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**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH**

**STATE OF IDAHO**

**Plaintiff,**

**V.**

**BRYAN C. KOHBERGER,**

**Defendant.**

**CASE NUMBER CR29-22-2805**

**MOTION TO STRIKE FELONY  
MURDER AGGRAVATOR**

COMES NOW, Bryan C. Kohberger, by and through his attorneys of record, and hereby moves to strike the felony murder aggravator from the State's Notice Pursuant to Idaho Code § 19-4004A. This Motion is made on the grounds that a malice aforethought murder cannot be aggravated by a burglary that itself is predicated on the same murder.

## Issues

1. Whether felony murder can be predicated on a burglary itself predicated on murder.
2. Whether malice aforethought murder can be aggravated by a burglary predicated on the same Murder.

### **I. Felony Murder cannot be predicated on a Burglary predicated on Murder.**

It is impossible to charge felony murder on the basis of a burglary with the intent to commit the murder in question. The State has given notice that it intends to show the murders in this case are aggravated because “the murder was committed in the perpetration or attempted perpetration of a .. burglary .. and the defendant killed, intended a killing, or acted with reckless indifference to human life...” In count I, the State charges that Mr. Kohberger committed burglary by “enter[ing] a residence, located at 1122 King Road, Moscow, with the intent to commit the felony crime of murder.” Counts II through V all charge premeditated murder. In other words, the State seeks to prove the aggravated circumstance of this murder by showing intent to commit murder at the time of entry.

As the Supreme Court of California has noted, “...in [a case such as this] the felony-murder rule [is] unnecessary...” *People v. Farley*, 210 P.3d 361, 410 (Cal. 2009). “The purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit.” *People v. Washington*, 402 P.2d 130, 133 (Cal. 1965). There is no rational reason for a first degree intentional murder to be enhanced by the fact that the murderer intended the killing at the time he or she entered a building.

States have taken different approaches to whether it is possible to *charge* felony murder where the felony is a burglary with the intent upon entry to commit murder. In *Sivak v. State*, 112 Idaho 197, 211-13 (1986), our Supreme Court determined that the felony in a felony murder was a lesser included offense of felony murder. In so doing, it construed the phrase “in the perpetration of, or attempt perpetration of” in I.C. § 18-8004A (1986)( which are the same as I.C. § 19-2515

(2023), to mean a murder “in furtherance” of the felony crime. *Id.* at 212 (*overruling State v. Hall*, 86 Idaho 63, 383 P.2d 602 (1963)). The Court held that:

holding on this issue makes sense because without the robbery, the state would have received only a second degree murder conviction against Sivak. And with it, a much lighter punishment. However, because of the robbery, the state sought and received a first degree murder conviction carrying a more severe penalty. Thus, Sivak, in essence, is being punished for the robbery by way of the punishment he received for the felony murder offense.

*Id.* at 212-13. The concept of committing a murder in furtherance of a burglary committed with the intent to commit that same murder has been rejected by multiple jurisdictions. *See, Williams v. State*, 818 A.3d 906, 913 (Del.v2002) *superseded by statute as stated in Comer v. State*, 977 A.2d 334, 340 (Del. 2009); *Parker v. State*, 731 S.W.2d 756, 759 (Ark. 1987). As the Court in *Williams* held:

Williams burglarized the Charles home with the intent of murdering Mason. The murder was not committed to carry out the commission of the burglary. Had his purpose been to steal jewelry and Mason was killed to facilitate his thievery, a case for felony murder would exist. Here, however, the sole purpose of the burglary was to murder his victim. It just so happened she was in a place he was not permitted to enter. Thus the murder, although “in the course of” the burglary, was not carried out “in furtherance of” it.

818 A.3d at 913.

Thus, under Idaho law, a felony murder could not be based upon a burglary whose sole aim is murder. If that is so, the question is whether a deliberate, intentional murder with malice aforethought can be aggravated by a burglary predicated on the murder itself.

## **II. A Malice Aforethought Murder cannot be aggravated by a Burglary predicated on the same Murder.**

New York’s Court of Appeals has held it cannot. In *People v. Cahill*, 809 N.E.2d 561, 588 (N.Y. 2003), the court considered whether a man charged with killing his wife’s murder could be aggravated because he entered his home to do it. The court began by considering the nature of burglary and finding it is an aggravated trespass, a trespass with the intent to commit a different

crime. *Id.* at 588. Then the court noted that to reach capital murder, a murder must be intentional and have an aggravating factor. *Id.* The court then found that a situation where the burglary is predicated on the murder intended is not adding anything to the murder. *Id.*

The court then considered the common law basis of felony murder and how it diverges from its use in the capital arena:

In contrast to Penal Law § 125.27(1), felony murder covers nonintentional killings. The very purpose of the felony murder doctrine is to utilize the underlying felony as a substitute for the defendant's murderous intent and thereby raise an unintentional killing to the level of murder (*see People v. Chico*, 90 N.Y.2d 585, 665 N.Y.S.2d 5, 687 N.E.2d 1288 [1997]; *People v. Lytton*, 257 N.Y. 310, 178 N.E. 290 [1931] ). As we said in *People v. Hernandez*, 82 N.Y.2d 309, 317, 604 N.Y.S.2d 524, 624 N.E.2d 661 [1993], “The basic tenet of felony murder liability is that the *mens rea* of the underlying felony is imputed to the participant responsible for the killing. By operation of that legal fiction, the transferred intent allows the law to characterize a homicide, though unintended and not in the common design of the felons, as an intentional killing” (citations omitted [in original]).

The felony murder concept was derived from the common law, at which no intent to kill was necessary. It was enough that the victim was killed while the accused was engaged in the commission of a felony. Under the common law, the felonious intent was imputed to the committed act, and, if it were homicide, made it murder (*see People v. Enoch*, 13 Wend. 159 [1834] ).

Penal Law § 125.27(1)(a)(vii) borrows language from the felony murder statute but is critically different because it deals with intentional, not unintentional, killings. The purposes of the capital statute and the felony murder statute are distinct, and the felonies covered by them are not the same. For example, under the felony murder statute, the killing need not be committed by one of the people engaged in the commission of the underlying crime (*People v. Hernandez*, 82 N.Y.2d 309, 604 N.Y.S.2d 524, 624 N.E.2d 661 [1993] ), whereas Penal Law § 125.27(1)(a)(vii) does not apply where the defendant's liability is based on someone else's conduct (unless the defendant commanded the murder). Moreover, felony murder liability for the death of a victim has been broadly construed (*see e.g. People v. Ingram*, 67 N.Y.2d 897, 501 N.Y.S.2d 804, 492 N.E.2d 1220 [1986]; *People v. Matos*, 83 N.Y.2d 509, 611 N.Y.S.2d 785, 634 N.E.2d 157 [1994] ), whereas the Legislature crafted Penal Law § 125.27(1)(a) to narrow the class of eligible offenders. Conceptually, Penal Law § 125.27(1)(a) begins with murder in the second degree and builds *on* it. Conversely, felony murder builds *toward* it. Thus, felony murder ends up as murder, whereas Penal Law § 125.27(1)(a) begins with murder. The two concepts share certain components but have entirely different objectives and constituents, and were statutorily constructed to reach different types of homicides and different categories of defendants.

809 N.E.2d at 361-62 (footnotes omitted). The court ruled that burglary predicated on the very same murder it sought to aggravate cannot satisfy its statute. *Id.* at 593.

Finally, California, whose statute then used the terminology “during the commission or attempted commission”, made essentially the same holding in *People v. Green*, 609 P.2d 468, 497, 504 (Cal. 1980) *superseded by statute on other grounds as state in People v. McLean*, 2003 WL 1091907 at \*20 (Cal.Ct.App. 2003) (unpublished). In *Green*, the court held:

The Legislature's goal is not achieved, however, when the defendant's intent is not to steal but to kill and the robbery is merely incidental to the murder—‘a second thing to it,’ as the jury foreman here said—because its sole object is to facilitate or conceal the primary crime. In the case at hand, for example, it would not rationally distinguish between murderers to hold that this defendant can be subjected to the death penalty because he took his victim's clothing for the purpose of burning it later to prevent identification, when another defendant who committed an identical first degree murder could not be subjected to the death penalty if for the same purpose he buried the victim fully clothed—or even if he doused the clothed body with gasoline and burned it at the scene instead. To permit a jury to choose who will live and who will die on the basis of whether in the course of committing a first degree murder the defendant happens to engage in ancillary conduct that technically constitutes robbery or one of the other listed felonies would be to revive ‘the risk of wholly arbitrary and capricious action’ condemned by the high court plurality in [*Gregg v. Georgia*, 428 U.S. 153, 189 (1976)].

609 P.3d at 505-06.

This Court should hold that Idaho has the same understanding of its aggravation statute. For this Court to rule otherwise, it would have to overrule *Sivak*, which it cannot do. Therefore, this Court must excise the felony murder aggravator from the State’s notice.


### CONCLUSION

Based upon the foregoing and argument to be presented at the hearing hereon, this Court is respectfully requested to grant this Motion that:

- (a) the felony murder aggravator in the State’s Notice Pursuant to Idaho Code § 18-4004A be struck;
- (b) the Court not instruct the jury on the felony murder aggravator.

Counsel requests a hearing on this issue. Counsel estimates requiring 20 minutes for the hearing.

DATED this 4 day of September, 2024.

BY:   
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JAY WESTON LOGSDON  
INTERIM CHIEF PUBLIC DEFENDER

**CERTIFICATE OF DELIVERY**

I hereby certify that a true and correct copy of the foregoing was personally served as indicated below on the 5 day of September, 2024 addressed to:

Latah County Prosecuting Attorney –via Email: [paservice@latahcountyid.gov](mailto:paservice@latahcountyid.gov)  
Elisa Massoth – via Email: [legalassistant@kmrs.net](mailto:legalassistant@kmrs.net)

  
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