaning from [its] common usage.” *State v. Brown*, 132 Wn.2d 529, 611, 940 P.2d 566 (1997). “In the course of” plainly implies that the enumerated felony is in progress at the time of the murder. “In the course of” is synonymous with “while,” which is defined as “during the time that.” *Oxford English Dictionary*, 231-33 (2d Ed. 1989); *Webster’s Third New International Dictionary, Unabridged*, p. 2604 (1993). According to this plain language, it is elemental that an actor does not commit a murder “during the time that” he is committing a felony when the felony occurs (both the act and the *mens rea*) after the murder.

WACDL primarily focuses on construction of the phrase “in the course of.”

B. Narrow Construction of Capital Eligible Crimes

It is important to be mindful that the statute at issue is part of Washington's capital punishment scheme. RCW Chapter 10.95. When the Legislature created the list of capital eligible crimes, one of the primary purposes was to comply with the mandates of *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153 (1976). Those cases required States that wished to reinstate capital punishment to narrowly draw (creating fewer capital eligible crimes) and define (selecting only the most culpable offenders) capital eligible crimes in order to avoid arbitrariness. As this Court explained in *State v. Bartholomew*, 98 Wn.2d 173, 189, 654 P.2d 1170 (1982) (*Bartholomew I*): "The concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." 98 Wn.2d at 188. "The Court has made clear, therefore, that if the legislature fails to provide sufficient guidance in defining

aggravating circumstances, then the state's supreme court in reviewing the death sentence must supply the omission, with an acceptably narrow interpretation. *The validity of the aggravating circumstances therefore will depend upon this court's maintaining a clear and narrow interpretation of the aggravating circumstances to provide the sentencing authority with the constitutionally necessary guidance.*” 98 Wn.2d at 189 (emphasis added).

By construing “in the course of” in a broad and distorting manner, both the State and the decision below ignore this admonishment.

C. This Court’s Previous Interpretations of Similar Statutes

This Court has previously encountered similar statutes which increase the punishment for a homicide (intentional or otherwise) when the homicide is committed during a separate felony crime. In construing those statutes, this Court has consistently required proof that the felony was commenced prior to or contemporaneously with the homicide in order for the killing to occur “during” or “in the

course of' that felony.

Because the terms of the current statute do not differ in any meaningful way from those statutes, this Court should not depart from its previous holdings. One reason for this is because, when a new statute utilizes old language, the Legislature is deemed to be familiar with the prior judicial construction of similar terms. *State v. Ritchie*, 126 Wash.2d 388, 894 P.2d 1308 (1995). Thus, this Court should read the current statute's use of the phrase "in the course of" in light of those prior constructions.

One of the first Washington cases to examine a statute increasing the punishment for a homicide committed during the commission of a separate crime was *State v. Diebold*, 152 Wash. 68, 72, 277 P. 394 (1929). In that case, this Court interpreted a statute making any death that occurred "in the commission of, or in an attempt to commit, or in withdrawing from the scene of, a felony" a second-degree murder. The issue in *Diebold* was whether the homicide occurred during a felony or whether the felony (taking a

motor vehicle) was complete at the time the defendant struck the victim while driving the stolen car.

The Court's analysis started with the legal question: when is a homicide committed "in the course of the perpetration of another crime?" 152 Wash. at 72. This Court stated the answer as follows: "It may be stated generally that a homicide is committed in the perpetration of another crime, when the accused, *intending to commit some crime other than the homicide, is engaged in the performance of any one of the acts which such intent requires for its full execution*, and, while so engaged, and within the *res gestae* of the intended crime, and in consequence thereof, the killing results." 152 Wash. at 72 (emphasis added). *Diebold* has been frequently cited by both courts and commentators for the proposition that a homicide is committed during a separate felony with the initiation of an attempt to commit that felony.

This rule was affirmed by this Court twelve years later in *State v. Anderson*, 10 Wn.2d 167, 177 116 P.2d 346 (1941). The

Court noted a split of authority in other jurisdictions, but called the *Diebold* holding “the better rule and the rule supported by the weight of authority.” 10 Wn.2d at 177 (*citing* 26 Am. Jur. 283 § 190).

The rule that the defendant must have begun to commit the felony in order for a homicide to be committed in the course of that felony was affirmed by this Court again in *State v. Golladay*, 78 Wn.2d 121, 131, 470 P.2d 191 (1970). In *Golladay*, the defendant was charged with committing a homicide during a larceny, but did not do any act associated with the larceny until the murder was completed. This Court characterized the record as disclosing “nothing to indicate that the defendant intentionally took the purse and shoes from the victim either before or after the attack.” 78 Wn.2d at 129. Characterizing *Diebold* as a “leading case,” *Golladay* expressly reaffirmed that a murder is not committed during another felony when a defendant commits the predicate felony after the homicide.

This Court construed the instant statute most recently in *State v. Brown, supra*. While *Brown* is instructive, it addresses a different issue than this case poses.² In *Brown*, the question was whether a homicide, arguably committed after the completion of a rape and robbery, was “in furtherance” of either crime. 132 Wn.2d at 609 (Brown argued “the killing of Ms. Washa was not in furtherance of either the rape or robbery because the killing occurred ‘hours’ after those crimes were committed or completed....”). In other words, Brown argued that once all of the elements of a felony have been committed no act can further that crime. This Court rejected Brown’s argument, finding that the homicide was committed because Brown “did not want to leave a witness alive.” *Id.* at 610. Thus, by killing the victim Brown was furthering his criminal purpose of

² Although *State v. Leech*, 114 Wn.2d 700, 790 P.2d 160 (1990) factually involved both an arson and a homicide, that case is easily distinguished from the instant case because the question there was whether the homicide occurred “in furtherance of” the arson. In *Leech*, the arson preceded the homicide. Thus, the question was whether the arson was still on-going when the homicide occurred. This Court held: “A death that is caused by an arson fire before it is extinguished occurs in furtherance of the arson and renders the arsonist liable for felony murder.” 114 Wn.2d at 704.

committing a rape and robbery without being apprehended.

It is important to note that this Court also found the evidence supported the inference that Brown possessed the intent to kill the victim contemporaneously with the commencement of the rape and robbery. In addition, *Brown* cited with approval to *State v. Dudrey*, 30 Wn. App. 447, 635 P.2d 750 (1981), which holds that a homicide is committed during a felony when, “at the time of the homicide, the appellant was engaged in the commission of the felony.” 30 Wn. App. at 450.

Thus, for nearly eighty years Washington courts have consistently held that a homicide committed entirely before the perpetrator forms the intent and commits a preliminary act necessary to commit a separate felony is not committed in the course of that felony.

D. The Possible Misuse of the “Intimate Connection” or “Res Gestae” Tests.

In addition to the legal test discussed above, a number of the above-cited cases include dicta which can lead to either an overly restrictive or overly broad construction of the statute. For example, the *Brown* court noted “[w]e have also recognized the need for a ‘causal’ or ‘intimate’ connection between a killing and a related felony to establish the killing was committed in the course of, in furtherance of, or in immediate flight from the felony.” *Id.* at 610.

This Court has previously used the phrases “intimate connection” and “*res gestae*” interchangeably. An “intimate connection” implies a close relationship between the felony and the murder. That relationship may be one of time, place, motive, or some combination of these factors. In this context, the phrase “*res gestae*” has been employed where a reviewing court finds no meaningful separation of time and/or place between the felony and

the homicide.³ While the “intimate connection”/”*res gestae*” tests are sometimes consistent with the ordinary meaning of “in the course of,” there are also instances when they are inconsistent with the terms of the statute. Thus, defining “in the course of” as requiring only an “intimate connection” results in an unwarranted expansion of the statute.

The problem with both phrases is that they can easily be reduced to a one dimensional temporal requirement. For example, in

³ WACDL urges this Court adopt the considered opinion of Prof. Wigmore and to dispense with--once and for all-- the concept of *res gestae* for all cases. The phrase has long since outlived any usefulness it ever had.

Res gestae, a Latin phrase which means "things done," generally refers to words and/or actions that "occur so close in time and substance" to each other that they are considered part of the same happening, event, or transaction. The phrase initially developed as an exception to the hearsay rule for statements. Eventually, though, the term seemed to embody the notion that evidence of any concededly relevant act or condition might also bring in the words which accompanied it. Thus, the conduct and the accompanying words were all part of the same transaction or the "things done," and if the conduct was admissible, so were the words.

Although the phrase may have played some beneficial role in the development of the law of hearsay and uncharged misconduct evidence, it has since been widely criticized for being useless and harmful. It is useless because the concepts included within *res gestae* can all be explained by reference to other more refined principles of evidence law. Professor Wigmore, author of the leading treatise on evidence, has written that the phrase is "not only entirely useless, but even positively harmful." The phrase is harmful because "by its ambiguity it invites the confusion of one rule with another and thus creates

reduced to a one dimensional temporal requirement. For example, in *Brown* this Court noted that “[f]rom the beginning of Appellant's criminal acts against Ms. Washa, he was not separated from her until he killed her and left for California.” In other words, this Court found a continuous course of conduct. However, the statute requires more than simply ensuring that the time interval between the murder and the felony is not too long.⁴ The plain language of the statute requires that the crimes occur in a particular order. In those cases where the murder is complete before the defendant forms the *mens rea* necessary to commit the requisite felony, or before the defendant commits any act necessary for the completion of that felony, then the statute does not apply. Because this statutory limitation is not apparent from either the terms “intimate connection” or “*res gestae*,” this Court should disapprove both tests.

⁴ The “intimate connection” test also suffers from a vagueness problem. How long of an interval is required before the felony and the murder are no longer intimately related?

E. While the Plain Language of the Statute Does Not Ordinarily Require a “Causal Connection” Between the Felony and the Murder, The State Assumed the Burden of Proving a Causal Connection in This Case.

A “causal connection” exists between a felony and a homicide when the felony is a proximate cause of the homicide. *See* Am. Jur. Homicide § 70 (2006) (“The death must be caused by the felonious act.”). “In determining whether there is a causal relation, some courts have suggested using ‘but for’ causation, or that the death would not have occurred but for the unlawful conduct.”). This Court has previously described a “causal connection” as requiring that “death must have been the probable consequence of the unlawful act.” *See Diebold*, 152 Wn.2d at 72. *See also State v. Golladay*, 78 Wn.2d at 131.

Utilizing the causal connection test, a felony can never be a proximate cause of a homicide where the victim is killed prior to the time that the defendant begins to commit the felony. However, it is also possible to commit a murder in the course of a separate felony

where the murder is not caused by any act associated with the felony. Thus, there are instances where the “causal connection” test is overly broad.

In this case, it is beyond dispute that the arson was neither a contributing nor a proximate cause of the victim’s death. While amicus contends that a “causal connection” is generally not necessary for a homicide to have occurred in “the course of” a felony, in this case the State was required to prove just such a connection; when the State incorporated the phrase into Hacheney’s jury instructions, it assumed the burden of proving the additional element. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998); *State v. Worland*, 20 Wash.App. 559, 566, 582 P.2d 539 (1978) (State assumes the burden of proving an additional element if, at the request of the State’s attorney, an additional or unnecessary element is incorporated into the jury instructions).

Under either test applicable to this case—the correct legal test discussed above, or the more restrictive test which the State assumed

the burden of meeting—the evidence was insufficient to prove that the homicide occurred in the course of an arson. WACDL urges this Court to reverse and dismiss Hacheney’s conviction for aggravated murder.

F. WACDL’s Position is Consistent with the Majority of Jurisdictions that Have Interpreted Similar Statutes.

A number of states have similar statutes elevating the seriousness of a homicide occurring in the course of another felony crime.⁵ A majority of jurisdictions hold that a felony committed entirely after a murder (sometimes termed an “afterthought”) is insufficient to support either a felony-murder conviction or the finding of a felony aggravator. *See United States v. Bolden*, 514 F.2d 1301, 1307 (D.C.Cir.1975) (conviction reversed where instructions may have left jury with “impression that coincidence in time between murder and robbery was sufficient” to support conviction in case where robbery was afterthought of murder); *Connolly v. State*, 500

³ Other states use “in the course of” or similar words or phrases such as “while,”

So.2d 57, 62 (Ala.Crim.App.1985), *aff'd*, 500 So.2d 68 (Ala.1986)
 (“An accused is not guilty of a capital offense where the intent to
 commit the accompanying felony, in this case rape, was formed only
 after the victim was killed.” “An accompanying felony committed as
 a ‘mere afterthought’ and unrelated to the murder will not sustain a
 conviction of capital murder.”); *People v. Gonzales*, 66 Cal.2d 482,
 58 Cal.Rptr. 361, 426 P.2d 929 (1967) (“The jury was properly
 instructed that intent to rob formed subsequent to the infliction of
 mortal wounds was not sufficient to support a finding of first degree
 felony murder); *Moody v. State*, 418 So. 2d 989 (Fla. 1982)
 (evidence insufficient to establish that homicide occurred in the
 course of arson where the evidence established that the arson was
 committed after the victim was killed); *State v. Snow*, 383 A.2d 1385
 (Me.1978) (jury must find that defendant “intended to pursue the end
 of his pecuniary gain by causing the death of” the victim); *Metheny
 v. State*, 359 Md. 576, 755 A.2d 1088 (2000) (“We conclude, as a

“during,” in perpetration of,” or “in the commission of.”

matter of statutory interpretation, that the General Assembly's use of the phrase 'while committing or attempting to commit' one of the aggravators conveys a legislative intent that a murder, in order to qualify for punishment by death, must have been connected to the aggravating crime by more than mere coincidence, therefore eliminating from death penalty consideration a robbery committed as an afterthought."); *People v. Brannon*, 194 Mich.App. 121, 486 N.W.2d 83, 85-86 (1992) ("Felony-murder doctrine will not apply if intent to steal property of victim was not formed until after homicide."); *State v. Newman*, 605 S.W.2d 781, 787 (Mo.1980) ("In order to find defendant guilty of murder in perpetration of robbery, intention to rob must have been formulated at time of shooting."); *People v. Joyner*, 26 N.Y.2d 106, 308 N.Y.S.2d 840, 257 N.E.2d 26, 27 (1970) ("In short, the court's language sufficiently informed the jurors that, if the defendant did not intend to rob [victim] at the time he stabbed and killed him, they could not find him guilty of felony murder."); *Diaz v. State*, 728 P.2d 503 (Okla. 1986) ("Appellant

correctly asserts that at the time of the homicide, the accused must be engaged in some act which is required to complete the underlying felony.”); *Commonwealth v. Spallone*, 267 Pa.Super. 486, 406 A.2d 1146 (1979) (conviction reversed where intent to rob was not formed until after the victim was killed); *State v. Buggs*, 995 S.W.2d 102,107 (Tenn. 1999) (“[I]ntent to commit the underlying felony must exist prior to or concurrent with the commission of the act causing the death of victim.”); *O’Pry v. State*, 642 S.W.2d 748, 761-62 (Tex.Cr.App.1981) (“proof of a robbery committed as an ‘afterthought’ and unrelated to a murder” insufficient to show that a defendant committed the murder during the course of committing a robbery).

In addition, LaFave and Scott, authors of the leading criminal law casebook, while noting the split of authority, simply conclude:

It would seem that the homicide, done without thought of a felony, could not be "in the commission of" the felony.

Wayne R. LaFave and Austin W. Scott, Jr., *Substantive Criminal*

Law § 7.5, at 228 (1986).

V. CONCLUSION

This Court should hold that in an aggravated murder prosecution the evidence is insufficient as a matter of law to support a conviction for a murder which is alleged to have been committed in the course of a felony when the commission of that felony begins after the murder. In addition, this Court should hold that in this case the evidence is insufficient to satisfy the State's assumed burden of proving that the murder was "causally connected" to the arson.

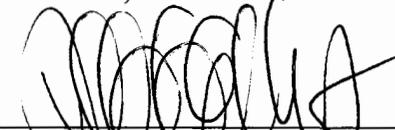
DATED this 22nd day of September, 2006.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Jeff Ellis certify that on September 22, 2006, I served the parties listed below with a copy of the *Amicus Brief* and *Motion to Permit WACDL to Appear as Amicus* by placing a copy in the mail, postage pre-paid, addressed to:

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Date and Place


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