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No. SC96650

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

THOMAS OATES,

Appellant.

Appeal from the Circuit Court of St. Louis County
Twenty-First Judicial Circuit
The Honorable Kristine A. Kerr, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Following a jury trial in the Circuit Court of St. Louis County, Defendant was convicted of two counts of second-degree felony murder in violation of Section 565.021(2) and two counts of armed criminal action in violation of Section 571.015.1.[1] (LF 122-125; Tr. 862). Defendant was sentenced by the court to 15 years in prison for the murder of Darrah Lane, 10 years in prison for the murder of Leon Davis, and five years in prison on each of the related armed criminal action counts, with the sentences ordered to be served concurrently. (Tr. 869-870; LF 134-138).

The sufficiency of the evidence to convict is not at issue. Viewed in the light most favorable to the verdicts, the evidence at trial and reasonable inferences therefrom established the following facts:

At the time of the crimes, Defendant had no income except that he received from selling marijuana. (Tr. 758).

On May 21, 2014, Defendant went to a Phillips 66 station to sell marijuana to Victims; he had informed Victim Davis the day before that he had marijuana available for sale. (Tr. 759-763). On the day of the crimes, Defendant had received a call from a female acquaintance of Victim Davis,

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[1] All statutory citations are to RSMo (2000) unless otherwise indicated. The transcript will be cited as "Tr." and the legal file as "LF."

inferentially Victim Lane, who used the pseudonym, "Mia." (Tr. 761-762).

Defendant took along a .38 Smith & Wesson that he bought "from a guy" in "the Central West End area." (Tr. 759-762). The location of the drug sale was chosen by Defendant because it was an area he was familiar with. (Tr. 762).

When he arrived at the service station, Defendant told Latonya Gray he was going over to Victims' car. (Tr. 355). Gray then chose to go inside the service station. (Tr. 355).

Defendant leaned in the driver's side of Victims' vehicle to permit Victims to inspect his marijuana and to conduct negotiations on the size and price of a potential purchase; while the parties were haggling over volume and price terms, Defendant said he would see what he could do for them and reached in to take his marijuana back. (Tr. 769-770). Victim Lane then hit the gas and the vehicle proceeded backward across the street to a Church's Chicken lot as Defendant's feet dangled and he attempted to jump inside the car. (Tr. 387-389, 769-770).

Once the vehicle came to a stop, Defendant went through the driver's side window, crushed a cup in the console, and shot and killed both Victims. (Tr. 387-389, 770-771). Defendant shot Victim Davis point-blank with his weapon pressed against Victim's head. (Tr. 549). Approximately one to two seconds later, Defendant shot Victim Lane in the neck while her neck was

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tilted somewhat backwards from approximately 6" to one foot behind her. (Tr. 389, 553-555). Both Victims died at the scene. (Tr. 563-564). The bullet to Davis went "between the first and the second neck vertebrae and severed the spinal cord." (Tr. 558). The bullet to Ms. Lane "went right alongside the uppermost vertebrae in the neck, and severely bruised the spinal cord at that level." (Tr. 558). Both died of gunshot wounds as the result of homicide. (Tr. 558).

Defendant then fled the vehicle in the presence of multiple witnesses, but returned for Victim Davis' .9 millimeter handgun, which had not been discharged. (Tr. 391-407, 772-773). Defendant fled again with both guns. (Tr. 391-407, 772-773). Defendant left his marijuana in Victims' car. (Tr. 631-633).

As he returned to the gas station, Defendant told Ms. Gray, "You didn't see nothing." (Tr. 360, 774).

Defendant drove to his girlfriend's mother's house, where Defendant asked his girlfriend's nephew for a change of clothes. (Tr. 534, 774, 776). Defendant changed clothes and hid his bloody clothes in a pet cage in his girlfriend's mother's garage. (Tr. 534, 776; Exs. 15-16). Defendant hid both guns behind a chest along the same wall of the girlfriend's mother's garage. (Tr. 776-777; Exs. 17-19). Police later recovered these items at that location after a consent search. (Tr. 578-586, 596).

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Defendant then obtained a ride to his old neighborhood in the Central West End, where he got a haircut and changed his hairstyle. (Tr. 777-778).

Ms. Gray phoned her store manager and told him who the shooter was. (Tr. 412, 461). The store manager reported Defendant's alias, T.J., and his phone number to police, who traced the information to Defendant. (Tr. 412-414). Gray and the store manager both identified Defendant in photo lineups. (Tr. 463; Exs. 27-28).

Police arrested Defendant as he was dropped off at the home he shared with his girlfriend. (Tr. 779).

Defendant admitted to his girlfriend that he shot both Victims but claimed he did so to save his life. (Tr. 476, 491).

Defendant waived his *Miranda* rights, gave a statement, requested a lawyer, reinitiated contact, and gave another statement. (Tr. 673, 711-732). Defendant admitted shooting both Victims and never claimed that Victim Lane was reaching for Victim Davis' gun, the story he told at trial. (Tr. 711-732). Between inconsistent statements to police and his trial testimony, Defendant gave at least four different versions of events but never denied shooting both Victims or causing their deaths. (Tr. 711-732, 757-811; Exs. 44-45).

Defendant testified at trial and admitted that he went to the scene to sell marijuana and that the marijuana in Victims' car was his. (Tr. 757-811).

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The jury was instructed on conventional second-degree murder, felony second-degree murder, voluntary manslaughter, and involuntary manslaughter, and found Defendant guilty of two counts of felony murder and two counts of armed criminal action. (Tr. 814-817; LF 84-125).

The court sentenced Defendant to a total of fifteen years in prison. (Tr. 869-870; LF 134-138).

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ARGUMENT

I.

The trial court did not err by refusing to give self-defense instructions on the two counts of felony murder because self-defense is, as a matter of law, not a defense to felony murder where it is not a defense to the underlying felony.

Defendant's first point contends that the trial court erred by refusing to give self-defense jury instructions for each count of felony murder.[2] However, self-defense is not a defense to felony murder unless it is a defense to the underlying felony. Here, the underlying felony was attempt to sell a controlled substance. Self-defense is not a justification for attempting to sell a controlled substance as a matter of law, so no such instructions were required

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[2] Only one self-defense instruction was proffered as to felony murder, hypothesizing self-defense against Darrah Lane, the female driver who was never in possession of a gun, based on Defendant's alleged fear of death or serious physical injury from Lane. (LF 82-83). While Defendant orally indicated he wished to offer a comparable instruction as to the other Victim (Leon Davis), he did not actually proffer such an instruction in written form. No allegation was made in the proffered instruction that Defendant was defending himself against the forcible felony of robbery.

or permitted. The court correctly denied the instruction because "today's Felony Murder" is "an offense of strict liability. If you participate in a crime, you have to take the consequences of the participation in the crime regardless of your mental state." (Tr. 821).

A. Standard of review

In determining whether the circuit court erred in refusing to submit an instruction on self-defense, the evidence is viewed in the light most favorable to the defendant. *State v. Smith,* 456 S.W.3d 849, 852 (Mo. banc 2015). The circuit court must submit a self-defense instruction "when substantial evidence is adduced to support it, even when that evidence is inconsistent with the defendant's testimony," and failure to do so is reversible error. *Id*. "Substantial evidence" is evidence putting a matter in issue. *State v. Avery*, 120 S.W.3d 196, 200 (Mo. banc 2003).

A defendant may be justified in the use of physical force when he reasonably believes such force is necessary to defend himself from what he reasonably believes to be the use or imminent use of unlawful force by another. *Smith*, 456 S.W.3d at 852; Section 563.031.1, RSMo (Cum. Supp. 2013). The use of deadly force, however, requires that he "reasonably believes that such deadly force is necessary to protect himself ... or another against death, serious physical injury, or any forcible felony." *Smith*, 456 S.W.3d at 852; Section 563.031.2(1), RSMo (Cum. Supp. 2013). "Reasonably believe"

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means "a belief based on reasonable grounds, that is, grounds that could lead a reasonable person in the same situation to the same belief. This depends upon how the facts reasonably appeared. It does not depend upon whether the belief turned out to be true or false." *Smith*, 456 S.W.3d at 852 (quoting MAI–CR 3d 306.06A[6]). "Deadly force" means "physical force which is used with the purpose of causing or which a person knows to create a substantial risk of causing death or serious physical injury." *Smith*, 456 S.W.3d at 852 (quoting MAI–CR 3d 306.06A[5]).

B. Requirements for use of deadly force

Where, as here, the defender killed the victim, evidence of four elements is required to make a submissible claim of self-defense: (1) absence of aggression or provocation on the defender's part; (2) real or apparent necessity for the defender to kill to save himself from immediate danger of serious bodily injury or death; (3) reasonable cause for the defender's belief in such a necessity; and (4) an attempt by the defender to do all within his power consistent with his personal safety to avoid the danger and the need to take a life. *Avery*, 120 S.W.3d at 200-201. *See*, §563.031.2.

The defendant has the burden of injecting the issue of justification or self-defense. §563.031.5. Self-defense may not be claimed if the actor was the initial aggressor unless he has withdrawn from the encounter and effectively communicated such withdrawal to the other person but the latter persists in

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continuing the incident by the use or threatened use of unlawful force, unless the aggressor is a law enforcement officer or there is some other statutory or legal exception. §563.031.1.

C. Rules governing statutory interpretation

"The Legislature's prerogative is to define crimes and set the punishment for offenders, and this prerogative is given great latitude." *State v. Bouser*, 17 S.W.3d 130, 138 (Mo. App. W.D. 1999). "Courts are without authority to read into a statute a legislative intent contrary to the intent made evident by the plain language, even when a court may prefer a policy different from that enunciated by the legislature." *Id.* (quoting *State v. Smith*, 972 S.W.2d 467, 479 (Mo. App. W.D. 1998)). Accordingly, appellate courts examine statutes in order to determine "the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning." *Id.* (quoting *Farmers' & Laborers' Coop. Ins. Ass'n v. Director of Revenue*, 742 S.W.2d 141, 145 (Mo. banc 1987)).

"The plain and ordinary meaning of 'any' … indicates our legislature intended that *every* felony could serve as an underlying felony for the purpose of charging a defendant with second degree felony murder pursuant to § 565.021.1(2). Nowhere does the statute limit the felony to be used in charging under this statute to any particular type of or specific felony, i.e., inherently

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dangerous, as some other states have done." *Id.*, 17 S.W.3d at 139 (emphasis original).

D. Self-defense has never been a defense to felony murder in Missouri.

"The felony-murder rule can be traced as far back as Lord Coke, who, in 1797, pronounced, 'If the act be unlawful, it is murder.' 3 Edward Coke, INSTITUTES OF THE LAWS OF ENGLAND (London 1797)." *State v. Bouser*, 17 S.W.3d 130, 135 (Mo. App. W.D. 2000). "At common law, there were no degrees of murder. A homicide was either murder or manslaughter." *Id.* "[N]ot only was it murder to kill another, though the intent was merely to severely hurt, but a homicide unintentionally committed in pursuit of a felony was murder, and was punishable with death." *Id.* (quoting *State v. Clark*, 652 S.W.2d 123, 125 (Mo. banc 1983) (citing WHARTON ON HOMICIDE, § 105, p. 147, 3rd ed. (1907)).

The felony-murder rule "permits the felonious intent necessary to a murder conviction to be shown by the perpetration of or attempt to perpetrate a felony." *Clark*, 652 S.W.2d at 126; *Bouser*, 17 S.W.3d at 135. "Proving one intended to commit the underlying felony 'raises a ***conclusive presumption*** that the defendant possessed the necessary felonious intent to support conviction for the resulting murder.'" *Bouser*, 17 S.W.3d at 135 (emphasis added). In *Clark, supra*, this Court employed the same language and added

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that the "conclusive presumption" of intent established that the crime was "intentional, willful, and premeditated, with malice aforethought, if felony murder, second degree, is charged, or these plus deliberation if felony murder, first degree is charged." *Clark*, 652 S.W.2d at 126.

In 1872, the applicable first-degree murder statute read:

> 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.

Wagner's Sta. (1872) c.42, art. 2, s.1, p. 445 (emphasis added) (quoted in *Bouser*, 17 S.W.3d at 135).

In response to the creation of the "merger doctrine" in *State v. Shock*, 68 Mo. 552 (1878), limiting or barring application of the felony murder rule "where the underlying felony is the very act that caused the homicide," the legislature replaced the words, "or other felony" in 1879 with "or mayhem." *See, Bouser*, 17 S.W.3d at 136-137; § 1232, RSMo (1879). "In effect, except as to the specifically enumerated felonies of arson, rape, robbery, burglary and mayhem, the legislature clarified that felony murder could not be charged as first degree murder." *Bouser*, 17 S.W.3d at 137.

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In 1884, this Court partially overruled *Shock* in *State v. Hopkirk,* 84 Mo. 278, 287 (1884), edging "the law closer to our present concepts by affirming that 'at common law, a homicide committed in the perpetration of a felony was murder, and this, whether there was any precedent intention of the homicidal act or not.'" *Bouser*, 17 S.W.3d at 137 (quoting *Hopkirk*).

In 1885, Missouri enacted a first-degree murder statute which remained in effect until 1975 and provided:

> 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, and every homicide 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.

MISSOURI LAWS, 1885, p. 138; *see*, Section 559.010, RSMo (1969) (repealed) *Bouser*, 17 S.W.3d at 137. The statute added the word, "homicide" to the description of felony murder to clarify a conflict in prior decisions. *Bouser*, 17 S.W.3d at 137.

Thus:

> In the late 1800's the legislature, at least in part reacting to the changing judicial interpretation of its laws, fashioned the murder statutes which would remain essentially unchanged until the 1970's when the legislature began revising the first and second degree murder

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> statutes. The first degree felony-murder statute remained essentially the same from 1885 until 1975, when the legislature created separate sections for intentional, premeditated "capital murder," § 559.005, and for first degree, unpremeditated, unintentional felony murder based on those felonies enumerated in the 1879 statute (except kidnapping replaced mayhem), § 559.007. The "or other felony" language was again left out.

Bouser, 17 S.W.3d at 138; *see,* Section 559.007, RSMo (Cum. Supp. 1975).

From 1879 until 1975, the second-degree murder statute provided that, "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." Section 1233, RSMo (1879); Section 3460, RSMo (1889); Section 1816, RSMo (1899); Section 4449, RSMo (1909); Section 3983, RSMo (1929); Section 559.020, RSMo (1969) (repealed). Thus, felony murder in the commission of felonies other than those enumerated in the first-degree murder statute was second-degree murder. *Id*. *See also*, *Clark*, 652 S.W.2d at 126. However, despite the language concerning "justifiable or excusable homicide," no case from this era is cited by either party which held that felony murder could be a justifiable or excusable homicide, suggesting that that language was construed to apply only to conventional second-degree murder.

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In 1975, the legislature rewrote the statutes and created three forms of murder: capital murder, which applied to any person who "willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being[;]" first-degree murder, which applied to any person who unlawfully killed another human being "without a premeditated intent to cause the death of particular individual but when committed in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary, or kidnapping[;]" and second-degree murder, which continued to apply to "[a]ll other kinds of murder at common law, not herein declared to be manslaughter or justifiable or excusable homicide[.]" Sections 565.005, 565.007, RSMo (Cum. Supp. 1975). *See*, Sections 565.001, 565.003, and 565.004, RSMo (1978) (repealed) (including insignificant modifications and renumbering of statutes from laws passed in 1977).

In *State v. Clark*, 652 S.W.2d 123 (Mo. banc 1983), this Court held that the "all other kinds of murder" language referenced in the second-degree murder statute encompassed: (1) intentional murder, nondeliberate, and (2) "homicides committed in the perpetration or attempt to perpetrate *any* felony other than the five listed in the first degree murder statute." *Bouser*, 17 S.W.3d at 136 (citing *Clark*, 652 S.W.2d at 127) (emphasis in *Clark*).

Despite the continued, specific defense of "justifiable or excusable homicide" contained in the second-degree murder statute, when this Court

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promulgated MAI-CR 6.07 (1975), the instruction for second-degree felony murder, the Court did not require a finding that the defendant did not act in self-defense in the verdict director, as it did for conventional second-degree murder, making it clear that this language applied only to conventional second-degree murder. *Compare*, MAI-CR 6.07 (1975) with MAI-CR 6.06 (conventional second-degree murder).

Similarly, the Court did not include such a paragraph in the verdict director for any of the instructions for first-degree felony murder, although it was required if appropriate for capital murder. *Compare*, MAI-CR 6.15-6.19 (first degree murder predicated on specified felonies) with MAI-CR 6.02 (capital murder).

The conclusion is thus inescapable that self-defense was never regarded as a defense to felony murder in the nearly 100 years that the second-degree murder statute included a reference to "justifiable or excusable homicide," much less after that language was deleted by the legislature.

Then:

> The 1983 legislature repealed all former versions of first and second degree murder and rewrote each. The 1975 distinction between capital murder and first degree murder was repealed and replaced by a first degree murder statute which eliminated all forms of first degree felony murder. § 565.020.1 RSMo Supp. 1983. Felony murder was reclassified

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> as second degree murder with a killing in the perpetration of "any felony" serving as a basis for establishing the reckless intent then required for second degree murder. § 565.021.2 RSMo Supp. 1983.

Bouser, 17 S.W.3d at 138.

These modifications were effective on July 1, 1984. § 565.021, RSMo (Cum. Supp. 1983). The new, second-degree felony murder statute applied when a person:

> Recklessly, under circumstances manifesting extreme indifference to the value of human life, causes the death or another person. Such recklessness and indifference are established if such person commits or attempts to commit ***any*** felony, and in the perpetration or attempted perpetration or in the flight from the perpetration or attempted perpetration, another person is killed as a result of the perpetration or attempted perpetration of such felony or immediate flight from the perpetration or attempted perpetration of such felony. However, evidence of such recklessness and indifference is not limited to the circumstances of the commission or attempted commission of a felony.

Section 565.021.1(2), RSMo (Cum. Supp. 1983) (emphasis added).

This felony-murder statute was quickly amended, effective October 1, 1984, to hold that a person committed felony murder in the second degree if he or she:

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> 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.

Section 565.021.1(2), RSMo (Cum. Supp. 1984) (emphasis added).

MAI-CR2d 13.06 (10-1-84), the verdict director for felony murder applicable to this statute, still did not include justification language included in the conventional second-degree murder verdict director. *See*, MAI-CR2d 13.04 (conventional second-degree murder). This cannot have been an oversight, as the verdict director did provide the opportunity to require the jury to find that the defendant was excluded from responsibility by a mental disease or defect. MAI-CR2d 13.06.

This version of the statute remained in effect at the time of the crimes in this case. Neither MAI-CR3d 313.06 (2001 & 2016), nor MAI-CR4th 414.06 (2017) includes a paragraph on justification either, although it is true that the conventional version of the crimes also do not, because the discussion of the applicable paragraph has been moved to the Notes on Use for Justification instructions. *See*, MAI-CR3d 306.06 & MAI-4th 406.06 & Notes on Use. None of the applicable Notes on Use reference any change in the

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substantive law on this issue, nor do they state that justification must now be submitted in felony murder cases. *Id*.

The evolution of felony murder in Missouri is thus one which begins with the common law, under which murders committed in the course of any felony created a "conclusive presumption" of murderous intent; progressed through experiments with various groupings of specific felonies and multiple levels of felony murder; a brief experiment with a *mens rea* requirement of reckless; and language referencing "justifiable or excusable homicide" in the larger second-degree murder statute of which it was a part that was never applied to felony murder and subsequently deleted by the legislature.

Finally, making an informed policy decision based on the experience gained from use of each of these options, the legislature chose to return to the common law version, which provides a conclusive presumption of murderous intent for *any* felony, and eliminated any language that could be used to support a caveat for "justifiable or excusable homicide" that had been included in some prior versions of the statute. The legislature settled upon second-degree murder as the appropriate level of the offense for all underlying felonies. Thus, the current statute is one of strict-liability second-degree felony murder, with no self-defense exception.

E. Changes in the justification statutes have not altered this principle.

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The 1939 version of the "Justifiable homicide" statute provided that homicide was justifiable when committed: (1) in "resisting any attempt to murder such person, or to commit any felony upon him or her, or in any dwelling house in which such person shall be; or (2) [w]hen committed in the lawful defense of such person, or of his or her husband or wife, parent, child, brother, sister, uncle, aunt, nephew, niece, master, mistress, apprentice or servant, when there shall be reasonable cause to apprehend a design to commit a felony, or to do some great personal injury, and there shall be reasonable cause to apprehend immediate danger of such design being accomplished; or (3) [w]hen necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed, or in lawfully suppressing any riot or insurrection, or in lawfully keeping or preserving the peace." Section 559.040, RSMo (1969). This statute was substantially identical to the one passed in 1889. *See, e.g.,* Section 3462, RSMo (1889).

In 1977, the legislature passed a new Chapter 563 on the defense of justification, which took effect on January 1, 1979. As relevant here, Section 563.031 provided:

> 1. A person may, subject to the provisions of subsection 2, use physical force upon another person when and to the extent he reasonably believes such to be necessary to defend himself or a third person from

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what he reasonably believes to be the use or imminent use of unlawful force by such other person, unless:

(1) The actor was the initial aggressor; except that in such case his use of force is nevertheless justifiable provided

(a) He has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened use of unlawful force; or

(b) He is a law enforcement officer and as such is an aggressor pursuant to section 563.046; or

(c) The aggressor is justified under some other provision of this chapter or other provision of law;

(2) Under the circumstances as the actor reasonably believes them to be, the person whom he seeks to protect would not be justified in using such protective force.

2. A person may not use deadly force upon another person under the circumstances specified in subsection 1 unless he reasonably believes that such deadly force is necessary to protect himself or another against death, serious physical injury, rape, sodomy or kidnapping.

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4. The defendant shall have the burden of injecting the issue of justification under this section.

Section 563.031, RSMo (Supp. 1977). *See also*, Section 563.036 (discussing physical force in defense of premises to repel trespass, arson, and burglary); Section 563.041 (discussing physical force in defense of property to prevent stealing, property damage, and tampering).

None of these statutes expressly provided that a defendant could not use physical force if otherwise authorized if he himself was engaged in a forcible felony (although if he killed, he was subject to prosecution for felony murder as previously indicated).

Effective July 2, 1993, the legislature amended the justification in defense of persons statute, Section 563.031, to add to subsection 2 the ability to use deadly force under subsection 1 to protect oneself or another against "serious physical injury through robbery, burglary or arson." Section 563.031, VAMS (1993). This version of the statute remained in effect until the 2007 amendment relied upon by Defendant, discussed *infra*.

The defense of premises section, Section 563.036, was amended to authorize deadly force when an "entry into the premises is made or attempted in a violent and tumultuous manner, surreptitiously, or by stealth, and he reasonably believes that the entry is attempted or made for the purpose of assaulting or offering physical violence to any person or being in

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the premises and he reasonably believes that force is necessary to prevent the commission of a felony." Section 563.036.2(3), VAMS (1993).

1. The 2007 and 2010 amendments to the justification statutes

Defendant relies upon 2007 amendments to the justification statutes; the self-defense statute was amended again in 2010. Neither the 2007 nor the 2010 amendments affected the statute defining the crime of felony murder. Indeed, it remained unchanged.

Defendant relies on Section 563.031 (Cum. Supp. 2007), which deals with "[u]se of force against persons," and Section 563.074 (Cum. Supp. 2007), which purports to describe when justification is an absolute defense to criminal and civil actions.

a. Amendments to Section 563.031

From August 28, 2007 to August 27, 2010, the following amended version of the justification statute, Section 563.031, RSMo (Cum. Supp. 2007) was in effect:

> 1. A person may, subject to the provisions of subsection 2 of this section, use physical force upon another person when and to the extent he reasonably believes such force to be necessary to defend himself or a third person from what he reasonably believes to be the use of imminent use of unlawful force by such other person, unless:

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(1) The actor was the initial aggressor; except that in such case his use of force is nevertheless justifiable provided:

(a) He has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened use of unlawful force; or

(b) He is a law enforcement officer and as such is an aggressor pursuant to section 563.046; or

(c) The aggressor is justified under some other provision of this chapter or other provision of law;

(2) Under the circumstances as the actor reasonably believes them to be, the person whom he seeks to protect would not be justified in using such protective force.

2. A person may not use deadly force upon another person under the circumstances specified in subsection 1 of this section unless:

(1) He or she reasonably believes that such deadly force is necessary to protect himself or another against death, serious physical injury, **or any forcible felony;** or

(2) Such force is used against a person who unlawfully enters, remains after unlawfully entering, or attempts to unlawfully

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enter a dwelling, residence, or vehicle lawfully occupied by such person.

3. A person does not have a duty to retreat from a dwelling, residence, or vehicle where the person is not unlawfully entering or unlawfully remaining.

4. The justification afforded by this section extends to the use of physical restraint as protective force provided that the actor takes all reasonable measures to terminate the restraint as soon as it is reasonable to do so.

5. The defendant shall have the burden of injecting the issue of justification under this section.

Section 563.031, RSMo (Cum. Supp. 2007) (emphasis added to indicate additions and changes).

Thus, the 2007 changes eliminated a listing of felonies that deadly force could be used to repel in favor of the term, "any forcible felony" and made other modifications based on the castle doctrine (presumably not at issue here).

In 2010, the statute was amended again, which resulted in the version in effect at the time of the crime in this case, which was effective from August 28, 2010 to October 13, 2016:

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1. A person may, subject to the provisions of subsection 2 of this section, use physical force upon another person when and to the extent he reasonably believes such force to be necessary to defend himself or a third person from what he reasonably believes to be the use of imminent use of unlawful force by such other person, unless:

(1) The actor was the initial aggressor; except that in such case his use of force is nevertheless justifiable provided:

(a) He has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened use of unlawful force; or

(b) He is a law enforcement officer and as such is an aggressor pursuant to section 563.046; or

(c) The aggressor is justified under some other provision of this chapter or other provision of law;

(2) Under the circumstances as the actor reasonably believes them to be, the person whom he seeks to protect would not be justified in using such protective force;

(3) The actor was attempting to commit, committing, or escaping after the commission of a forcible felony.

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2. A person may not use deadly force upon another person under the circumstances specified in subsection 1 of this section unless:

(1) He or she reasonably believes that such deadly force is necessary to protect himself, or herself or her unborn child or another against death, serious physical injury, or any forcible felony; or

(2) Such force is used against a person who unlawfully enters, remains after unlawfully entering, or attempts to unlawfully enter a dwelling, residence, or vehicle lawfully occupied by such person.

(3) Such force is used against a person who unlawfully enters, remains after unlawfully entering, or attempts to unlawfully enter private property that is owned or leased by an individual claiming a justification of using protective force under this section.

3. A person does not have a duty to retreat from a dwelling, residence, or vehicle where the person is not unlawfully entering or unlawfully remaining. **A person does not have a duty to retreat from private property that is owned or leased by such individual.**

4. The justification afforded by this section extends to the use of physical restraint as protective force provided that the actor takes all reasonable measures to terminate the restraint as soon as it is reasonable to do so.

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> 5. The defendant shall have the burden of injecting the issue of justification under this section. **If a defendant asserts that his or her use of force is described under subdivision (2) of subsection 2 of this section, the burden shall then be on the state to prove beyond a reasonable doubt that the defendant did not reasonably believe that the use of such force was necessary to defend against what he or she reasonably believed was the use or imminent use of unlawful force.**

Section 563.031, RSMo (Cum. Supp. 2010) (emphasis added to indicate additions, italics to indicate the section relied upon by Defendant).

"Forcible felony" is defined as "any felony involving the use or threat of physical force or violence against any individual, including but not limited to murder, robbery, burglary, arson, kidnapping, assault, and any forcible sexual offense." Section 563.011(3), VAMS (2010).

It is clear in context that the amendment relied upon by Defendant created an additional ***barrier*** to the use of self-defense that was not present in prior justification statutes for those engaged in forcible felonies; it did not authorize a new form of self-defense to persons committing other felonies. Prior to the amendment a person who used non-deadly force, or unsuccessfully employed deadly force, was not precluded from relying upon

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that section of statute. After the amendment, they were. The law involving felony murder did not change.

b. Section 563.074

Prior to August 28, 2007, the only language governing the effect of self-defense upon civil remedies appeared to be Section 563.016, RSMo (2000), which provided:

> The fact that conduct is justified under this chapter does not abolish or impair any remedy for such conduct which is available in any civil actions.

Id.

Effective August 28, 2007, the legislature enacted Section 563.074, which provides:

> 1. Notwithstanding the provisions of section 563.016, a person who uses force as described in sections 563.031, 563.041, 563.046, 563.051, 563.056, and 563.061 is justified in using such force and such fact shall be an absolute defense to criminal prosecution or civil liability.
>
> 2. The court shall award attorney's fees, court costs, and all reasonable expenses incurred by the defendant in defense of any civil action brought by a plaintiff if the court finds that the defendant has an absolute defense as provided in subsection 1 of this section.

Section 563.074, RSMo (Cum. Supp. 2007).

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Defendant relies upon the first paragraph of this statute, but does not appear to claim that it changed the law as to when justification applies in a self-defense context. Rather, it simply clarified that, when it applies in a criminal context, self-defense and other justifications are also civil defenses and provides for an award of attorney's fees, costs, and expenses in civil suits where the defense is applicable.

F. Plain-language statutory interpretation precludes use of a justification defense for felony murder because Defendant has the constructive intent to knowingly cause the death of another person *ab initio* when he forms the intent to commit the felony, and is therefore the "initial aggressor" as a matter of law, and the 2007 and 2010 amendments to the justification statutes did not change that.

Defendant argues that a ten-year-old amendment to the justification statute that added *words of limitation* to the justification defense shows a legislative intent to *expand* the defense to cases of felony murder that do not involve "forcible felonies" as statutorily defined. Defendant reasons that the legislature knew how to add exceptions to the *limitation* language to create an additional limitation had it desired to do so, even as he correctly observes that the legislature is deemed to understand the background law it operates to amend. However, the legislature well knew that in *felony murder* cases, no additional limitation was needed because it already existed.

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The legislature left in place both the language defining the offense of felony murder—a strict liability offense that continues to apply to *any felony*—and the specific prohibition against self-defense applying to initial aggressors except under specified circumstances not present here. Had the purpose of the statute been to limit the application of felony murder to forcible felonies, rather than to take away the defense of justification from perpetrators of forcible felonies in other instances, the legislature knew how to do so: it had done so before in the definition of felony murder itself, and then repealed it.

Centuries of law holds that the perpetrator of a covered felony—which in Missouri is now "any" felony—is deemed to have the constructive intent to commit felony murder at the outset of the crime, if it becomes necessary, and is therefore an "initial aggressor" by definition, and excluded from eligibility from a justification defense (in Missouri by the application of Section 563.031.1(1)). For this reason, felony murder has always been viewed as a "strict liability offense" based on public policy.

Notably, the legislature did *not* alter this characterization of the crime or the doctrine in the 2007 amendments cited by Defendant. Section 565.021.1(2) continues to provide that a person commits second-degree murder if he or she "[c]ommits or attempts to commit any felony, and in the perpetration or the attempted perpetration of such felony or in the flight from

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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." *Id*.

The statute defining the offense was not amended to read "forcible felony" instead of "any felony," nor was it limited to enumerated or inherently dangerous felonies in 2007 or 2010, suggesting the legislature preferred the felony murder doctrine to remain intact as to all felonies, even as it *further* limited other forms of justification in non-lethal situations involving forcible felonies.

Thus, the amendment relied upon by Defendant (italicized and in bold above) added new *words of limitation* to the instances in which a defendant may claim self-defense which were not present in the two prior versions of the statute. The only additional words of additional permission to use justification pertained to various nuances of the castle doctrine, and to defending against all, rather than some, forcible felonies, provisions which Defendant does not claim in his brief applied to his use of force in this case.

The plain language of the amendments did not change the applicable law concerning Defendant's *mens rea*, which precludes a claim of self-defense because Defendant is an initial aggressor as a matter of law.

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In the case at bar, this Court is asked to apply the felony murder and justification statutes in place at the time of the crime, which provided that a murder committed during the course of *any* felony was felony murder and, in addition, provided that any form of self-defense was unjustified in various enumerated instances, including (as to non-lethal crimes) when the defendant was engaged in a forcible felony. Here, the legislature was seeking to *further limit* the application of the justification defense in cases in which defendants were engaged in felonies, not to *expand* it. The legislature would have been fully aware that in cases of lethal force, an avalanche of precedent had established that justification was not a defense. However, that law did not apply to cases of non-lethal force. The legislature therefore sought to further limit self-defense claims by felons by limiting even ordinary self-defense to cases that did not involve, *inter alia*, forcible felons, just as it had already done as to initial aggressors. *Cf.,* §§ 563.031.1(1) & (3), RSMo. (Cum. Supp. 2010).

More than three decades ago—in 1984—the Missouri legislature made a policy choice *not* to limit the felony murder strict liability concept to enumerated or "inherently dangerous" offenses as many other states had done; rather, the state returned to the common law approach, in which *any* felony could form the basis for a strict-liability felony murder charge. That intent remains intact, as demonstrated by the legislature's choice not to

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return to the previous approach in the 2007 amendments cited by Defendant, which did not touch the definition or application of felony murder in Missouri. Moreover, while some prior versions of the felony murder statutes had included language providing that the act was murder "unless" it was "justifiable or excusable homicide," the legislature had deleted such language and did not choose to reinstate it, further supporting the inference that the statute's "conclusive presumption" of murderous intent *ab initio* does not provide an exception for acts of self-defense necessitated by reactions to the commission of the felony.

G. Defendant was not entitled to a self-defense instruction because case law makes it clear that self-defense does not apply to felony murder where it is not a defense to the underlying felony.

"The felony murder rule derives from common law and permits a homicide to be classified as murder, even though committed unintentionally, if it occurred during the pursuit of a felony." *State v. Williams*, 24 S.W.3d 101, 110 (Mo. App. W.D. 2000). "It is the intent to commit the underlying felony, not the intent to kill, that is the gravamen of the felony murder offense." *Id.*

> The purpose of the felony murder rule is to deter the commission of homicides during felonious activity by holding the felon liable for murder, even though the killing may have been committed only

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> recklessly, negligently, or even entirely accidentally. Homicides are thus prevented by requiring that the felon commit the felony in a careful manner or risk murder liability for any deaths that result. The felony murder rule, therefore, dispenses with the usual rule of determining the *mens rea*, or state of mind, of the person causing the homicide and allocating the punishment for the unlawful killing accordingly. ***In other words, a person is strictly liable for murder if he causes any deaths during his commission of a felony***.

Id. (quoting Russell R. Barton, *Application of the Merger Doctrine to the Felony Murder Rule in Texas: The Merger Muddle*, 42 BAYLOR L.REV. 535, 536 (1990) (footnotes omitted)) (emphasis added).

"[T]o prove second degree felony murder under § 565.021.1(2), the state is not required to show such an intent [to knowingly cause the death of another person, or the purpose of causing serious physical injury to another person], but only that a person was killed in the perpetration or the attempted perpetration of such felony or in the flight from the perpetration of such felony. In other words, under § 565.021.1(2), the 'underlying felony supplies the requisite *mens rea* for second-degree felony murder.'" *Williams*, 24 S.W.3d at 111 (Mo. App. W.D. 2000) (quoting *State v. Pembleton*, 978 S.W.2d 352, 356 (Mo. App. E.D. 1998)).

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Effective October 1, 1984—after the 1981 Missouri Supreme Court decision in *State v. O'Neal*, 618 S.W.2d 31 (Mo. Div. 2 1981) relied upon by Defendant, which interpreted a previous statute—the Missouri legislature enacted Section 565.021.1(2) providing that "any felony" will serve as a predicate felony for purposes of felony murder, defining felony murder as a form of second-degree murder, and eliminating murders committed during specified felonies from the first-degree murder statute. *State v. Williams*, 24 S.W.3d at 114-116.

Section 565.021 now provides in pertinent part:

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

Id. (emphasis added); *State v. Williams*, 24 S.W.3d at 118.

Thus, a person is guilty of second-degree murder if he commits any felony and, in the perpetration of that felony, another person is killed as a

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result of the perpetration of that felony. *State v. Burrell*, 160 S.W.3d 798, 803 (Mo. banc 2005).

"These amendments evidence the legislature's intent to eliminate first degree felony murder. It clearly chose to instead solely classify felony murder under the second degree murder statute and to delineate '*any felony*' as capable of supporting a second degree felony murder conviction under § 565.021.1(2). If the legislature had desired to limit underlying felonies, it would have done so, as it had done for the previous first degree murder statute." *Bouser*, 17 S.W.3d at 139 (emphasis original).

This revision also eliminated the "justifiable or excusable homicide" language from the second-degree felony murder statute and the "unlawfully kills" language from the prior first-degree felony murder statute and, hence, the grounds for the *dicta* in *O'Neal* cited by Defendant, which was later parroted in *dicta* contained in *Starr* and *Peal* (the other two cases relied upon by Defendant).

In *Williams*, *supra*, the Court of Appeals rejected application of the "merger doctrine" to felonies causing deaths (except as to manslaughter and murder) and held that "the courts are obligated to enforce the felony murder statute as written, without limiting its application by the doctrine." *Id.* at 117. "It is not the role of courts to abolish or judicially limit or expand a constitutionally valid statutory offense clearly defined by the legislature." *Id.*

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(quoting *Rodriguez v. State*, 952 S.W.2d 342, 354 (Tex. App. 1997)). The Court concluded that "our legislature excluded murder and manslaughter as predicate felonies for felony murder and, in doing so, ***intended that no other limitations be placed on the offense of felony murder*****,** which would include limitation by way of the merger doctrine." *Id.* (emphasis added).

Even under the prior version of the statute providing that felony murder could be charged as first-degree murder for certain predicate felonies, this Court held that "self-defense is not a defense to homicide committed in the perpetration of arson, rape, burglary, robbery, or other felony." *State v. Newman*, 605 S.W.2d 781, 786 (Mo. 1980); *State v. Burnett*, 293 S.W.3d 335, 341 (Mo. 1956).

Thus, defendant's claim that he shot the victim in self-defense is not relevant to whether the defendant was guilty of attempting to sell a controlled substance, and therefore was not a defense to the underlying felony. Defendant is "strictly liable for murder if he causes any deaths during his commission of a felony." *Williams*, 24 S.W.3d at 110. Defendant committed both murders during the attempted perpetration of a felony, sale of a controlled substance, which is not in dispute. Section 565.021.1(2). Defendant admitted shooting both Victims, and both the medical examiner and the jury found that Defendant caused their deaths. Defendant evinced

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consciousness of guilt by fleeing the scene, not calling 911, hiding his bloody clothes, hiding the murder weapon, altering his appearance, and lying to police once caught.

Defendant relies upon *dicta* from old and inapposite cases interpreting a statute no longer in effect to suggest that at one time the question of whether the justification of self-defense was available as a defense to felony **first-degree** murder (which no longer exists) was "called into question" (although never resolved in his favor). Defendant cites *State v. Starr*, 998 S.W.2d 61, 65 (Mo. App. W.D. 1999), a case which predates *Williams*, out of the same Court which decided *Williams*, and which interpreted the statute superseded by the one interpreted in *Williams*.

Starr, in turn, cited *State v. O'Neal*, 618 S.W.2d 31, 38 (Mo. Div. 2 1981), a case authored by a Commissioner of one division of the Court, which it admits was "at odds" with *State v. Newman*, 605 S.W.2d 781, 786 (Mo. Div. 1 1980), a case authored by another Commissioner of a different division of the Court. Both *O'Neal* and *Newman* interpreted Section 565.003, RSMo (1978) (repealed), which dealt with first-degree murder for specified predicate felonies. While noting with curiosity the question raised by the contradiction, and by *dicta* in *O'Neal* purporting to interpret then-extant language in repealed §§565.003-.004 as providing that one could be convicted of first-degree felony murder for specified predicate felonies "unless the death is

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excusable or justifiable[,]" *Starr* was not decided on that ground; nor, for that matter, was *O'Neal*. *See, Starr*, 998 S.W.2d at 64-66; *O'Neal*, 618 S.W.2d at 38; *cf.*, *Newman*, 605 S.W.2d at 786. As noted in the historical recitation *supra*, this language had appeared in previous versions of the second-degree murder statutes which also defined felony murder (including the one in effect at the time *O'Neal* was decided), but has since been repealed.

While *O'Neal* was a first-degree felony murder case under Section 565.003, RSMo (1978) (repealed), which provided that any person who "unlawfully kills" another human being without premeditated intent was guilty of first-degree murder if the killing was perpetrated during specified felonies, use of the term, "unlawfully" as a modifier may have suggested the *dicta*, in that a killing which was not unlawful because it was justified or excusable may not seem covered by such a term, just as the statute defining second-degree murder expressly stated. However, the current second-degree felony murder statute contains no such modifier. All that is required is that the defendant:

> 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

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such felony or immediate flight from the perpetration of such felony or attempted perpetration of such felony.

Section 565.021.1(2), RSMo (Cum. Supp. 1984).

Thus, all that is required in the current statute is: 1) a felony; and 2) a killing in the course of the felony, the same requirements as at common law. *O'Neal* simply does not apply to the law as it exists today.

Moreover, *O'Neal* itself recognized that "if the actor has the requisite intent to commit or participate in the underlying felony (in this case burglary) no other mental state on his part need be demonstrated because of the ***strict liability*** imposed by the felony rule." *O'Neal*, 618 S.W.2d at 38. (emphasis added). *O'Neal*'s holding rejected the defendant's contention that a paragraph should have been included in the verdict director requiring him, and not just his accomplice, to have a culpable mental state based on a change in the statute governing criminal responsibility for the actions of others (and the associated MAI-CR2d 2.12). *Id*. at 38-39. Indeed, *O'Neal* held that the MAI-CR2d language would not henceforth apply to the felony murder situation and that a modification in the laws of criminal responsibility for the actions of others did not affect felony murder because it was inconsistent with the strict liability purpose of felony murder. Thus, if anything, *O'Neal* is authority for the propositions that a modification dealing with broadly applicable law concerning self-defense when committing forcible

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felonies does not touch the basic strict liability principle governing felony murder, and that this Court should draw no inference from a change in MAI-CR instructions when they conflict with that principle. *See, O'Neal*, 618 S.W.2d at 38-39.

Starr expressly stated that it did not decide the question of whether a self-defense instruction was applicable in a felony-murder case; it merely assumed the most favorable reading for Defendant to demonstrate that there was no prejudice: "it is unnecessary to decide whether *Newman* or *O'Neal* is the last controlling decision of the Supreme Court. Even assuming the instructional error alleged by Mr. Starr, there must be prejudice to him before the jury's verdict is overturned." *Id*. at 65. The court found no such prejudice. *Id*. at 66. *Starr* denied relief to the defendant, holding that his "theory of defense at trial was that no attempted robbery occurred" and that had the jury believed his evidence "that he was not attempting to rob" the victim "at the time of the shooting, but was only responding to" the victim shooting at his van, "the jury would have found him not guilty of felony murder." *Id*. at 65, 66. "When the inclusion of the self-defense instruction is unnecessary, its omission is clearly not prejudicial." *Id*. at 66. Any language therein about self-defense applying to felony murder is therefore *dicta* borrowed from the inapplicable statute interpreted in *O'Neal*.

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Moreover, *Starr* was perhaps too generous to that defendant's argument that revisions to MAI-CR eliminated the rationale of *Newman*. First, as is clear from *Newman* itself, *Newman* was based on the law supporting the instruction, which preceded the instruction, and relied upon *Burnett*, *infra*. Second, while all of the verdict directing language from other homicide instructions was moved to the justification instruction's Notes on Use, those Notes do not note any change in the law or instruct that self-defense had become appropriate in felony murder cases despite no applicable changes in the statutes themselves.

Finally, to the extent that *Newman* and *O'Neal* – each decided by Commissioners of different divisions of the Court – conflict in interpreting the same statute, the fact that the jury instructions at the time were consistent with *Newman* and not with *O'Neal* is some indication of the entire Supreme Court's actual position as to that statute, particularly where *Newman* involved a holding and Defendant's cited statement from *O'Neal* was *dicta*.

While Defendant, *Starr*, and at least one case citing *Starr*[3] in a footnote mention a change in the structure of jury instructions as a possible indication

[3] *See*, *State v. Peal*, 393 S.W.3d 621, 635 n.11 (Mo. App. W.D. 2013). In *dicta* in a closing footnote, after rejecting Defendant's claim in an untimely motion

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that the Supreme Court changed the law *sub silentio*, and thereby eliminated the rationale of *Newman*, they are mistaken. While *Newman* pointed out that jury instructions at the time cross-referenced special negative defenses, including the justification of self-defense, for all forms of murder except the two degrees of felony murder, the holding was based not on the jury instructions but on underlying law. "…MAI-CR 15.04-15.12, for use in first degree [felony] murder and 15.16 for second degree felony murder made no provision for such defense ***for the reason that self-defense is not a***

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for rehearing that newly discovered evidence of a weapon would have enabled him to raise a self-defense claim to felony murder on multiple grounds, the court repeated the claim that MAI-CR 3d "provides a separate instruction for self-defense and its Notes on Use do not preclude a self-defense instruction for felony murder, thus the rationale in *Newman* is no longer viable." *Id.*, citing *Starr* at 65. Because this ignores *Newman*'s reliance on *Burnett*, the language of *Newman* itself, and hundreds of years of felony murder case law, this *dicta* is not persuasive. Moreover, the fact that the explanation for instructing on justification were relocated in the instruction book, but did not expressly state the law one way or the other in the Notes on Use, is not authority for a change in the controlling case law. The change here is far less meaningful than the change rejected as a basis for decision in *O'Neal, supra*.

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defense to homicide committed in the perpetration of arson, rape, burglary, robbery or ***other felony***." *Newman*, 605 S.W.2d at 786 (emphasis added). The Court cited its prior opinion in *State v. Burnett* (which unlike *O'Neal* was an en banc case), 293 S.W.2d 335, 343 (Mo. banc 1956), for the underlying law which formed the basis of the holding. The jury instructions were just an illustration of law this Court had already found.

Newman and *Burnett*—unlike *O'Neal* and *Starr*—actually made a holding on the question of whether "self-defense is not a defense" to first-degree felony murder and held that it was not. *Newman*, 605 S.W.2d at 786.[4]

Burnett made an explicit holding that "there was no issue of self-defense" in a case involving first-degree felony murder committed in the course of attempted robbery. *Burnett*, 293 S.W.2d at 343. *Burnett*, in turn, cited to some four previous decisions of this Court, establishing the lengthy pedigree of this doctrine: *State v. Hart*, 237 S.W. 473 (Mo. 1922) (no self-defense instruction required in felony first-degree murder case, where attempted bank robbery was underlying felony, predicated on the fact that the deceased cashier fired the first shot); *State v. King*, 119 S.W.2d 322, 327

[4] The *Newman* Court also held that Defendant's evidence was essentially a denial that a robbery occurred and that no reference to the self-defense instruction was therefore required. *Id.*

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(Mo. 1938) (noting it is "well-established" that "an accused forfeits the right of self-defense" where homicide takes place in the course of a robbery); *State v. Hamilton*, 85 S.W.2d 35, 37 (Mo. 1935) (evidence did not justify self-defense instruction where victim fired first shot during robbery attempt resulting in first-degree felony murder); *State v. Kenyon*, 126 S.W.2d 245, 249 (Mo. 1938) (defendant could not claim self-defense where he shot and killed kidnapping victim who attempted to "jump him" that he otherwise had not intended to kill). *See also, State v. Painter*, 44 S.W.2d 79, 82-83 (Mo. 1931) (defendant with felonious intent to inflict great bodily harm loses the right to invoke self-defense).

Notably, all of these decisions were issued at a time when the second-degree murder statute which encompassed the definition of felony murder (although not the first-degree one) expressly referenced excusable or justifiable homicide as a defense (although it did not specifically state whether it applied to the felony-murder version of the crime).

Here, viewed in the light most favorable to Defendant, Defendant brought a .38 Smith & Wesson to the drug deal after receiving a call from the "girl." (Tr. 764). When Victims requested a volume discount, Defendant said, "well, here, let me see what I can do for you" and Victim Lane "stepped on the gas and the car just shot off" and Victim jumped in the window to avoid having his feet run over. (Tr. 769). As Defendant fell in the car, he "smashed

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the cup that was in the console and she hit the brake" and Defendant "fell into the radio." (Tr. 770). The car "rocked back" causing Defendant to fall into the back seat. (Tr. 770).

Victim Davis—not Victim Lane—told Defendant to be calm and then grabbed and dropped a pistol. (Tr. 770-771). As Davis—not Lane—grabbed his gun a second time, "before [Davis] can turn all the way to shoot me" Defendant "shot him before he could shoot me." (Tr. 771).

While this may have justified an instruction concerning the Davis murder in the absence of contrary case law, it did not support an instruction excusing Defendant from shooting Lane after Davis was dead.[5]

According to Defendant, Victim Lane "didn't say nothing, sir" after Defendant shot and killed Davis. (Tr. 771). Defendant claimed that Victim Lane "went forward" or "just jumped diagonally towards the gun" but he "shot her before she could get to it." (Tr. 772).

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[5] The position of Victim Lane's body in the photograph at the scene and the location of her wound both belie Defendant's claim that she was reaching for Davis' gun. Defendant shot Victim Lane in the neck while her neck was tilted somewhat backwards from approximately 6" to one foot behind her and the jury saw applicable photographs. (Tr. 389, 553-555).

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However, because Defendant previously had the constructive intent to commit felony murder—prior to any actions by either victim--he was the initial aggressor and was not entitled to a self-defense instruction based on this or any other evidence. Under the case law, he was strictly liable for the deaths that resulted from his felony.

H. Defendant's interpretation would produce absurd results.

Defendant's proposed interpretation would produce absurd results. For example, the girlfriend who allegedly drove Defendant to and from the drug deal but was never in the car where the shooting took place could arguably be prosecuted successfully for two counts of felony murder with no defense, whereas the actual shooter could be acquitted because he was fortunate enough to be the one to acquire a justification defense during the crime. *See, e.g., State v. Durham*, 299 S.W.3d 316 (Mo. App. W.D. 2009) (defendant liable for aiding and abetting even though children forced to commit crimes had a defense). This would not further the public policy of encouraging felons to commit their crimes more safely, or to avoid crimes known to produce a risk of violence (which, as Missouri courts have opined on multiple occasions, include drug deals where participants commonly carry weapons). *See, State v. Williams*, 24 S.W.3d 101, 110 (Mo. App. W.D. 2000); *State v. Burrage*, 465 S.W.3d 77, 80-81 (Mo. App. E.D. 2015) (both robberies and deaths are foreseeable parts of illegal drug deals); *State v. Blunt*, 465 S.W.3d 370, 372

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(Mo. App. E.D. 1993) (foreseeable that a death could result from an illegal drug deal because guns are commonly carried and used by participants in drug deals). Indeed, such an interpretation would favor those who initiated felonies and chose to carry guns, thus increasing the probability of deaths perpetrated in the course of felonies, while inflicting greater liability on accomplices with less dangerous and less influential roles, which is contrary to the public policy behind the felony murder doctrine. *Id*.

I. Defendant's interpretation is at odds with the weight of authority from other jurisdictions.

Defendant's claim is at odds with the weight of authority from other jurisdictions interpreting when defenses apply to felony murder. Although a number limit the application of felony murder to specified crimes, the crime remains a "strict liability" offense to which justification does not apply. The rationale is that the felon is deemed to have malicious intent *ab initio* and is thus the initial aggressor (or similar term of art), and is not entitled to have his use of lethal force be deemed justified under the circumstances his felony produced. *See, e.g., Utah v. Soules*, 286 P.3d 25, 26-27 (Utah App. 2012); *People v. Walker*, 78 A.D.3d 63, 67-71 (N.Y. Sup. Ct., App. Div., 2010) (collecting cases from Alaska, California, Colorado, Connecticut, Florida, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Mississippi, Texas, Tennessee, and Washington, and observing "nearly every jurisdiction that

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has opined on the matter makes a justification defense unavailable to those who initiated the underlying felonies"); *State v. McGee*, 655 A.2d 729, 733 (Vt. 1995) ("If defendant was acting while in the course of an attempted felony, he was not entitled to the benefit of self-defense because his own conduct brought about the difficulty"); *State v. Bell*, 450 S.E.2d 710 (N.C. 1994) (defendant forfeited right to self-defense as defense to felony murder); *State v. Celaya*, 660 P.2d 849 (Ariz. 1983) (accused cannot use defense that he brought upon himself); *United States v. Peterson*, 483 F.2d 1222, 1231 (D.C. Cir. 1973) ("It has long been accepted that one cannot support a claim of self-defense by a self-generated necessity to kill. The right of homicidal self-defense is granted only to those free from fault in the difficulty…"). *See also*, P. Robinson, Criminal Law Defenses (1984), § 132 at 99 (citing jurisdictions which deny a self-defense claim "where the defendant was a participant in a felony and committed the homicidal act during the course of the felony").

In *Street v. State*, 338 A.2d 72 (Md. App. 1975), the Maryland Court of Appeals held that the "applicable rule of law is well stated" in the following quote from 1 Wharton's Criminal Law & Procedure, 501, § 229 (12th ed. R. Anderson 1957):

> While there is no fixed rule applicable to every case with reference to what constitutes one an aggressor so as to preclude his right to self-defense, it may be stated generally that any act of the accused in

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> violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide.

Street, 338 A.2d at 340. *Street* therefore held that the claim of self-defense was "unavailable to the appellant as a matter of law because he was an aggressor engaged in the perpetration of a robbery." *Id*. at 339-340.

Upon later habeas review, the federal court agreed, holding that when "a defendant is charged under this [felony murder] statute, the defense of self-defense is unavailable to him as a matter of law because he is an aggressor engaged in the perpetration of a felony." *Street v. Warden, Maryland Penitentiary*, 423 F. Supp. 611, 613 (D.C. Md. 1976). The court went on to observe that this "Maryland construction of the felony-murder statute comports with the general rule on the subject of the non-availability of self-defense as a defense to felony-murder." *Id*. at 613-614 (citing cases from Tennessee, California, and 1 Wharton's Criminal Law and Procedure § 252 (1957)).

The Mississippi Supreme Court similarly recognized that felony murderers are constructive initial aggressors precluded from raising self-defense in *Layne v. State*, 542 So.2d 237 (Miss. 1989). In *Layne*, the defendant complained that the jury instruction "strip[ped] him of the defense which he relied on at trial—self-defense." *Id*. at 242. The state Supreme

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Court held that, "Unlike other sections of the capital murder statute," the felony murder section "does not require the prosecution to prove the elements of murder, only that a killing took place while the accused was 'engaged in the commission' of the enumerated felonies." *Id.* at 243. There was no basis upon which the jury "may rationally have concluded that Layne had not participated actively in the robbery of [Victim] and killed [Victim] in his effort to escape therefrom" despite the fact that Victim had awoke and attempted to prevent the defendant's escape during an ensuing scuffle. *Id.* at 238, 243.

The Mississippi Supreme Court quoted the Texas Court of Criminal Appeals' "fitting" rationale in *Davis v. State*, 597 S.W.2d 358 (Tex. Crim. App. 1980), as follows:

> The purpose of the felony-murder rule is to deter even accidental killings in the commission of designated felonies by holding the felon strictly liable for murder….When a burglar kills in the commission of a burglary, he cannot claim self-defense, for this would be fundamentally inconsistent with the very purpose of the felony-murder rule.

Layne, 542 So.2d at 243 (quoting *Davis*, 597 S.W.2d at 360 (citations omitted)).

The Mississippi Supreme Court acknowledged that this "rule is derived from the common law precept that an aggressor in a violent confrontation is

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precluded from claiming self-defense as a mitigating circumstance" and held that authority "indicates that a person who provokes a difficulty thereby forfeits his right to self-defense." *Id.*

"This doctrine has been extended to preclude a person who commits a felony from claiming self-defense not only to the intended victim of the felony, but also as to any person intervening in an attempt either to prevent the crime of to apprehend the criminal." *Id.*

The Mississippi Supreme Court quoted *Street v. Warden, supra*, with approval in holding that when a defendant is charged under a felony murder statute, "the defense of self-defense is unavailable to him as a matter of law because he is an aggressor engaged in the perpetration of a felony." *Id.* (quoting *Street*, 423 F. Supp. at 613-614). The Court agreed with the Maryland state and federal courts that this "construction of the felony-murder statute comports with the general rule on the subject of the non-availability of self-defense as a defense to felony-murder." *Id.*

The court noted that "[m]any other jurisdictions have reached this same conclusion." *Id.* at 243-244 (citing decisions from Alabama, California, Kansas, New York, and Tennessee). The court held that "most" of these cases "rely upon the common law rule that an aggressor in an act of violence is foreclosed from pleading self-defense, although some courts base the result upon the policy consideration that felons should be held strictly accountable

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for any death resulting from their criminal activity." *Id.* at 244. The court concluded that "any claim of self-defense is irrelevant to a charge of capital felony-murder." *Id.*

In *State v. Bell*, 450 S.E.2d 710 (N.C. 1994), the North Carolina Supreme Court held that premeditation and deliberation are not elements of the crime of felony murder; the prosecution "need only prove that the killing took place while the accused was perpetrating or attempting to perpetrate one of the enumerated felonies." *Id.* at 723. "By not requiring the State to prove the elements of murder, the legislature has, in essence, established a *per se* rule of accountability for deaths occurring during the commission of felonies." *Id.*

The North Carolina Supreme Court held: "In a felony-murder prosecution, a person who is found by the jury to be engaged in an attempted robbery must be considered the initial aggressor; it is immaterial whether the victim of the robbery or the defendant fired first." *Id.*, 450 S.E.2d at 387. The court cited *Street, supra*, for the proposition that "the defense of self-defense is unavailable as a matter of law" to a defendant charged with felony murder "because he is an aggressor engaged in the perpetration of a felony." *Id.* at 386 (quoting *Street v. State*, 338 A.2d 72, and *Street v. Warden*, 423 F.Supp. at 613-614, *aff'd*, 549 F.2d 799 (4th Cir. 1976)). The court also cited decisions from Alaska, Alabama, Arizona, California, Georgia, Illinois, Kansas,

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Minnesota, Mississippi, New York, Tennessee, Texas, and Washington. *Id.* at 386-387. "[T]he accused cannot set up in his own defense a necessity which he brought upon himself." *Id.* at 387 (quoting *State v. Jones*, 385 P.2d 1019, 1021 (Ariz. 1963)).

In *State v. Celaya*, 660 P.2d 849 (Ariz. 1983), the Arizona Supreme Court held that a defendant was entitled to a self-defense instruction based on the alleged use of force in the underlying felony charge of robbery, but that the defendant was not entitled to an instruction on self-defense "in connection with the felony-murder charge." *Id.* at 855. "When the felony is so entwined with the murder that it is part of that murder we will not hold a stop-watch on the events or artificially break down the actions of the defendant into separate components in order to avoid the clear intent of the legislature in enacting the felony-murder rule." *Id.* (quoting *State v. Richmond*, 560 P.2d 41, 45 (Ariz. 1976)). "In a felony-murder prosecution, a person who is found by the jury to be engaged in an attempted robbery must be considered the initial aggressor; it is immaterial whether the victim of the robbery or the defendant fired first." *Id.*

In *State v. Amado*, 756 A.2d 274 (Conn. 2000), the Connecticut Supreme Court held that "self-defense does not apply to a charge of felony murder." *Id.* "It has long been accepted that one cannot support a claim of self-defense by a self-generated necessity to kill….In sum, one who is the

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aggressor in a conflict culminating in death cannot invoke the necessities of self-preservation." *Id.* at 282 (quoting *State v. Lewis*, 717 A.2d 1140 (Conn. 1998)). The Connecticut high court rejected the defendant's argument that it should review the evidence as to whom was the initial aggressor, stating that in *Lewis* it had done so only because there was also an intentional murder charge in that case. *Amado*, 756 A.2d at 283. The court held that it had, in fact, established a "bright line rule that a claim of self-defense, as a matter of law, is not available to an individual charged with felony murder." *Id.* at 282-283. The court quoted language from *Lewis* holding that, "Even if we were to assume without deciding that this evidence, viewed in the context of all the evidence regarding the killing of the victims, would have permitted a rational jury to find self-defense without resorting to speculation, the defendant was not entitled to an instruction on that theory of defense because he was engaged in robbing the victims when his purported justification for killing them arose." *Id.* at 283 (quoting *Lewis*).

In *Amado*, the Connecticut Supreme Court cited with approval the decision of multiple other jurisdictions, stating that "[o]ther jurisdictions have also denied 'a self-defense claim where the defendant was a participant in a felony and committed the homicidal act during the course of the felony.'" *Id.* at 283 (quoting P. Robinson, Criminal Law Defenses (1984), § 132, p.99,

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and citing decisions from Maryland, Arizona, Georgia, Michigan, Mississippi, New York, North Carolina, Tennessee, and the Second Circuit).

In *People v. Renaud*, 942 P.2d 1253 (Colo. App. 1996), the Colorado Court of Appeals held that self-defense "may be available as an affirmative defense to a predicate felony but not as to the resulting death." *Id.* at 1256, (citing *People v. Burns,* 686 P.2d 1360, 1362 (Colo. App. 1983)).

In *Commonwealth v. Foster*, 72 A.2d 279 (Pa. 1950), the Pennsylvania Supreme Court upheld an instruction to the jury that "[i]f you find that it was a murder committed in the perpetration of a robbery, then your verdict should be murder in the first degree." *Id.* at 281. The Pennsylvania high court further approved an instruction that the defendant could not contend that he acted in self-defense because he was engaged in a robbery. *Id.* The court was unconcerned with the defendant's predicament, as a legal matter, because he created the situation; the trial judge's charge that "any person in that barroom, whether they were personally attacked or not, would have had a right to have killed any or all of these three men who entered there for that purpose….the persons perpetrating the robbery had no rights under the law, no right to injure anyone in self-defense. If they staged a robbery, they lost the legal right which law-abiding citizens have to defend themselves. They had no legal right to injure anybody and much less to kill anybody or to attempt to kill anybody." *Id.*

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In *Wilson v. State*, 113 S.E.2d 95 (Ga. 1960), the Georgia Supreme Court rejected a defendant's claim that he was entitled to a self-defense instruction in a felony murder case involving a robbery in which a victim allegedly pulled a gun and chased the defendants from his bus after a shoot-out. *Id.* at 97. The deceased was found with his "gun in his right hand with six empty cartridges in it." *Id.* "Resistance by armed force of an attempt by the defendant to commit robbery upon" the victim "would be justifiable" and "the defendants could not claim self-defense in defending themselves." *Id.* at 99.

In *Smith v. State*, 354 S.W.2d 450 (Tenn. 1961), the Tennessee Supreme Court rejected a defendant's claim that he was entitled to a self-defense instruction in a felony murder case in which the defendant claimed that he shot the proprietor he was attempting to rob because the proprietor told him he didn't have any money in the cash register and then attempted to shoot a pistol at the defendant. *Id.* at 451-452. "Such a defense…is not available." *Id.* at 452. Rather, the perpetrator of the felony "is the instigator and author and brings about the whole chain reaction, and thus cannot defend on this ground." *Id.* The killing was "done and is part of the *res gestae* of the whole acts embracing the robbery." *Id.* The court approved a New York decision holding that "the law makes the killing of another while engaged in the commission of a felony, murder in the first degree, independent of all

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questions of motive, and the person who kills another while engaged in committing a felony cannot escape conviction from murder in the first degree, by showing that his intent was not to kill, but to defend his own life or person, or to escape arrest, or to avoid pursuit or death." *Id.* (citing Cox v. People, 80 N.Y. 500).

In *Schnitker v. State*, 401 P.3d 39 (Wyo. 2017), the Wyoming Supreme Court recently noted that "[a] large majority of jurisdictions have determined that self-defense is not available to a defendant who initiates the underlying felony supporting a charge of felony murder." *Id.* at 42. "Indeed, nearly every jurisdiction that has opined on the matter makes a justification defense unavailable to those who initiated the underlying felonies." *Id.* (quoting *People v. Walker*, 78 A.D.3d 63, 68-69 (N.Y. App. Div. 2010)) (citing decisions from Arizona, Alaska, California, Colorado, Connecticut, Florida, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Mississippi, Pennsylvania, Tennessee, Texas, and Washington). "These cases reason that prohibiting a defendant from claiming self-defense is consistent with the purpose of the felony murder rule." *Schnitker*, 401 P.3d at 43. It is immaterial whether the victim of the felony or the defendant first utilizes physical force. *Id.* (quoting *Amado, supra*, 756 A.2d at 284). The purpose of the felony murder rule is to "punish those whose conduct brought about an unintended death in the

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commission or attempted commission of a felony." *Id.* (quoting *Amado*, 756 A.2d at 284).

Schnitker quotes *Walker, supra*, for the fundamental proposition that:

> The purpose of the felony murder statute is to punish felon for killing a victim when the mortal danger arises from his or her commission of an enumerated felony, even when the killing was in self-defense. Therefore, a justification charge as to felony murder itself would directly undermine the legislative purpose of the statute.

Schnitker, 401 P.3d at 43 (quoting *Walker*, 78 A.D.3d at 71).

Schnitker noted that the Georgia Supreme Court had recently overruled a previous case holding that self-defense may be asserted as a defense to felony murder and rejected the claim that there was a meaningful "split of authority" on this issue. *Id.* at 43-44. *See, Woodard v. State*, 771 S.E.2d 362, 369 (Ga. 2015). The Wyoming Supreme Court therefore agreed "with the majority of jurisdictions that have addressed this issue" and held that "self-defense is not available to a defendant who kills while engaged in the perpetration of" an underlying felony. *Id.* at 44.

Schnitker also addressed the defendant's claim that a defendant in the context of felony murder has the right of self-defense "parallel to the right of self-defense provided to an initial aggressor." *Id.* "One who kills in the perpetration of an enumerated felony cannot satisfy" the "threshold

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requirement" that "self-defense is only available if, *inter alia*, the slayer was not at fault in bringing on the difficulty." *Id*. (internal quotation marks omitted).

In *Gray v. State*, 463 P.2d 897 (Alaska 1970), the Alaska Supreme Court observed that:

> Murder, at common law, was defined as the unlawful killing of a human being with malice aforethought, either express or implied. Express malice could be found in the deliberate intention of the defendant to take the life of the deceased unlawfully, while implied malice could be found either where the evidence showed circumstances indicating that the defendant had a heart regardless of social duty, in that he knowingly did an act which might result in death or grievous bodily harm, or where defendant killed another in the course of perpetrating a felony. In all of these instances it did not matter whether the defendant actually intended to kill the deceased.

Gray, 463 P.2d at 901.

The Alaska Supreme Court continued its analysis with a fundamental rationale for the common-law felony-murder rule: "Once malice could be found, the defendant could be held liable for all results which flowed naturally and probably from his volitional acts." *Id*. at 902.

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While in Alaska, the felony murder rule requires an intentional killing, the Alaska Supreme Court nonetheless rejected the defendant's claim that he was entitled to a self-defense instruction based on the excessive use of force by the officer he killed. *Id.* at 907-910. The court found "no persuasive policy reasons for according appellants the privilege of self-defense" even though such a defense existed outside the felony-murder context. *Id.* at 909. A "person who commits an armed robbery forfeits his right to claim as a defense the necessity to protect himself against the use of excessive force by either the intended victim of the robbery or by any person intervening to prevent the crime or to apprehend the criminal, absent a factual showing that at the time the violence occurred, the dangerous situation created by the armed robbery no longer existed." *Id.* "To permit appellants to justify their slaying" of the officer "by claiming self-defense" would "be to fashion a rule of law unresponsive to society's need for protection against just such extraordinarily dangerous conduct." *Id.* at 910.

In *State v. Dennison*, 801 P.2d 193 (Wash. 1990), the Washington Supreme Court rejected a burglar's claim that his right to self-defense was "revived" by his attempt to "flee the scene" when the gun fire ensued which resulted in the felony murder. *Id.* at 197-198. While the court "specifically declined to decide whether self-defense could be revived during felony murder" because fleeing constituted part of the burglary, it indicated that if it

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"decided this issue, the result would be the same." *Id*. The court assumed the defendant was an "initial aggressor" in committing the felony, but noted that he had not communicated his withdrawal by dropping the gun or surrendering. *Id*. at 198.

The Washington Supreme Court also held that the refusal of a self-defense instruction was proper. *Id*. at 197. "The purpose of the felony murder rule is to deter felons from killing negligently or accidently by holding them strictly responsible for the killings they commit." *Id*.

> According to the record, Dennison unlawfully entered a house, was armed with a weapon, and was attempting to flee when the gun fire ensued resulting in [Victim's] death. Regardless of Dennison's claim that he pointed his gun to the ground or told [Victim] that all he wanted to do was leave, Dennison was still armed, still engaged in the activity of the burglary and was fleeing therefrom. Fleeing from a burglary is not the same as withdrawing from the burglary. Because Dennison admits that he was in the process of fleeing the scene of the felony, meaning the burglary was still in progress, Dennison's factual scenario falls squarely within the first degree felony murder statute. Since the statutory exceptions to felony murder do not apply, Dennison must be held strictly responsible for the death caused while fleeing

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> from the first-degree burglary. The proposed self-defense instruction was properly refused.

Id. at 197.

Dennison is instructive because the defendant in the felony murder case was deemed the initial aggressor despite the Victim, according to the defendant, first appearing in the bedroom doorway with a gun pointed at the defendant. *Id*. at 195. The defendant claimed to have grabbed the Victim's hand, which was on a gun, and pushed it into the air. *Id*. Only then did the defendant hold his own gun in the Victim's stomach. *Id*. Even then, the defendant testified that after backing the Victim out onto the porch, he "told [Victim] that he had not taken anything, that it was all over, that he did not intent to hurt [Victim], and that he just wanted to leave." *Id*. According to the defendant, the Victim said "okay" and the defendant then "pointed his gun down at the ground and released his grip on [Victim's] hand which held the gun. After Dennison's hand was released, Dennison claims, [Victim] shot at him. In response, Dennison claims he fired at [Victim], resulting in [Victim] being knocked onto a couch. [Victim] assertedly aimed at Dennison again and Dennison fired more shots. It was subsequently determined that [Victim's] gun had in fact been fired and had jammed after the first shot. Dennison fled the scene leaving the pillowcase and burglary tools at [the burglary Victim's] house. [Victim] died of the gunshot wounds." *Id*.

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Thus, *Dennison* is similar to the case at bar in that the crime did not contemplate violence at its inception (although the perpetrator was armed and prepared for such because such consequences are foreseeable), the Victim pulled a gun first, and the defendant claimed he was merely trying to get away from the scene when the violence erupted. Nevertheless, under the felony-murder rule, the felon was held to be the initial aggressor as a matter of law and was not entitled to claim self-defense.

Similarly, in *People v. Loustaunau*, 226 Cal. Rptr. 216 (Cal. App. 2d Dist. 1986), the California Court of Appeals held that when "a burglar kills in the commission of a burglary, he cannot claim self-defense, for this would be fundamentally inconsistent with the very purpose of the felony-murder rule." *Id*. at 219. "The purpose of the felony-murder rule is to deter even accidental killings in the commission of designated felonies by holding the felon strictly liable for murder." *Id*.

Indeed, even one of the rare exceptions proves the rule. In *People v. Maclin*, 12 N.E.3d 648 (Ill. App. 1st. Dist. 2014), the Illinois Court of Appeals held that "[p]rovocation and belief in the need for self-defense can be partial defenses to felony murder, if the provocation or the belief in the need for self-defense occurred *before defendant formed the intent to commit the underlying felony*." *Id*. at 660 (quoting *Walker, supra*, at 287-288) (emphasis added). This reinforces the State's position that the intent to commit the underlying

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felony, once acquired, renders the perpetrator the aggressor (with the constructive intent to commit felony murder *ab initio*) and establishes the mental state required for the crime of felony murder, which is then a matter of strict liability beyond the reach of the justification defense. *See*, *id*. *See also, United States v. Thomas*, 34 F.3d 44, 48-49 (2nd Cir. 1994) (at common law and its successor in federal statute, any felony was deemed to supply the required mental state of "malice aforethought" and to foreclose self-defense from even first-degree felony murder where, for example, a robbery victim drew first, because the need for self-defense resulted from Defendant's constructive malice or aggression in committing the felony). *See also, Jackson v. State*, 205 S.W.3d 282, 285 (Mo. App. E.D. 2006) (counsel not ineffective for failing to submit a lesser-included offense that would have subjected defendant to a charge of felony murder because self-defense would then have not been available under the felony murder rule); *Rainer v. State*, 342 So.2d 1348 (Ala. Crim. App. 1977) (victim threatened defendant with shotgun and would not put it down, but this did not give defendant right to kill victim in self-defense in felony-murder case). *But see, Commonwealth v. Fantauzzi,* 73 N.E.3d 323 (Mass. App. 2017) (despite two precedents holding that self-defense did not apply to felony murder in Massachusetts, and acknowledgment that general rule is that self-defense is not applicable to felony murder, court reversed voluntary manslaughter conviction where

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instructions were convoluted and erroneous; court purported to create an exception for felonies which were not inherently dangerous where the defense was that the defendant was not the aggressor and initiator of the violence).

This pedigree and rationale has been acknowledged by Missouri appellate courts. In *State v. Bouser*, 17 S.W.3d 130 (Mo. App. W.D. 1999), the Court of Appeals held that proving "one intended to commit the underlying felony" "raises a ***conclusive presumption*** that the defendant possessed the necessary felonious intent to support conviction for the resulting murder." *Id.* at 135 (emphasis added) (quoting *State v. Chambers*, 524 S.W.2d 826, 829 (Mo. banc 1975), overruled on other grounds by *State v. Morgan*, 592 S.W.2d 796, 801 (Mo. banc 1980)).

J. Even if, *arguendo*, a forcible felony is required, Defendant's charged felony was forcible in context, and felony murder itself is a forcible felony which precludes the use of self-defense.

Section 563.011(3) provides that a forcible felony is "*any* felony involving the use or threat of physical force or violence against any individual, *including but not limited to* murder, robbery, burglary, arson, kidnapping, assault, and any forcible sexual offense[.]" *Id.* (emphasis added).

In a case with similar facts to the case at bar, the Kansas Supreme Court held in *State v. Mitchell*, 942 P.2d 1 (Kan. 1997), that the defendant was not entitled to a self-defense instruction in a felony murder case in which

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the defendant (a seller of drugs) shot the victim (a buyer) in the cab of a truck during a cocaine deal after he claimed the victim had robbed and shot him. *Id*. at 2. Police searched the truck and found five bullets missing from Victim's ammunition in the overhead compartment and Victim's widow admitted Victim said he had purchased the same caliber of gun and ammunition that the defendant said Victim had shot him with. *Id*. at 2-3. Defendant claimed that he was trying to buy marijuana from Victim when he was robbed of $500 and claimed that Victim had struggled over the gun the defendant was found with (which was of a different caliber than the ammunition found and the gun the defendant initially said he was shot with). *Id*. at 3.

The Kansas Supreme Court interpreted the interplay between the Kansas first-degree felony-murder statute, which applied to "inherently dangerous" felonies as defined by statute—which included sale of cocaine—and its self-defense statute, which is not available to a person who is attempting to commit, committing, or escaping from the commission of a forcible felony. *Id*. at 3-4. "Forcible felony" in Kansas is defined as including "treason, murder, voluntary manslaughter, rape, robbery, burglary, arson, kidnapping, aggravated battery, aggravated sodomy and any felony which involves the use or threat of physical force or violence against any person." K.S.A. 21-3110(8); *Mitchell*, 942 P.2d at 3.

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The Kansas Supreme Court observed that sale of cocaine "is the only felony now included" in Kansas' first-degree felony murder statute "as an inherently dangerous felony that we previously have held is not a forcible felony[.]" *Id*. at 5. The court acknowledged that two legislative amendments showed that "the legislature emphatically intended to extend the felony-murder doctrine to killings occurring during drug transactions." *Id*. at 6. The court further noted that an arresting officer testified that it was "very common" for someone involved in narcotics activity to carry a weapon. *Id*. The court concluded that, "A shooting during a drug transaction would not be unexpected." *Id*.

The Kansas Supreme Court concluded that in light of the legislative amendments specifically defining sale of cocaine as an inherently dangerous felony to which first-degree felony murder applied, it could consider the circumstances of the commission of the crime in addition to the elements of the crime in the abstract in determining "whether sale of cocaine is a forcible felony[.]" *Id*. In *Mitchell*, the court concluded that "the circumstances of the cocaine sale showed the threat or use of physical force or violence against a person. Both the buyer and the seller carried and used concealed firearms. The result was [Victim's] death." *Id*. The defendant was therefore precluded from a self-defense instruction; past cases permitting self-defense

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instructions were distinguishable because in those, self-defense "was asserted as justification for committing the underlying felony." *Id.*

Here, Defendant dove into the Victims' vehicle with a gun (without permission) during the course of the drug deal gone bad, the act which initiated the gun play which resulted in two deaths. Invading the vehicle of another without permission, while armed, constituted the "use or threat of physical force or violence" against Victims.[6] *See, People v. Greer*, 762 N.E.2d 693, 695 (Ill. App. 5th Dist. 2002) (armed violence based on unlawful possession of a controlled substance with intent to deliver held to be a forcible felony within the meaning of the felony murder statute under the residuary clause despite not being specified because it involved the "use or threat of physical force or violence against any individual" as committed in that case

[6] In fact, if Victims were not the initial aggressors or themselves engaged in a forcible felony, they would have justification for using deadly force against Defendant in defense of their vehicle under Section 563.031.2(2) (deadly force may be used against a person who "unlawfully enters, remains after unlawfully entering, or attempts to unlawfully enter" a "vehicle lawfully occupied by" the user of force). Victims did not "have a duty to retreat" from a "vehicle where" they were not unlawfully entering or unlawfully remaining" in their vehicle. Section 563.031.3(1).

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where the defendant took a gun to the scene in anticipation of a confrontation).[7] As in *Mitchell*, Defendant is precluded from raising self-defense by the fact that he was engaged in what, in context, was a forcible felony involving the use of a gun in a drug deal gone bad. *Id*.

Moreover, felony murder is itself a forcible felony which precludes the use of a justification defense. Section 563.011(3) provides that a forcible felony is "*any* felony involving the use or threat of physical force or violence against any individual, *including but not limited to* murder …" *Id*. (emphasis added).

Here, Defendant arrived at the drug deal, armed and possessing the constructive intent to knowingly cause the death of the Victims in the perpetration of his felony, constructively "aware that his" "conduct" was "practically certain to cause that result." *See,* Section 562.016.3(2). This intent, which he possessed *ab initio* as a matter of law, rendered his crime—

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[7] The State acknowledges that the current Notes on Use appear to analyze only the statutory elements of the offense in determining whether it is a forcible felony. MAI-CR4th 406.06, Notes on Use 7 (2017). However, as this Court's holdings in *O'Neal, supra*, and the recent case of *State v. Bazell*, 497 S.W.3d 263 (Mo. banc 2016), illustrate, jury instructions should be modified to conform to case law, not the other way around.

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second-degree murder—a "forcible felony" for which a justification defense was not available. Under Section 563.031.1(1), he was "the initial aggressor" as a matter of law, and was not entitled to a justification defense. Moreover, under Section 563.031.1(3), Defendant was not entitled to use a justification defense because he was committing the forcible felony of murder.[8]

Indeed, the Illinois Court of Appeals has so ruled. In *People v. Abrams*, 441 N.E.2d 352 (Ill. App. 3d Dist. 1982), the court found that the failure to instruct the jury on "legal justification" or self-defense as to the conventional murder charge was not prejudicial because the defendant was found guilty of felony murder and "the claim of self-defense is not available to one who participates in a forcible felony (such as felony murder)." *Id.* at 356. The court therefore held that the Illinois statute governing use of force by an aggressor applied and that legal justification was not available because defendant was a person who "is attempting to commit, committing, or escaping after the

[8] Defendant was not justified in using deadly force against the alleged robbery of his illegal drugs by the Victims because he arrived at the crime as an "initial aggressor," armed with a gun and possessing the intent (as a matter of law) to kill Victims in the course of committing a felony. *See*, Section 563.031.1(1); *cf.*, Section 563.031.1(3).

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commission of a forcible felony[.]" *See*, 720 ILCS 5/7-4 (formerly IL ST CH 38 para. 7-4).

This holding is consistent with the rationale of the felony murder statute, that possession of the intent to commit the felony is intent to commit felony murder, an act for which no justification defense is available. Because Defendant was legally embarked upon the crime of felony murder from the initiation of the felony, he was not entitled to claim justification based upon subsequent events that occurred during his commission of that crime.

Defendant's first point should be rejected.

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II.

The trial court did not err by denying Defendant's Motion to Strike the State's Notice to Submit Felony Murder Second Degree Instruction, and in subsequently submitting such instructions, because Section 565.021.3 expressly requires the jury to be instructed on felony murder where it is supported by the evidence and requested by one of the parties or the court. Defendant did not preserve a constitutional claim for appeal because he failed to cite the section or sections of the Constitution alleged to be violated below. Moreover, Defendant had ample notice and an opportunity to prepare a defense to felony murder where the State provided a Notice prior to trial outlining the grounds of the claim specifically referencing the applicable counts of the Indictment, and the statute made it plain to Defendant that an instruction would not only be permitted, but required if requested and supported by the evidence.

Defendant's second point contends that his constitutional right to due process and to be tried "for the offenses with which he is charged" were violated because the indictment charged conventional second-degree murder but not felony second-degree murder.

Defendant concedes that Section 565.021.3 provides that:

> Notwithstanding section 556.046, RSMo, and section 565.025, in any charge of murder in the second degree, the jury shall be instructed on … any and all of the subdivisions in subsection 1 of this section which are supported by the evidence and requested by one of the parties or the court.

Section 565.021.3, RSMo (2000).

This includes section 565.021.1(2), which sets forth felony murder. Section 565.021.1(2), RSMo (2000).

In addition, Section 545.030.1(18) provides that "[n]o indictment or information shall be deemed invalid, nor shall the trial, judgment or other proceedings thereon be stayed, arrested or in any manner affected … [f]or any defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

Defendant nonetheless claims that the provisions of Section 565.021.3 are unconstitutional because an indictment must set forth each element of a crime that it charges.

Defendant's claim that an element was omitted was rejected in *State v. Gheen*, 41 S.W.3d 598 (Mo. App. W.D. 2001). The Court held that:

> MACH–CR 13.06 does not require, or even recommend in its suggestions, that the rules of 23.01(b) must also be followed for an uncharged underlying felony when charging a defendant with felony

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> murder. In order to provide the accused with proper due process notice, MACH–CR 13.06 only requires that the underlying felony be named in the indictment, which, in this case, it was. The underlying felony is not so much an element of the charged crime as it is a way to prove the necessary mens rea for felony murder. *State v. Williams,* 24 S.W.3d 101, 110 (Mo.App.2000). "As such the rule does not make the underlying felony an element of the felony murder; it merely provides an additional means of proving the requisite felonious intent for murder." *Id.* The state fully complied with the rules of 23.01(b) and with MACH–CR and Gheen was provided ample notice of the charges against him.

Id., 41 S.W.3d at 603-604.

In *State v. Kohser*, 46 S.W.3d 108 (Mo. App. S.D. 2001), the Court of Appeals rejected the claim that the State's "Notice of Intention to Submit Murder 2nd-Felony" "constitutionally fails" because it failed to specify the degree of robbery in the underlying felony and impaired his ability to prepare a defense against felony murder. *Id.* at 113. Defendant "had notice" of the possible conviction of felony murder. *Id.* The Court found it "abundantly clear Defendant had sufficient notice of a possible second-degree felony-murder conviction (with robbery being the underlying felony) to prepare a defense." *Id.* at 114.

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The *Kohser* Court cited this Court's decision in *State v. Blankenship*, 830 S.W.2d 1, 13 (Mo. banc 1992), for the proposition that the notice to which an accused is entitled when second-degree felony murder is an option as a lesser-degree offense to first-degree murder is such notice as will enable an accused to make a defense. *Kohser*, 46 S.W.3d at 114.

Blankenship rejected a claim "that the trial court lacked jurisdiction to enter judgment and sentence" on Defendant's "five second degree-felony murder convictions because he was not given notice of these charges in the indictment." *Blankenship*, 830 S.W.2d at 13. The Court found that Defendant was on notice to defend a robbery and that the purpose of the instruction's Note on Use alleged to have been violated was to "furnish the accused with a description of the charge against him as will enable him to make a defense." *Id*. Because the defendant "was not prejudiced by the absence of a specific notice," the Supreme Court denied the claim. *Id*.

Here, the State filed a Notice of Intention to Submit Murder Second Degree-Felony on February 26, 2016, which advised that "Under Count I [of the Indictment]: Defendant is further given notice that should the state submit murder in the second degree-felony under Section 565.021.1(2), RSMo, it will be based on the death of Darrah Lane as a result of the attempted perpetration of the class C felony of Distribution of a Controlled Substance under Section 195.211, RSMo, committed by defendant." (LF 26-

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27). The Notice further advised that "Under Count III [of the Indictment]: Defendant is further given notice that should the state submit murder in the second degree-felony under Section 565.021.1(2), RSMo, it will be based on the death of Leon Davis as a result of the attempted perpetration of the class C felony of Distribution of a Controlled Substance under Section 195.211, RSMo, committed by defendant." (LF 26-27).

Defendant acknowledged this Notice in moving to strike the State's Notice on March 11, 2016, on the theory that felony murder was not a lesser-included offense of conventional second-degree murder because it contained an additional element. (LF 78-79).

Because Defendant had both notice and an opportunity to prepare a defense, his due process rights were not violated. *See, Blankenship*, *supra*. Defendant was well-aware that he was charged with murdering Victims during a drug deal gone bad, and was well-prepared to address those issues and did address those issues.

Moreover, Defendant was on notice from the indictment charging Second Degree Murder and Section 565.021.3 that felony murder could be submitted based on the indictment and would be required to be submitted if supported by the evidence and requested by any part or the Court. The statute is "presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision." *State v. Mixon*, 391 S.W.3d

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881, 882 (Mo. banc 2012). Defendant had the burden of "proving the act clearly and undoubtedly violates the constitution." *Id*. "If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted." *Id*.

Here, Defendant failed to preserve his constitutional attack for appellate review because he did not raise the question at the earliest opportunity consistent with good pleading and orderly procedure, and did not specify the section or sections of the constitution claimed to have been violated in his motion below. *In re Marriage of Welsh*, 714 S.W.2d 640, 647 (Mo. App. S.D. 1986); *State v. Brookshire*, 325 S.W.2d 497, 500 (Mo. 1959).

"If a statute can be applied constitutionally to an individual, that person will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *State v. Self*, 155 S.W.3d 756, 760 (Mo. banc 2005).

Here, the statute was constitutionally applied to a defendant who had ample notice and opportunity to prepare a defense under *Blankenship*. *See also, State v. Hendren*, 524 S.W.3d 76, 81-85 (Mo. App. W.D. 2017) (upholding conviction of felony murder where charging instrument charged conventional second-degree murder because constitutional notice received and no prejudice to preparation of defense).

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Defendant's second point should be rejected.

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CONCLUSION

Defendant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with Rule 84.06(b) and contains 18,305 words, excluding the cover, this certification, and the signature bloc, as counted by Microsoft Word 2010 software.

/s/ Gregory L. Barnes
GREGORY L. BARNES
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