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Eric Henkel
University of Montana School of Law

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TWO CRIMES FOR THE PRICE OF ONE: RESHAPING FELONY HOMICIDE IN *STATE v. RUSSELL*

Eric Henkel*

I. INTRODUCTION

At the core of criminal law rests the basic principle that people should be responsible for any harm that results from their unlawful actions.¹ Whenever a defendant is found criminally liable, the law imposes a penalty. Usually, courts impose one penalty for every crime committed. Sometimes, however, it is not that simple. The traditional felony homicide doctrine holds a felon strictly liable for a death that occurs during the commission of a felony.² When a defendant is convicted of felony homicide, it is often difficult to determine if the defendant should be punished for two crimes—deliberate homicide and the underlying felony. Prior to the Montana Supreme Court's decision in *State v. Russell*,³ a defendant convicted of felony homicide could be convicted and punished for the underlying felony and the resulting homicide.⁴

In this note, I discuss the Montana Supreme Court's departure from the conventional view that a defendant convicted of felony homicide could also be convicted of the predicate felony offense. The note begins with a brief overview of how felony homicide and predicate felony offenses are conceptualized in various jurisdictions, including Montana's conceptualization prior to *Russell*. Then, the *Russell* opinion is discussed. In the opinion, the majority concludes that "in the unique context of felony homicide, the predicate offense is, of necessity, an included offense, as well as an element of the felony homicide itself."⁵ Essentially, the majority's holding implied that no set of circumstances could exist whereby a defendant charged with felony homicide could also be charged with the predicate felony. Furthermore, the majority opinion inexcusably ignores the well-established rule that requires predicate felonies to be causally connected to a homicide in order for the felony homicide doctrine to apply. Finally, I conclude with an

* Eric Henkel, candidate for J.D. 2011, The University of Montana School of Law. The author specially thanks Craig and Rita Henkel, Cory and Brynn Laird, Spencer, Tony and Jill Yacu, Amy Henkel, Kevin Donahoe, Mark Henkel, Kelly Devlin, and Sherry Devlin for all of their support. The author offers additional thanks to all members of the Montana Law Review for their invaluable advice throughout the development of this note.

1. Guyora Binder, *The Origins of American Felony Murder Rules*, 57 *Stan. L. Rev.* 59, 73 (2004).

2. *Id.* at 60.

3. *State v. Russell*, 198 P.3d 271 (Mont. 2008).

4. *State v. Close*, 623 P.2d 940, 950 (Mont. 1981).

5. *Russell*, 198 P.3d at 274.

analysis and critique of the majority's reasoning in *Russell* for departing from a longstanding precedent.

II. AN OVERVIEW OF FELONY HOMICIDE AND PREDICATE FELONY OFFENSES

The felony homicide doctrine is interpreted and applied differently in many jurisdictions throughout the United States. For example, some jurisdictions only apply the felony homicide doctrine when the underlying felony is "so distinct from the homicide so as not to be an ingredient thereof."⁶ Under this approach, the felony homicide doctrine is inapplicable if the act causing the underlying felony is the same act that causes a victim's death.⁷ This approach is often referred to as the "merger doctrine" because the underlying felony, if not distinct, merges into the homicide.⁸ Jurisdictions adopting this approach reason that every murder is preceded by an assault, and, thus, without the merger doctrine every homicide would fall under the felony homicide doctrine.⁹

Some jurisdictions subscribing to the merger doctrine enumerate certain felonies that "do not merge with the homicide so as to preclude a charge of felony murder."¹⁰ Thus, if a statute enumerates aggravated assault as an underlying offense, then any death caused during the commission of an aggravated assault appropriately falls under the felony homicide doctrine. Generally, jurisdictions do not have difficulty classifying predicate felonies or determining when the felony homicide doctrine should apply.¹¹ Instead, problems tend to arise when a defendant is faced with multiple convictions, one for felony homicide and one for the underlying felony.¹²

Many courts prohibit the conviction of underlying felonies in order to protect a defendant's double jeopardy rights. For example, in Georgia, any time an underlying felony forms the basis for a felony homicide charge, a defendant can only be convicted of the felony homicide.¹³ Other jurisdic-

6. *State v. Smallwood*, 955 P.2d 1209, 1226 (Kan. 1998).

7. *State v. Heemstra*, 721 N.W.2d 549, 558 (Iowa 2006).

8. *Id.*

9. *Cmmw. v. Kilburn*, 780 N.E.2d 1237, 1240 (Mass. 2003).

10. 40 Am. Jur. 2d *Homicide* § 67 (1999); see e.g. *State v. McCann*, 907 P.2d 239, 241 (Okla. Crim. App. 1995).

11. See e.g. *State v. Mason*, 709 N.W.2d 638 (Neb. 2006); *Cmmw. v. Burton*, 876 N.E.2d 411 (Mass. 2007); *People v. Rosenthal*, 914 N.E.2d 694 (Ill. App. 2009); *State v. Moore*, 213 P.3d 150 (Ariz. 2009).

12. See e.g. *State v. Arroyo*, 931 A.2d 975 (Conn. App. 2007); *Quillen v. State*, 163 P.3d 587 (Okla. Crim. App. 2007); *People v. Ream*, 750 N.W.2d 536 (Mich. 2008); *State v. Rudolfo*, 187 P.3d 170 (N.M. 2008); *Brady v. State*, 659 S.E.2d 368 (Ga. 2008).

13. *Bolston v. State*, 651 S.E.2d 19, 21 (Ga. 2007).

tions, such as North Carolina, allow the conviction of underlying felonies but limit punishment to the felony homicide conviction.¹⁴ Several jurisdictions follow similar approaches to Georgia and North Carolina.¹⁵ The basic rationale behind these approaches is that the underlying felony should merge with the felony homicide because it is a lesser included offense in the felony homicide.¹⁶

Prior to 2008, a defendant convicted of felony homicide in Montana could also be convicted and punished for the underlying felony.¹⁷ In *State v. Close*, the Montana Supreme Court reasoned that “the statute proscribing the underlying felony . . . is designed to protect a wholly different societal interest from the felony murder statute, which is intended to protect against homicide.”¹⁸ The majority in *Close* felt that “[t]he legislature manifested a clear intention to serve two different interests in enacting the statutes.”¹⁹

Before 2008, the Montana Supreme Court had never encountered a case that was factually similar to *Russell*. In *Russell*, the defendant challenged the validity of his underlying felony conviction in light of his felony homicide conviction.²⁰ However, the factual premise of *Russell* was unique because the underlying felony and the felony homicide were committed against different victims.²¹ The specific issue in front of the Court was whether the underlying felony conviction was prohibited by the double jeopardy clause of the Montana Constitution.²²

III. STATE OF MONTANA v. RUSSELL

A. Facts

On April 25, 2005, Rusty Lee-Ray Russell and his friend Brandon Spotted Wolf spent the evening consuming alcoholic beverages at various locations throughout Billings, Montana.²³ Although Russell and Spotted Wolf were under the legal drinking age, they were able to convince an older third party to buy them two bottles of whiskey.²⁴ Russell and Spotted Wolf proceeded to make their way across Billings, drinking in various back al-

14. *State v. Dudley*, 566 S.E.2d 843, 847 (N.C. App. 2002).

15. See e.g. *State v. Eby*, 37 P.3d 625, 631 (Idaho App. 2001); *People v. Baugh*, 832 N.E.2d 903, 914 (Ill. App. 2005).

16. *Eby*, 37 P.3d at 631; *Dudley*, 566 S.E.2d at 847; *Baugh*, 832 N.E.2d at 914; *Bolston*, 651 S.E.2d at 21.

17. *Close*, 623 P.2d at 951.

18. *Id.* at 950.

19. *Id.* at 951.

20. *Russell*, 198 P.3d at 274.

21. *Id.* at 273.

22. *Id.* at 274.

23. *Id.* at 272.

24. *Id.*

leys.²⁵ In the early morning hours of April 26, 2005, the two men met up with Henry Rideshorse outside of a local thrift store.²⁶ Together, the three men continued to drink in the alley behind the thrift store.²⁷

Behind the thrift store, Russell, Spotted Wolf, and Rideshorse found several transients sleeping in the alley.²⁸ The three men approached one of the transients, Dale Wallin, and Spotted Wolf demanded money from him.²⁹ Because Wallin failed to respond to Spotted Wolf's demands, Spotted Wolf pulled out a knife and used it to slash Wallin's face.³⁰ Spotted Wolf handed the knife to Russell who proceeded to stab Wallin multiple times in the back.³¹

After stabbing Wallin, Russell walked further down the alley and approached another sleeping transient, John Gewanski.³² Russell proceeded to stab Gewanski multiple times, resulting in Gewanski's death.³³ After killing Gewanski, both Russell and Spotted Wolf resumed their attack on Wallin until Rideshorse intervened and stopped the violent beating.³⁴ After Russell and Spotted Wolf fled the scene, Wallin made his way to a local hospital and was able to survive his numerous stab wounds.³⁵

The State of Montana charged Russell with multiple offenses including "the deliberate homicide of Gewanski, the aggravated assault of Wallin, robbery by accountability, and aggravated assault of Gewanski by accountability."³⁶ The State brought the deliberate homicide charge under Montana Code Annotated § 45-5-102(1)(b), also known as the felony homicide statute.³⁷ The underlying felony for the felony homicide charge was specifically identified as the aggravated assault of Wallin.³⁸

Before the jury issued a verdict, Russell requested that "the court . . . instruct the jury that, if they convicted Russell of deliberate homicide under a felony homicide theory, they must all agree on the particular act or acts he committed."³⁹ The instruction was refused and the jury subsequently re-

25. *Id.*

26. *Russell*, 198 P.3d at 274.

27. *Id.* at 273.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Russell*, 198 P.3d at 273.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 273.

38. *Russell*, 198 P.3d at 273.

39. *Id.*

turned a verdict of guilty on all four counts, including the felony homicide of Gewanski and the aggravated assault of Wallin.⁴⁰

Before sentencing, Russell requested that the district court dismiss his conviction for the aggravated assault on Wallin because it violated the double jeopardy provisions of the Montana Constitution.⁴¹ Specifically, Russell maintained that the conviction placed him in double jeopardy because the felony homicide of Gewanski was predicated on the aggravated assault of Wallin.⁴² The district court refused to grant Russell's motion to dismiss, and he received a separate sentence for each of his convictions.⁴³ Russell appealed the district court's decision to the Montana Supreme Court.

B. *Majority Holding*

In a divided opinion delivered by Justice Leaphart, the Montana Supreme Court reversed the district court's "order denying Russell's motion to dismiss his conviction for aggravated assault."⁴⁴ Two justices dissented from the majority's opinion as it related to the dismissal of the aggravated assault conviction.⁴⁵ Justice Nelson concurred in part and dissented in part because, although he agreed with the Court's method of analysis in dismissing the aggravated assault conviction, he believed the conviction should have been affirmed based on an invalid felony homicide conviction.⁴⁶

The majority held that a defendant convicted of felony homicide cannot also be convicted of the underlying felony because "[i]n the unique context of felony homicide, the predicate offense is, of necessity, an included offense, as well as an element of the felony homicide itself."⁴⁷ Thus, the majority concluded that the double jeopardy clause of the Montana Constitution⁴⁸ prohibited the conviction and punishment of Russell for the aggravated assault because the felony homicide conviction was predicated on "the same aggravated assault."⁴⁹

Although Russell framed the issue on appeal as a constitutional issue, the majority's reasoning was primarily based on two Montana statutes:

40. *Id.*

41. Mont. Const. art. II, § 25; Reply Br. Appellant at 1, *State v. Russell*, 198 P.3d 271 (Mont. 2008).

42. *Russell*, 198 P.3d at 274.

43. *Id.* at 273.

44. *Id.* at 277.

45. *Id.* at 281–284 (Rice, J. & Gray, C.J., dissenting).

46. *Id.* at 278–281 (Nelson, J., concurring in part and dissenting in part).

47. *Id.* at 274 (majority).

48. Mont. Const. art. II, § 25.

49. *Russell*, 198 P.3d at 277.

§§ 46–11–410 and 46–1–202(9).⁵⁰ The majority began by stating the general rule that a defendant can be convicted of multiple offenses whenever “the same transaction may establish the commission of more than one offense”⁵¹ However, the exception to this general rule is that “a defendant may not . . . be convicted of more than one offense if one offense is included in the other.”⁵² Furthermore, “included offense” is defined as any offense that “is established by proof of the same or less than all the facts required to establish the commission of the offense charged.”⁵³ In relation to included offenses, the Montana Supreme Court previously held that “the term ‘facts’ refers to the statutory elements of the offenses, not the individual facts of the case.”⁵⁴

After reframing the issue as statutory rather than constitutional, the majority applied the highlighted statutes to Russell’s facts. Because the State charged Russell with felony homicide of Gewanski and identified the aggravated assault of Wallin as the underlying felony, the majority reasoned that the aggravated assault was a necessary element of the felony homicide.⁵⁵ Furthermore, because the State used the same evidence “to prove the stand-alone aggravated assault charge . . . and the predicate felony relied upon in the felony homicide charge,” the majority reasoned that the aggravated assault was an included offense of the felony homicide.⁵⁶ Therefore, the majority concluded that Russell could not be convicted of aggravated assault because it was an included offense as defined by § 46–1–202(9).⁵⁷

The majority opined that the State could have avoided the merging of the homicide and assault convictions by identifying the robbery charge as the predicate felony.⁵⁸ Additionally, the State could have charged Russell under the traditional deliberate homicide statute⁵⁹ instead of the felony homicide statute.⁶⁰ According to the majority, either alternative would have allowed separate convictions for the aggravated assault of Wallin and the felony homicide of Gewanski.⁶¹

50. *Id.* at 274; Mont. Code Ann. §§ 46–11–410, 46–1–202(9).

51. Mont. Code Ann. § 46–11–410(1).

52. *Id.* at § 46–11–410(2)(a).

53. *Id.* at § 46–1–202(9).

54. *State v. Beavers*, 987 P.2d 371, 377 (Mont. 1999).

55. *Russell*, 198 P.3d at 274.

56. *Id.*

57. *Id.* at 274–275.

58. *Id.* at 275.

59. Mont. Code Ann. § 45–5–102(1)(a).

60. *Russell*, 198 P.3d at 275.

61. *Id.*

C. Justice Nelson's Concurring and Dissenting Opinion

Justice Nelson wrote a partially concurring and partially dissenting opinion in which he agreed with the majority's method of analysis but disagreed with the majority's "ultimate disposition" of the appeal.⁶² Specifically, Justice Nelson contended that the aggravated assault conviction should have been affirmed because Russell's felony homicide conviction was invalid.⁶³ According to Justice Nelson, because the felony homicide conviction was invalid, the Court should not have reached the double jeopardy claim.⁶⁴

Justice Nelson argued that "a causal connection between the felonious act and the death must be present" in order for the felony homicide doctrine to apply.⁶⁵ Justice Nelson cited several cases decided by the Montana Supreme Court that require a victim's death to be a natural consequence of, or closely related to, the predicate felony.⁶⁶ Furthermore, Justice Nelson stressed that the plain language of Montana's felony homicide statute states that a victim's death must occur during "the course of" a predicate felony or the "flight thereafter."⁶⁷ Justice Nelson argued that no factual or legal basis existed to support the contention that Gewanski's death occurred during the commission of a felony because the initial assault on Wallin was already over when Gewanski was killed.⁶⁸ Additionally, Justice Nelson contended that Gewanski's death did not occur during the "flight" after the predicate felony because Russell's actions after he assaulted Wallin were not indicative of a fleeing criminal.⁶⁹ Therefore, because he believed that Russell's felony homicide conviction was invalid as a matter of law, Justice Nelson dissented from the majority's overall disposition of the appeal.

D. Justice Rice's Dissenting Opinion

Justice Rice wrote a dissenting opinion in which Chief Justice Gray joined. Justice Rice disagreed with the majority opinion because (1) it side-stepped the constitutional issue raised on appeal, and (2) it arbitrarily overruled the longstanding precedent in Montana that a person convicted of felony homicide could also be convicted of the predicate felony.⁷⁰ Justice

62. *Id.* at 278 (Nelson, J., concurring in part and dissenting in part).

63. *Id.*

64. *Id.*

65. *Id.* at 279.

66. *Russell*, 198 P.3d at 279–280 (Nelson, J., concurring in part and dissenting in part).

67. *Id.* at 279–280; Mont. Code Ann. § 45–5–102(1)(b).

68. *Id.* at 279.

69. *Id.* at 280.

70. *Id.* at 281–284 (Rice, J. & Gray, C.J., dissenting).

Rice argued that the majority failed to recognize that felony homicide is “a unique creation” and is not subject to general merger provisions.⁷¹

Justice Rice relied heavily on the Montana Supreme Court’s decision in *Close*⁷² to support his contention that felony homicide is not subject to general merger provisions.⁷³ In *Close*, the Court held that the “statute proscribing the underlying felony is designed to protect a wholly different societal interest from the felony murder statute, which is designed to protect against homicide.”⁷⁴ Therefore, Justice Rice argued that any merging of the underlying felony with the felony homicide charge would ignore the Legislature’s intention of using the felony homicide statute to protect two different interests.⁷⁵

Beyond the argument that felony homicide was uniquely designed to protect multiple interests, Justice Rice criticized the Court for avoiding the constitutional issue that was actually raised on appeal.⁷⁶ Russell’s original argument on appeal was that the double jeopardy clause of the Montana Constitution prohibited his conviction for aggravated assault because his felony homicide conviction was predicated on the same assault.⁷⁷ Based on Russell’s actual appeal, Justice Rice argued that the majority’s holding was flawed because it produced “a result disconnected from the facts” of the case.⁷⁸ Justice Rice reasoned that the basic concept behind double jeopardy is that “no person should suffer twice for a single act.”⁷⁹ Furthermore, Justice Rice argued that the factual premise presented in Russell’s case showed that he was not placed in double jeopardy because he committed two separate acts against two separate victims—felony homicide of Gewanski and aggravated assault of Wallin.⁸⁰ Therefore, Justice Rice dissented from the majority opinion because he believed that the majority gave Russell a “free pass” for the aggravated assault of Wallin.⁸¹

IV. ANALYSIS

In delivering the *Russell* opinion, the Montana Supreme Court made two mistakes that produced a holding inconsistent with the facts of the case. First, the majority’s analysis incorrectly classified the aggravated assault of

71. *Id.* at 283.

72. *Close*, 623 P.2d 940.

73. *Russell*, 198 P.3d at 282–283 (Rice, J. & Gray, C.J., dissenting).

74. *Close*, 623 P.2d at 950–951.

75. *Russell*, 198 P.3d at 282 (Rice, J. & Gray, C.J., dissenting).

76. *Id.* at 281.

77. *Russell*, 198 P.3d at 274.

78. *Id.* at 284 (Rice, J. & Gray, C.J., dissenting).

79. *Id.*

80. *Id.*

81. *Id.*

Wallin as a lesser included offense in the felony homicide of Gewanski.⁸² Second, the majority incorrectly assumed “that the assault on Wallin and the killing of Gewanski were part of the same transaction.”⁸³ This assumption caused the majority to overlook an invalid felony homicide conviction. Consequently, the majority’s holding was misleading because it implied that the double jeopardy clause of the Montana Constitution always prohibits the State from convicting a defendant of both felony homicide and the underlying felony.⁸⁴

A. *Considering Lesser Included Offenses in Relation to Felony Homicide*

Under Montana law, whenever “the same transaction may establish the commission of more than one offense, a person charged with the conduct may be prosecuted for each offense.”⁸⁵ However, one exception to this rule is that “a defendant may not . . . be convicted of more than one offense if one offense is included in another.”⁸⁶ An offense is included in another when both offenses can be established by proof of the same elements.⁸⁷ In *State v. Matt*, the Montana Supreme Court concluded that assault with a weapon is not a lesser included offense of assault on a peace officer because one requires the use of a weapon and the other requires bodily injury to a peace officer.⁸⁸ Therefore, the Court held that an offense is not included in another when each offense requires proof of a different element.⁸⁹

In order to determine if an offense is included in felony homicide, it logically follows that a court needs to understand the essential elements of felony homicide. In Montana, the felony homicide statute states, in pertinent part, that a person commits deliberate homicide if the person commits “robbery, sexual intercourse without consent . . . aggravated assault, or any other forcible felony and in the course of the forcible felony or flight thereafter, the person . . . causes the death of another human being.”⁹⁰ On the face of this statute, the commission of a forcible felony is clearly an essential element of felony homicide.⁹¹ Therefore, as the majority opinion in

82. *Id.* at 274 (majority).

83. *Russell*, 198 P.3d at 275.

84. *Id.* at 277.

85. Mont. Code Ann. § 46–11–410(1).

86. *Id.* at § 46–11–410(2)(a).

87. *Beavers*, 987 P.2d at 377.

88. *State v. Matt*, 106 P.3d 530, 533 (Mont. 2005).

89. *Id.*

90. Mont. Code Ann. § 45–5–102(1)(b).

91. *Close*, 623 P.2d at 951.

Russell correctly pointed out, “a defendant cannot commit the offense of felony homicide without committing a predicate felony offense.”⁹²

In *Russell*, the majority’s crucial error occurred when it concluded that the aggravated assault of Wallin was a lesser included offense in the felony homicide of Gewanski.⁹³ Because the commission of a predicate offense is an element of felony homicide, the majority reasoned that “the predicate offense is, of necessity, an included offense.”⁹⁴ Thus, the majority concluded that the double jeopardy clause of the Montana Constitution prohibits the State from convicting a defendant of both felony homicide and the underlying felony.⁹⁵ However, this conclusion was inconsistent with Montana law. In 1999, the Montana Supreme Court stated that “the double jeopardy clause . . . prohibits [the State] from imposing on criminal defendants multiple punishments for the same offense.”⁹⁶ In *Russell*’s case, the facts clearly indicate that he committed two separate offenses on two separate victims—aggravated assault of Wallin and felony homicide of Gewanski. Therefore, because he was not subjected to multiple punishments for a *single* offense, *Russell*’s double jeopardy rights were not violated.

Theoretically, the majority’s understanding of double jeopardy was correct because it was based on the belief that *Russell* was punished twice for the same crime. However, the majority’s holding came out backwards because it was “disconnected from the facts of [the] case.”⁹⁷ In his dissent, Justice Rice correctly argued that the majority overlooked the critical fact that the predicate felony and the felony homicide produced different victims.⁹⁸ Consequently, punishing *Russell* once for stabbing Wallin and then killing Gewanski produced a result that “is antithetical to the legal and moral concepts behind double jeopardy.”⁹⁹

B. *Felony Homicide and Causal Connection*

Assuming arguendo that the majority was correct in classifying *Russell*’s predicate felony as an included offense, the Court should never have reached the issue because *Russell*’s felony homicide conviction was invalid and should have been vacated. Even though *Russell* did not challenge his felony homicide conviction, the Court reserves the power to review any

92. *Russell*, 198 P.3d at 275.

93. *Id.*

94. *Id.* at 274.

95. *Id.* at 277.

96. *State v. Guillaume*, 975 P.2d 312, 318 (Mont. 1999).

97. *Russell*, 198 P.3d at 284 (Rice, J. & Gray, C.J., dissenting).

98. *Id.*

99. *Id.*

error that causes “substantial injustice.”¹⁰⁰ Specifically, the majority incorrectly assumed that “the assault on Wallin and the killing of Gewanski were part of the same transaction.”¹⁰¹ Consequently, the majority opinion implied that felony homicide is appropriate even when the underlying felony is not causally connected to the actual homicide.

Under Montana law, a felony homicide occurs when a person “causes the death of another human being” during “the course of [a] forcible felony or flight thereafter.”¹⁰² Additionally, in 1976, the Montana Supreme Court established that “for the felony-murder rule to apply a causal connection between the felonious act and the death must be present.”¹⁰³ Furthermore, “the homicide must be so closely connected” to the underlying felony that there is an “actual legal relation between the killing and the crime committed.”¹⁰⁴

A causal connection is an element of felony homicide because it allows a court to infer the defendant’s intent to kill. A prosecutor satisfies the intent element of felony homicide by proving that the defendant acted with the intent to commit the underlying felony.¹⁰⁵ However, the intent to commit the underlying felony will not transfer to the homicide if the prosecution fails to demonstrate a “causal relationship” between the two crimes.¹⁰⁶ The Court has stated that the purpose of the felony homicide doctrine is “to clothe the felon’s act of killing with [intent]” and not “to foist authorship of a homicide upon [the] felon.”¹⁰⁷ Thus, this purpose is only satisfied when the homicide is “a consequence of the felony . . . and not mere coincidence.”¹⁰⁸

In the *Russell* opinion, the majority should have recognized that the causal connection requirement was not satisfied. In his dissent, Justice Nelson correctly pointed out that the facts “do not support the proposition that a causal connection existed between the aggravated assault on Wallin and the death of Gewanski.”¹⁰⁹ The facts clearly demonstrate that no causal connection existed because the assault on Wallin was already over when “Russell attacked and killed Gewanski.”¹¹⁰ By failing to acknowledge the grievous flaw in *Russell*’s felony homicide conviction, the majority severely

100. *State v. Andersen-Conway*, 171 P.3d 678, 680 (Mont. 2007).

101. *Russell*, 198 P.3d at 275 (majority).

102. Mont. Code Ann. § 45-5-102(1)(b).

103. *State ex. rel. Murphy v. McKinnon*, 556 P.2d 906, 910 (Mont. 1976).

104. *Id.*

105. *State v. Weinberger*, 671 P.2d 567, 568 (Mont. 1983).

106. *Id.*

107. *Id.* at 569.

108. *Id.*

109. *Russell*, 198 P.3d at 280 (Nelson, J., concurring in part and dissenting in part).

110. *Id.*

crippled Montana's causal connection requirement. Additionally, it was "necessary for [the] Court to consider the legal validity of the felony homicide conviction" in order to protect "Russell's fundamental right to due process."¹¹¹ Because the Court failed to address Russell's felony homicide conviction, the majority's analysis implied that felony homicide is appropriate even when the underlying felony has no causal connection to the homicide.

VI. CONCLUSION

The Montana Supreme Court's decision in *Russell* drastically changed the felony homicide doctrine in Montana. The *Russell* opinion is significant because it eliminated the possibility of punishing defendants for predicate felonies. Specifically, the Court incorrectly classified Russell's aggravated assault on Wallin as an included offense in the felony homicide of Gewanski.¹¹² Consequently, Russell was only punished for the felony homicide of Gewanski and received no punishment for his assault on Wallin. The Court's holding is significant because it implies that the felony homicide doctrine is applicable even when the predicate felony has no causal connection to the actual homicide. The Court overlooked the fact that Russell committed two separate acts on two different victims—aggravated assault of Wallin and felony homicide of Gewanski. Ultimately, the *Russell* opinion reshapes felony homicide in Montana because it eliminates the chance for multiple punishments, and it ignores the causal connection requirement for felony homicide.

111. *Id.* at 279.

112. *Id.* at 274–275 (majority).