IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. KEYON DASHAWN HARRISON Defendant-Appellant	SUPREME COURT NO. 16-1998 POLK COUNTY No. FECR285476

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE PAUL SCOTT

APPELLANT'S PROOF REPLY BRIEF AND ARGUMENT

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ARGUMENT

I. THE FELONY MURDER RULE IS FUNDAMENTALLY UNFAIR AS APPLIED TO JUVENILES

Preservation of Error

The State initially argues that Harrison failed to preserve error on his claim regarding the fundamental unfairness of the felony murder rule as applied to juveniles. *See* Appellee's Brief P. 24-25. This is simply not the case. The Iowa Supreme Court has recognized that typically constitutional challenges should be raised at the earliest possible time within the proceedings. *State v. Ritchison*, 223 N.W.2d 207, 214 (Iowa 1974). However, this rule is far from ironclad.

First, challenges to the timeliness of a constitutional challenge must be raised and decided by the district court. *See State v. Allen*, 304 N.W.2d 203, 206 (Iowa 1981) ("Defendant is excused in this case only because the trial court overlooked the untimeliness of the constitutional attack."). In this case the State did not assert a timeliness challenge to Harrison's arguments and the district court did not rule on the timeliness aspect of Harrison's claims. (Tr. Trial Day 4 P. 11-30; Tr. Sentencing P. 2-21, 30-34). For this reason alone, the State's timeliness challenge must be disregarded.

Second, holding that Harrison somehow failed to preserve error when the issue was presented to the district court, resisted by the State and ultimately ruled on by the district court both during the trial and through post-trial motions, would

wholly undermine the error preservation principles. In discussing a similar situation, the Iowa Supreme Court has stated as follows:

> We think that in applying our error-preservation rules, we must keep their underlying purpose in mind. Here, the defendant certainly could have raised his constitutional challenge to the sentencing statutes earlier. He knew when he pleaded guilty in November of 1997 what sentencing provisions would apply and he could have filed his motion and brief then. On the other hand, his failure to do so did not undermine the goals of our error-preservation rules. Opposing counsel had advance notice of the motion and its constitutional basis; he did not object to the court's consideration of the defendant's motion or voice any disadvantage generated by the timing of the motion. The court had an opportunity to consider the motion and supporting arguments prior to the hearing, and ruled on the motion at the hearing. Nothing about the course of these proceedings would have been altered had the defendant filed his motion earlier. Under these circumstances, the goals of our error-preservation rules have been met. *Cf. State v. Milner*, 571 N.W.2d 7, 12 (Iowa 1997) (holding error was preserved when issue was raised at the earliest available opportunity and "the objectives of our error-preservation rules were accomplished"); *State v. Johnson*, 476 N.W.2d 330, 334 (Iowa 1991) (holding defendant failed to preserve error when his objection to the composition of the jury panel was not made until a postverdict motion in arrest of judgment, noting that the failure to object earlier deprived the court of the opportunity to take corrective action); *State v. Ritchison*, 223 N.W.2d 207, 214 (Iowa 1974) (rejecting constitutional challenge to statute under which defendant was charged on basis that challenge made at the close of all the evidence was not filed at the earliest opportunity). It would be exalting form over substance to hold that the defendant failed to preserve error simply because the motion could have been filed earlier, even though the objectives of our error-preservation rules were met. Consequently, we hold that the defendant adequately preserved error.

State v. Mann, 602 N.W.2d 785, 791 (Iowa 1999). This court should follow this same logic and hold that Harrison preserved error on this argument.

Discussion

In responding to Harrison's arguments, the State fails to recognize or even address several arguments and instead presents assertions that are legally and factually incorrect. It is important to note that the basis of Harrison's constitutional challenges to the felony-murder rule reside in a due process argument asserting that the underlying proceedings were fundamentally unfair as applied to Harrison. The State never meaningful addresses this argument and instead attempts to hide in the fray by relying upon legally and factually incorrect assertions. The most glaring example of this is the improper assertion that the basis of the felony murder rule does not rely on the "foreseeability" that a predicate felony could result in the death of another person but instead is premised on the "inherently dangerousness" nature of the predicate felony. This premise is circular and flawed.

As thoroughly discussed by the *amici*, the felony murder rule is predicated on transferred intent, namely, a transfer of the intent from the ***felonious conduct*** to the ***murder***. Transferred intent is, in turn, justified due to the presumed ***foreseeability*** of the potential of death based upon the inherently dangerous felonious acts. *See Amicus Brief* P. 13-19. Despite the State's arguments to the contrary, this is not a new argument and has been recognized by leading legal treatises (2 W. LaFave's

Substantive Criminal Law) and leading constitutional authorities. In his concurrence in *Miller v. Alabama*, Justice Breyer recognized that the premise of the felony murder rule is "that one engaged in a dangerous felony ***should understand*** the risk that the victim of the felony could be killed, even by a confederate." 567 U.S. 460, 492 (2012) (Breyer, J., concurring) (citing 2 LaFave *Substantive Criminal Law* § 14.5(c) (emphasis added)). This is exactly why the State's argument misses the point: When an individual engages in an inherently (or abnormally) dangerous activity, foreseeability that something bad (i.e. a killing) may occur is presumed. Thus, the State's position that foreseeability is not a factor in the felony murder context is patently incorrect.

Likewise, the State improperly understands the idea of transferred intent and how it applies in this context. For example, the State asserts that the jury was instructed that Harrison needed to "knowingly approve and agree to the [killing], either by active participation in it or by knowingly advising or encouraging the act in some way before or when it [was] committed." Appellee Brief P. 32 (quoting Jury Instr. 17, 21; APP-069, 073) (bracketing in Appellee Brief). This is simply not the case. First, the actual instruction reads as follows:

> "Aid and abet" means to knowingly approve and agree to the ***commission of a crime***, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed.

(APP-069, Jury Instruction NO. 17) (emphasis added). Thus, what the jury was instructed that Harrison was required to knowingly approve and agree to the ***robbery*** and if he did then the intent was transferred to the murder.

This transferred intent is what forms the basis for the felony murder doctrine. Justice Breyer again explored this in his concurrence in *Miller*, stating:

> The felony murder doctrine traditionally attributes death caused in the course of a felony to all participants who intended to commit the felony, regardless of whether they killed or intended to kill. *See* 2 W. Lafave, Substantive Criminal Law §§ 14.5(a) and (c) (2d ed. 2003). This rule has been based on the idea of "transferred intent"; the defendant's intent to commit the felony satisfies the intent to kill required for murder. *See* S. Kadish, S. Schulhofer, & C. Steiker, Criminal Law and Its Processes 439 (8th ed. 2007); 2 C. Torcia, Wharton's Criminal Law § 147 (15th ed. 1994).

567 U.S. at 491 (2012) (Breyer, J., concurring). This imputation and presumption of intent from the robbery to the felony murder —when applied to juveniles and in particular juveniles in the aiding and abetting context—is the exact reason the felony murder rule violates the due process clauses of the United States Constitution and the Iowa Constitution. *See generally*, *Sandstrom v. Montana*, 442 U.S. 510, 522 (1979); *Mullany v. Wilbur*, 421 U.S. 684 (1975) and *Connecticut v. Johnson*, 460 U.S. 73 (1983). As such, this Court should reverse the district court and find that the felony murder rule, as applied to juveniles such as Harrison, is unconstitutional.

II. HARRISON'S PUNISHMENT IS IN VIOLATION OF THE CRUEL AND UNUSUAL PUNISHMENT CLAUSES OF THE UNITED STATES AND IOWA CONSTITUTION AS IT IS GROSSLY DISPROPORITIONATE TO HARRISON'S ACTIONS

Discussion

A. Facially/Categorical Prohibition to Life Sentence for Juvenile Felony Murder Conviction

Harrison stands by his original assertion that sentencing a juvenile to life with the possibility of parole is categorically cruel and unusual in the felony murder context. However, it is necessary to address the State's position that the "categorical challenge is also foreclosed by *Louisell*, where the Iowa Supreme Court severed unconstitutional portions of the prior version of section 902.1." Appellee's Brief P. 45 (citing *State v. Louisell*, 865 N.W.2d 590, 599-601 (Iowa 2015). This argument has no merit in that it is not an issue before this Court.

Louisell involved the sentencing of a juvenile convicted of murder who received a determinate sentence of twenty-five (25) years during her resentencing. *Id.* at 594-595. Ultimately, the Iowa Supreme Court determined that the district court's imposition of a determinate sentence was not within the district court's authority. *Id.* at 598. However, it is important to note that *that* question is not before the Court in this case. Instead, Harrison is requesting that this Court find the imposition of life with the possibility of parole as applied in the juvenile felony murder context is cruel and unusual under the United States Constitution and the

Iowa Constitution and this case be remanded back to the district court for resentencing. *See generally, Woodson v. North Carolina,* 428 U.S. 280, 305 (1976) ("[W]e conclude death sentences imposed upon the petitioners under North Carolina's mandatory death sentence statute violated the Eighth and Fourteenth Amendments and therefore must be set aside…and the case is remanded for further proceedings not inconsistent with this opinion.")

B. As-Applied Prohibition of Life Sentence to Harrison

Harrison maintains that life with the possibility of parole is cruel and unusual as applied to him in this case. It is worth noting that the State consistently references that Harrison may have been the principal actor in this murder or an aider and abettor, however, this is not how the case was truly tried. In its closing argument the State fully admitted that Collins was the person who shot and killed the victim. (Tr. Trial Day 4 P. 41) ("And the evidence suggests Keith Collins was the one that was more likely in that position. But that doesn't end our analysis because you don't have to be the triggerman to be responsible for a crime."). Thus, there is no real doubt that Harrison's only involvement was as an aider and abettor.

The question then becomes is it grossly disproportionate for a juvenile aider and abettor to a felony that results in a murder to be sentenced to the most severe penalty available? The answer must be an unequivocal yes. In applying an analysis under the United States Constitution first, despite the State's contentions to the

contrary, the gravity of Harrison's offense—a juvenile aiding and abetting a felony which resulted in a murder—is grossly disproportionate to the sentence which he received. As Harrison was not the principal, had no gun in his possession and no real evidence was presented establishing he had knowledge of Collin's possession of a weapon, an inference of gross disproportionality has been created. *State v. Bruegger*, 773 N.W.2d 862, 873 (Iowa 2009). The next two steps involve intrajurisdictional and interjurisdictional analysis. *Id.*

Harrison acknowledges that there is little evidence to support an intrajurisdictional analysis. This very well could be because Harrison may be the first juvenile to be convicted as an aider and abettor under the felony murder rule. A recent study recognized that beginning in 2012, Iowa had forty-six (46) juveniles sentenced to life without the possibility of parole. The Associated Press, *A State-by-State Look at Juvenile Life Without Parole*, Standard-Examiner, July 30, 2017 http://www.standard.net/National/2017/07/31/A-state-by-state-look-at-juvenile-life-without-parole (last visited October 13, 2017). It is very likely that most if not all of these individuals were not convicted of felony murder, but instead were convicted under traditional premeditated murder. Thus, an intrajurisdictional analysis is not practicable or feasible in this instance, except to acknowledge that the underlying predicate felony (in this case robbery) obviously carries a significantly lower sentence than felony murder. Indeed, had the victim in this case not been

killed, Harrison could have been convicted of robbery in the first degree, a class "B" felony and may have received a sentence not to exceed twenty-five (25) years. Iowa Code § 711.2; 902.9.

Harrison also disagrees with the State's contention that the interjurisdictional analysis is not beneficial to Harrison's position. In the years following the tidal wave of juvenile justice reform by the United States Supreme Court, several jurisdictions have begun to modify the treatment of juvenile life sentences. The Associated Press, *A State-by-State Look at Juvenile Life Without Parole*, Standard-Examiner, July 30, 2017, http://www.standard.net/National/2017/07/31/A-state-by-state-look-at-juvenile-life-without-parole (last visited October 28, 2017). This does not mean merely converting juvenile life sentences from life without parole to life with parole, but instead states have begun giving courts greater discretion or resentencing individuals to determinate terms of years. *Id.* For example, Graham from *Graham v. Florida*'s life without parole case was resentenced in Florida to a determinate sentence of twenty-five (25) years. *Graham v. Florida*, 560 U.S. 48 (2010); see also The Associated Press, *A State-by-State Look at Juvenile Life Without Parole*, Standard-Examiner, July 30, 2017 http://www.standard.net/National/2017/07/31/A-state-by-state-look-at-juvenile-life-without-parole (last visited October 28, 2017). It is important to note that these changes and resentencings are not limited to only juvenile felony murder sentences, but all life without parole sentences. These clear

changes throughout the country confirm that Harrison's sentence of life with the possibility of parole violates the Eighth and Fourteenth Amendments of the United States Constitution.

The State further asserts that Harrison's case does not establish the "unusual combination of features that converge to generate a high risk of potential gross disproportionality." Appellee's Brief P. 47 (quoting *Bruegger*, 773 N.W.2d at 884). Harrison vehemently disagrees with this assertion. Preliminarily, as recognized by the Iowa Supreme Court in *Bruegger*, that the Iowa Constitution's cruel and unusual punishment prohibition is not "toothless." 773 N.W.2d at 883. Instead, it provides more stringent protections than the Federal Constitution. *Id.* The felony murder rule—more than just about any other rule of law—creates the potential for gross disproportionality. This is the very reason it has been repeatedly criticized by legal scholars and commentators for decades. *State v. Heemstra*, 721 N.W.2d 549, 554 (Iowa 2006) (recognizing that the felony murder rule is "[o]ne of the most controversial doctrines in the field of criminal law…") (citations omitted).

Similar to the defendant in *Breugger*, this case presents the perfect storm of factors and creates a constitutionally improper sentence for Harrison. As the State recognized in its closing argument, Harrison was not the "triggerman" and did not kill the victim. (Tr. Trial Day 4 P. 41). He did not have any knowledge a murder would occur and based upon his sixteen (16) year old, under developed brain he

could not fully appreciate that a murder was likely to occur. The evidence did not establish he even had knowledge that a gun would be involved. Yet, under the rigidness of Iowa's felony murder rule, Harrison has been sentenced to the longest sentence available to juvenile offenders—life with the possibility of parole. Harrison was treated no differently than if he had planned this murder for months in advance and committed it in the most horrendous ways imaginable.

Finally, it is worth noting that Harrison is eligible for parole under his current sentence. However, the ability of parole appears to be a legal fiction more than a real opportunity. In July 2017, the Associated Press compiled an analysis of all jurisdictions regarding the number of juveniles sentenced to life without parole sentences, the number of individuals who had been resentenced and the number of individuals released. The Associated Press, *A State-by-State Look at Juvenile Life Without Parole*, Standard-Examiner, July 30, 2017 http://www.standard.net/National/2017/07/31/A-state-by-state-look-at-juvenile-life-without-parole (last visited October 28, 2017). This data established that there were approximately 3,169 juveniles serving life without parole. *Id.* Of those individuals who were resentenced, only 156 (less than 5%) have actually been released from prison. *Id*. Iowa had forty-six (46) juveniles sentenced to life without parole. *Id*. At the time of the analysis, all but three had been resentenced. *Id*. . Only eight have been released, including one individual who was only released to

hospice care and died shortly after being released from prison. *Id.* Accordingly, while Harrison has a theoretical eligibility for parole, the reality of being released is quite different and unlikely. Accordingly, this Court should hold that Harrison's sentence of life with the possibility of parole is unconstitutional, as applied.

III. THE DISTRICT COURT IMPROPERLY INSTRUCTED THE JURY REGARDING ROBBERY AND THE FELONY MURDER RULE.

Harrison reasserts his argument that the jury was improperly instructed regarding Robbery and the felony murder rule.

IV. THE FELONY-MERGER DOCTRINE APPLIES TO HARRISON'S FELONY-MURDER CONVICTION AND HARRISON'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ATTACK THE FELONY-MURDER BY ROBBERY WHEN THE UNDERLYING ASSAULT SERVED THE BASIS FOR THE UNDERLYING ROBBERY

Harrison reasserts that his trial counsel was ineffective for failing to attack the felony murder by robbery when the "assault" is also what caused the murder.

V. HARRISON'S TRIAL COUNSEL FAILED TO OBJECT TO TESTIMONY AND VIOLATED HARRISONS RIGHT TO CONFRONTATION AS PROTECTED UNDER THE IOWA AND UNITED STATES CONSTITUTION

Harrison reasserts his argument that he received ineffective assistance of counsel on this issue.

CONCLUSION

Harrison respectfully requests that this Court reverse his conviction of murder in the first degree. Specifically, Harrison request that this Court find that the felony-murder rule is inapplicable for juveniles. Harrison also requests that this Court hold that the jury was improperly instructed regarding the felony-murder rule and was not properly instructed regarding the requirement that the underlying robbery must arise to the level of a felonious robbery and not Robbery in the Third Degree. Harrison also requests that this Court find that Harrison received ineffective assistance of counsel for the failure to request an independent act instruction as outlined in *State v. Heemstra* regarding the underlying robbery. Harrison also requests that this Court find Harrison received ineffective assistance of counsel due to Harrison's trial counsels failure to object to the testimony of the codefendant's conviction and the admissibility of non-testifying lay witness's testimony from the codefendant's trial. Finally, Harrison requests that this Court determine that Harrison's sentence of life with the possibility of parole is unconstitutionally cruel and unusual in violation of the Iowa and United States Constitutions.

Respectfully Submitted,

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ATTORNEY'S COST CERTIFICATE

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Proof Reply Brief and Argument was $0.00, as it was electronically filed.

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Dated: October 28, 2017

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I certify on October 28, 2017, I will serve this document on the Appellee's Attorney, Iowa Attorney General's Office, by electronically filing it.

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