



Aiding and Abetting Felony Murder Task Force

Wednesday, August 18, 2021

10:00 am – 12:00 pm

Department of Corrections (DOC), 1450 Energy Park Drive, West Entrance, Afton Room, 1st Floor, St. Paul, MN 55108**

Via Webex

Public access to PowerPoint presentation shown during the meeting available [here](#)

*** Due to the ongoing health pandemic and the need to ensure that individuals who have contact with incarcerated and detained individuals are limited from public exposure, meetings will be held virtually under Minn. Stat. § 13D.021. It is not feasible to have members of the public or taskforce/staff in the regular meeting room and remote monitoring access will continue to be noticed and made available to the public via the website above and on the meeting room door.*

Agenda

I. Welcome/Introduction of New Members

II. Business Items

Members Present (10 of 12): Brian Mueller, Greg Egan, Kathy Keenan, Ken Sass, KiloMarie Granda, Nate Reitz, Nicholas Kimball, Perry Moriearty, Toni Carter, Bill Ward

DOC Staff Present: Safia Khan, Amy Lauricella, LaTavia Osgood

Public Present: Nine individual call lines dialed into the meeting.

Guest Presenters: Professor Richard Frase, *U of MN Law School*; Professor Mark Osler, *St. Thomas Law School*; Valerie Clark, *DOC*

a. Officer roles and elections

- i. Greg Egan, chair, KiloMarie Granda, vice chair – unanimously elected
 1. Ayes – 10
 2. Nay – 0
 3. Abstain – 0

b. Standing meeting schedule and dates

- i. Regular meeting – 3rd Wednesday of every month from 10am-12pm
- ii. Will add additional special meetings as necessary, including hearing from impacted individuals who are currently incarcerated
- iii. 3 subcommittees
 1. Data – Nate Reitz, chair
 2. Statutes/Case Law and policy aspects – Perry Moriearty, chair
 3. Engagement and Outreach – Toni Cater, chair
- iv. If interested in co-chairing, let Greg Egan know

III. Legal principles of murder in criminal law, including felony murder doctrine – Prof. Richard Frase, University of Minnesota Law School

- a. 2nd degree murder eliminates requirements of proof having to do with intent – violates fundamental principles of criminal law
- b. Basic principles of criminal liability requires blameworthiness
 - i. Voluntary act – or failure to act
 - ii. Harm caused or risk of harm to individuals or society
 - iii. Culpable state of mind (*aka mens rea*) – at least proof of criminal negligence
- c. No criminal liability without a voluntary act and at least criminal negligence
- d. MN does not have a general negligent criminal homicide law – so we begin with recklessness (required in 2nd degree manslaughter) which is being aware of and consciously disregarding of substantial and justifiable risk
- e. Homicide is not murder unless the person intends to cause death/kill or at least *extreme* recklessness (called “depraved mind” in MN – 3rd degree murder) – an example is kids playing roulette with a loaded gun and someone is killed (this is outrageous and reckless conduct that meets the extreme indifference)
- f. Then we have felony murder, which violates most of the above principles
 - i. A person can be deemed guilty of murder without proof of intent to kill or extreme recklessness – even an involuntary act might qualify for felony murder
 - ii. Felony murder began in common law England, which has since abandoned the rule (as has Scotland, Republic of Ireland, Canada, and does not exist in civil law countries of Europe)
 - iii. At least four US states do not have felony murder (HA, KY, MI, NJ which follows model penal code rule) and many others have limited its scope
 - iv. MN does put limits on FM liability – 1) it isn’t just any felony, it has to be a dangerous felony which means it poses a special/significant threat to human life and that threat has to exist in the abstract; 2) also has to be a special danger in the manner in which it was committed (while this seems like a limit, this standard is applied to all actors beyond just the primary actor, including accomplices who may not been part of the manner of the act)
 1. Special danger determinations are made by judges, not the jury
 2. If these are met, we presume a degree of culpability
- g. Felony murder is based on the concept that by attaching this culpability, we assume that this is a deterrent to participating in a crime

- i. There is data that this is not the case for accomplices, who have very little control over the dangerous manner in which the felony is being committed
- h. FM violates fundamental principles of criminal law and punishment, even in the case of primary actors, and is OFTEN true for accomplices
- i. Some states have adopted an affirmative defense for accomplices, the defendant must prove by a preponderance of the evidence that: 1) did not directly cause death or solicit the killing; 2) was not armed with a deadly weapon; 3) had no reasonable grounds to believe any other actor was so armed; and 4) had no reasonable grounds to believe any other actor intended to cause or risk death or great bodily harm
- j. Prof. Frase believe MN should reject that compromise as a defendant should never have to prove their innocence.
- k. If the state cannot prove to the jury beyond a reasonable doubt that the accomplice was extremely reckless as to the risk of death, murder liability is unjust.

IV. Discussion

- a. For states and common law countries that have decided to abandon the doctrine, what have they relied on to make that decision?
 - i. Likely that most of these jurisdictions have something equivalent to the extreme recklessness concept – worth looking at this to focus on as a minimum level of mental culpability
- b. For states who provide affirmative defenses for accomplices, is this a recent change?
 - i. Not a long time, but it's also not brand new – NJ has a four-part affirmative defense used in a case from 1990 and facts from 1983 – unaware if NJ was first state to have it, though
- c. Unaware of requirement in second degree felony murder that there has to be the underlying crime is of particular dangerousness – judicially created
 - i. Text of statute says any felony, but commentary shows that this doesn't mean any felony but those that are particularly dangerous – courts have used their authority to shape doctrine – these specific standards are judicially created and entirely in case law – legislature has ultimate control over how crimes are defined
- d. Have you given any thought to how a sentencing guidelines state like MN could punish accomplices differently than principals in this crime? Culpability is currently so intertwined that it is difficult to parse this out from sentencing.
 - i. There is a great parallel between the accomplice liability statute which speaks in broad terms (they're all parties and equally liable, even including expansive liability) and the felony murder statute where courts have inherent power to interpret statutes unless the legislature objects. The guidelines commission ranks felony murder (2nd degree) and 3rd degree depraved heart murder at different levels in the guidelines. Many of these 2nd degree

folks are no more culpable than the 3rd degree folks but they are ranked the same. MSGC has authority to unpack accomplice liability.

- ii. MN does not have a long history of differentiating accomplice liability, though, it could do this.
- e. Can you speak to the other limitations (e.g., duration, proximate cause, agency)?
 - i. Haven't looked at many of these closely, as there isn't much case law on this in Minnesota. Encourages the task force to call on a legislative researcher or the AGs office who may be able to look into this issue. There are many ways to limit the use of this doctrine/rule. Prevents it from operating unfairly. Some states limit it based on who is killed or who does the killing if the party is not an accomplice (but instead is a third party, such as police officer).
- f. What data do you think we should obtain to help us understand the application and scope of the doctrine in MN and who it is that is serving these sentences?
 - i. DOC data; MSGC whether they have the variable to show that someone was convicted as an accomplice (only goes back to 2006ish, so somewhat limited); whether the Supreme Court has data on the charges that are initially filed so that can be compared to convictions from MSGC.
 - ii. Another angle of the felony murder rule is that it is a great bargaining tool for plea deals. How often are these charges filed against accomplices, who are they charged against, what level of severity are the charging crimes compared to what is plead to, etc.

V. Accomplice liability nexus/modifier with felony murder – Prof. Mark Osler, St. Thomas Law School

- a. *Tyson v. US* – Tyson in prison for murder, escapes, kills someone during the escape and given another life sentence, family then attempts to help him escape again, no one is killed during that escape, steal another family's car, Tyson murders the other family, his two sons who were part of helping him escape as accomplices were also convicted and sentenced to death for the murders of the other family even though they went to find that family some water and intended to leave them behind – *idea that sons and daughters must be punished for the sins of the father*
- b. The essence of conspiracy is punishing someone for agreeing to commit a crime
- c. Core elements:
 - i. Intent to work with another to commit a crime
 - 1. Intend that a criminal goal be achieved
 - 2. Be knowledgeable
 - ii. At least one overt act towards accomplishing that (in non-narcotic situations – within narcotics, all that is required is to show an agreement that is truly believed)
 - 1. Doesn't have to be performed by another co-conspirator (this leads to unusual outcomes)

- d. Examples:
 - i. Mark asks Perry to buy gas to be used by Mark to burn the barn – Perry tells Mark there are no animals in the barn – Mark burns the barn, turns out someone was in the barn
 - 1. Neither intended to murder anyone but because Perry conspired with Mark on the underlying crime of arson, felony murder is combined with accomplice liability where Perry can be found guilty of intentional felony murder
 - ii. In the narcotic context, if asked to store drugs for Mark in her garage and Perry agrees, that is enough – even if the drugs don't actually get placed in her garage, she can still be prosecuted for conspiring for possessing with intent to distribute
- e. [Minn. Stat. § 609.05](#) – includes conspiracy and aiding and abetting
 - i. Requires that the crime be completed
 - ii. This was employed in the example above
- f. [Minn. Stat. § 609.175](#) – could be an attempt/inchoate crime
- g. Statutes are only part of the equation of what goes wrong in terms of fundamental fairness – prosecutor discretion also impact this, and historically, troubling disparities and overreach may come from there
 - i. Prosecutor has the choice to charge or not charge with felony murder, particularly for accomplices
 - ii. Prosecutor training often begins with narcotics where you can use conspiracy to pressure people to testify against co-conspirators, which are then used in felony murder as the prosecutors advance in their jobs
 - iii. Used as leverage for people to plead guilty or testify against a co-conspirator – these power dynamics are difficult in that the person who is the accomplice is already impacted by the power dynamics with the principal and then also with the state
 - 1. This can also result in an “upside down” case where the principal is then given the opportunity to flip against the accomplice – these dynamics often come into play when the parties are in a relationship, where, for example, the accomplice girlfriend refuses to testify against the principal boyfriend due to power dynamics, but the boyfriend will testify then against the girlfriend
- h. Discretion and disparities come into play, particularly in geography
 - i. Outcomes may depend on where you committed the crime and which prosecutor you get
 - ii. Prosecutors, particularly in high profile cases, may feel a need for a conviction, even if the less culpable person is the one that is ultimately convicted
- i. When you look at criminal law as a whole – why do we have this at all? – deterrence is often expressed as the reason for permitting accomplices to be held to the same culpability standard
 - i. In order for deterrence to work, the people making the decisions to participate need to know of the potential penalty AND they have to make a rational analysis of that decision

1. Do people know about the effects of felony murder? No – information to understand the mechanism isn't there for the public
2. We assume rational cost benefit analyses are being made – not true in most cases
- ii. Retribution – need to punish people – is also often held out as a legitimate basis but there is a lesser need for punishment when the accomplices did not commit these acts
- j. Underlying the felony murder doctrine is this idea of transferred intent – we transfer to the conspirator the intent of the person who commits the killing, in some situations this may make sense (e.g., fight outside a bar, if we hit a bystander during a fight, that could be transferred rationally as something foreseeable and where the principal actor is the one punished), but in others, it doesn't make sense, particularly when there are such high stakes for accomplices not acting to kill someone
- k. Holding people culpable who are not directly responsible for the act they are being convicted for does not comport with our sense of fairness
- l. If we were to reject second degree felony murder, the underlying crime would take its place (e.g., armed robbery or arson – both have fairly high guidelines in sentencing to start out with) it's not all or nothing with felony murder, the person could still be charged with the crime they committed

VI. Discussion

- a. Reactions to prosecutorial discretion and how it comes into play with accomplice liability and felony murder?
 - i. Includes over-generalizations directed at prosecutors
 - ii. Interested in looking at disparities from county to county, does this data exist?
 1. Prof. Osler confirmed that this is anecdotal
 - iii. There are differences between counties in MANY areas, in part because discretion is used in different ways in different counties by different prosecutors – this is a reality and not a criticism
 - iv. We have clearly highlighted the need to identify and isolate particular data sources, perhaps charges, sentences, AND instances where charges were not levied
 1. *E.g.*, father was selling marijuana and had son in car, young man came to purchase marijuana and father shot and killed young man, both father and son are charged with felony murder, son is now serving time for dad's act as dad has died – not surprising to know that father had a history in bringing children out to engage in sex
 - v. Need to look at underlying facts – google searches pull up quite a bit of information on felony murder cases and the disparities in outcomes for greater MN cases were apparent to even non-attorneys

- b. Data is difficult in areas where decisions weren't made – where people didn't choose to charge felony murder – can be really difficult to measure this for the task force
 - i. This could be an area for the data subcommittee to think creatively around this issue and areas to highlight for the report to the legislature

VII. DOC Data Presentation - Valerie Clark, DOC Research

- a. PPT available on task force [website](#)
- b. Scope of this data is as close to aiding and abetting felony murder with imperfect data (DOC does not always incorporate sentence detail into database)
 - i. Looked at all homicides that had aiding and abetting in it – there could be some anomalies in this data
 - ii. Most relevant convictions fall under 2nd degree murder
 - iii. Persons serving time for these offenses are disproportionality:
 - 1. Black/African American and Indigenous
 - 2. Young (most under 30 at time of offense), but recently, getting older
 - iv. These sentences are long; most topping 15 years but trending shorter in recent years
 - v. Most of these commitments are coming from Mpls. St. Paul metro area with almost 80% in recent years

VIII. Next Steps and Closing

- a. Subcommittees will begin to coordinate
- b. Next meeting date September 15, 2021, 10am-12pm