

Gail Rice's Written Testimony

Felony Murder Testimony – November 13, 2006

I appreciate the opportunity to address you on the subject of felony murder today. As both a murder victim family member and a person who has worked extensively in prison literacy and prison ministry before and after my brother's murder, I am committed to restorative justice. I have grave concerns about whether felony murder laws bring about any sort of justice.

My brother, Bruce VanderJagt, was a Denver police officer who was murdered by a skinhead, Matthaeus Jaehnig, on November 12, 1997. Jaehnig was assisting Lisl Auman, whom he had met the night before, to move her things out of a lodge thirty miles away into her girlfriend's Denver apartment. They had also burglarized her ex-boyfriend's room, which was a felony. Although Lisl was worried about Jaehnig that morning, she went with him in his stolen TransAm with three assault rifles. When the burglary was discovered and they were being pursued by a Jefferson County police officer, Jaehnig was high on methamphetamines, driving over 100 m.p.h. on mountain roads. At one point, Jaehnig had Lisl steer the car so that he could use both hands to shoot out the headlights of the police car. My brother was one of the first officers on the scene after Jaehnig's car arrived at the Denver condo complex of Lisl's girlfriend. Police saw only Lisl, ordered her to surrender, handcuffed her, and placed her in a squad car. They think that before she was taken into custody, she may have handed Jaehnig an assault rifle. Jaehnig, crouched in a dead-end stairwell, fired ten bullets into Bruce, killing him instantly. The place soon became a war zone, swarming with police. Eventually, Jaehnig used Bruce's service revolver to commit suicide. Meanwhile, Lisl was transported to the Denver police station, knowing that Jaehnig had killed a policeman but not knowing that Jaehnig was dead too. In two separate taped interrogations, she lied repeatedly to police about the burglary.

Lisl's supporters pointed out that the political climate of recent skinhead-police violence, added to the facts that a policeman had been shot and that Jaehnig couldn't be prosecuted for the murder, led to the decision by prosecutors to try her for felony murder. In July of 1998, Lisl was convicted of conspiracy to commit burglary, second-degree burglary, and felony menacing because of Jaehnig's shooting at the police car. Because the crimes resulted in a murder, she was also convicted of first-degree felony murder. Under Colorado's felony murder law, her sentence was life with no parole. The jury that convicted her had no idea what sentence she would receive if she were found guilty, and some regretted the sentence. One juror contacted the trial judge and begged to change her vote; that juror later dedicated herself to publicizing the case and raising money for Lisl's subsequent appeals.

Lisl became the national poster child for everything that was wrong with the felony murder law. Her supporters argued in the Colorado Appellate and Supreme Courts that she had no intention of committing murder and shouldn't have been charged with murder because she was not committing a crime or fleeing from it at the time of the murder.

Even though I was outraged at Bruce's murder, the life with no parole sentence troubled me too. Since I had dealt with so many inmates in my work (some of them murderers), I knew that Lisl had received a sentence that was much harsher than many murderers get. Lisl and her supporters were able to use the unfairness of the sentence to rally people to Lisl's defense. The late author

and journalist Hunter S. Thompson took up her cause, using his money and celebrity connections to begin a "Free Lisl" movement, complete with rallies, her own website, and endless publicity.

After losing the appeal in the Appellate Court, Lisl's lawyers appealed to the Colorado Supreme Court. Meanwhile, the "Free Lisl" movement and sympathy for her grew. I was outraged that Lisl was using the unfairness of the felony murder law and her life sentence to obscure her real guilt and responsibility in Bruce's death. In fact, she viewed herself as the real victim and convinced many people that she was the real victim. Both the prosecution and the defense were stunned at Supreme Court's ruling: it upheld the felony murder law and its application to Lisl, but overturned her conviction and ordered a new trial based on one word that was omitted in the trial judge's directions to the jury. Neither side had argued this point, and I suspect that the Colorado Supreme Court was looking for some loophole because of the public pressure to change her sentence. In order for everyone to avoid the horrible ordeal of a retrial, the prosecution accepted a plea bargain. Lisl pled guilty to second-degree burglary and accessory to first-degree murder. In August of 2005, she was sentenced to six months in a halfway house and 9-12 years of community corrections supervision. After 8 years of prison, Lisl was freed. Was I happy she was not imprisoned for life? Yes. Was I happy at the amount of time she served? No. I felt that 15-20 years was much more appropriate for her crime.

I oppose the felony murder law for several reasons. I believe that an accountability theory is wrong when it treats people who don't intend to commit murder and who don't actively and knowingly participate in the murder the same way that murderers are treated. Accountability should be determined on a case-by-case basis, with sentences that reflect differing degrees of intent, participation, and guilt. When people are convicted of felony murder under an accountability theory and receive sentences as harsh or harsher than some murderers get, they are likely to feel more like victims than victimizers. Their lives revolve around the injustice that has been done to them rather than the harm they have done to others.

Because there was an all-or-nothing, mandated sentence of life imprisonment for felony murder, Lisl had no chance to escape life imprisonment except to deny her guilt and portray herself as an innocent victim. Her failure to acknowledge guilt harmed everyone, and compounded the pain of those of us who were the real victims. I'm sure many victims experience this lack of remorse from those sentenced to felony murder.

My extensive experience with many inmates, including some murderers, leads me to think that the felony murder law does not deter crime. Most inmates I've met have committed crimes because of peer pressure, because they are under the influence of alcohol or drugs, or because guns are readily available and tempting to use in a conflict. The perpetrators do not stop to think of the legal penalties if they get caught. Jaehnig, Bruce's killer, had a level of methamphetamines in his blood 100 times that of a first-time user, and I'm certain that criminal penalties were the last thing he was thinking about as he blasted Bruce with his assault rifle.

Finally, I oppose the felony murder law because it has been used in the past to sentence people to death. When I became involved in death penalty abolition work several years ago, I was horrified to find that many people who were not the actual killers but who had been convicted of felony murder were on death row. I would hope that any supporters of the death penalty would reserve that ultimate punishment only for people who have actually committed the murders beyond a shadow of a doubt. To execute accomplices who have not committed murder represents the worst possible disparity in the way the death penalty is carried out.

I hope the story of how the felony murder law has affected me will help you as you seek just laws and appropriate reforms for the future.

Mrs. Gail Rice
13 Cedar Creek Ct.
Palos Heights, IL 60463
phone: 708-597-8315
fax: 708-597-7331
e-mail: Gailvrice@aol.com

Lawyers debate centuries-old legal concept

By Jeff Kass, News Staff Writer, Rocky Mountain News

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She didn't pull the trigger, but it didn't matter.

The legal theory under which Lisl Auman was convicted dates to British common law in the 12th century, which held people responsible for unintended deaths that occurred in the course of other serious crimes.

If someone died of a heart attack during a robbery, for example, the robber was guilty of what was known as felony murder.

England abolished felony murder in 1957, in part because of an outcry over the harsh punishment, including death, handed out to those who did not mean to kill.

But in the United States, supporters argue that felony murder laws are useful for holding people accountable, and deterring crime.

Most states have basic statutes similar to Colorado's felony murder law.

"The public policy behind it is that a criminal is to be held liable for all their actions," says Peter Weir, executive director of the Colorado District Attorneys Council.

He used Auman's case as an example, while emphasizing that he did not mean to take a stand on the specifics.

"But for that burglary, the death would not have occurred."

Colorado lists six underlying crimes -- arson, robbery, burglary, kidnapping, sexual assault, and escape -- that subject people to felony murder charges.

Once a jury found Auman guilty of second-degree burglary, it didn't matter whether she had no intention of killing a police officer, under the law. Or if she didn't pull the trigger.

Auman was handcuffed and in a police cruiser when officer Bruce VanderJagt was shot.

"I think that's the real harm of felony murder," said University of Colorado law professor William Pizzi. "It can make you responsible for consequences that are unforeseen or unlikely in the extreme."

People are also subject to felony murder if the death occurs during the "immediate flight" from the underlying crime.

That is another point in Auman's case.

Defense attorneys critical of the law say the definition of "immediate flight" can be unfairly long, especially in Auman's case, where the original burglary and final shooting lasted through an extended police chase and two counties.

It is an issue public defender Kathleen Lord, Auman's attorney, said she will take up on appeal.

"Even if you assume there was a burglary in Buffalo Creek, it's over" by the time police catch up with Auman on the highway, Lord said.

"At the beginning it's not immediate flight, and at the end when she's in custody it's not immediate flight."

Other attorneys amplify that argument.

"I can't say I've heard of a case where the individual is in custody at the time of the murder and held responsible," said Cynthia Orr, an attorney with the San Antonio firm of Goldstein, Goldstein and Hilley, who is helping draft a National Association of Criminal Defense Lawyers brief on Auman's behalf.

Lord said she may also use the "choice of evils" defense because she contends that Matthaeus Jaehnig ordered Auman to take the car's wheel while he shot at police.

"Is she guilty of helping him, or did she really have no choice?" Lord said. "The notion was, take the steering wheel or crash into traffic."

Supporters of the law say the events Auman set in motion were still spinning when VanderJagt was shot.

"The prosecution will argue it was a continuous chain of events, and the prosecution will no doubt argue for an expansive definition of what immediate means," said Denver criminal defense attorney Nathan Chambers, who represents convicted Oklahoma City bomber Timothy McVeigh.

Denver defense attorney Scott Robinson says of Auman's case: "It's not necessarily an unfair stretching of the facts, but it's not two guys holding up a store and someone gets shot."

The state attorney general's office, which will speak for the prosecution on appeal, declined comment until the first briefs are filed.

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