

**Testimony in SUPPORT OF SB 395 – No Felony Murder for Children**

*Submitted by*

**The Re-Entry Clinic, American University Washington College of Law**

The **Re-Entry Clinic at the American University Washington College of Law** represents child offenders serving life sentences in Maryland prisons. We have represented and know of child offenders sentenced to life in prison as a result of felony murder convictions. Felony murder has been described by legal scholars as “an unsightly wart on the skin of criminal law”<sup>1</sup> that has “no logical or practical basis for existence” in modern jurisprudence.<sup>2</sup> However weak its underlying principles, felony murder is even more tenuous as applied to child offenders. For this reason, we SUPPORT passage of SB 395 and urge you to vote in favor of its passage.

Felony murder allows individuals who have committed a felony to be convicted of murder without requiring the prosecution to prove the mens rea element necessary for a murder conviction.<sup>3</sup> For example, under the felony murder rule, one who commits or attempts to commit a crime like arson or burglary can nonetheless be convicted of first-degree murder. Allowing one to stand convicted of the most serious crime in our criminal justice system without so much as a mention of the individual’s intent to kill runs counter to fundamental principles of American jurisprudence.<sup>4</sup>

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<sup>1</sup> Packer, *Criminal Code Revision*, 23 U. TORONTO LJ. 1, 4 (1973).

<sup>2</sup> Moreland, *Kentucky Homicide Law With Recommendations*, 51 KY. LJ. 59, 82 (1962).

<sup>3</sup> [Legal Information Institute](https://www.law.cornell.edu/wex/mens_rea), Cornell L. School, [https://www.law.cornell.edu/wex/mens\\_rea](https://www.law.cornell.edu/wex/mens_rea) (mens rea refers to criminal intent).

<sup>4</sup> *United States v. Freed*, 401 U.S. 601, 613 (1971) (“The existence of a mens rea element is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.”); *Morissette v. United States*, 342 U.S. 246, 250-51 (1952) (“The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will . . . .”).

Felony murder is a legal fiction. First-degree homicide is the deliberate, premeditated, and willful killing of an individual, which carries a mandatory life sentence in Maryland.<sup>5</sup> Barn-burning, carjacking, and prison escape are not first-degree murder, and neither are the nine other enumerated felonies in Maryland's first-degree murder statute.<sup>6</sup>

Maryland's application of the felony murder rule allows for one to be convicted of first-degree murder and sentenced to life in prison so long as the death resulting from commission of the felony was "reasonably foreseeable." This means that if during the felony's commission Defendant A's co-defendant causes the death of another, Defendant A, even without knowledge of his co-defendant's actions, could be convicted of first-degree murder. Even more extenuated, both defendants could be convicted of first-degree murder when an unrelated third-party, who bears no relation to the perpetrators, does the killing.<sup>7</sup>

Though the felony murder doctrine in and of itself is at a constitutional crossroads, its application to children is even more indefensible. Maryland's first-degree murder statute is inconsistent with the U.S. Supreme Court's own precedent regarding child offenders. Relying on the Eighth Amendment's prohibition of cruel and unusual punishment, in *Roper v. Simmons*,<sup>8</sup> *Graham v. Florida*,<sup>9</sup> and *Miller v. Alabama*,<sup>10</sup> the Court unequivocally declared that developmental difference

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<sup>5</sup> Md. Code Ann., Crim. Law § 2-201(providing that a murder is in the first degree if it is committed in the perpetration of or an attempt to perpetrate arson, barn-burning, burglary, carjacking, prison escape, kidnapping, mayhem, rape, robbery, sexual offense, sodomy, or manufacture or possession of a destructive device).

<sup>6</sup> *Id.* (requiring a sentence of imprisonment for life without parole or imprisonment for life).

<sup>7</sup> *Jackson v. State*, 286 Md. 430 (1979) (convicting defendants of first-degree murder even though a responding police officer, rather than either of the perpetrators of the felony, fired the fatal shot that killed a bystander).

<sup>8</sup> 543 U.S. 551 (2005).

<sup>9</sup> 560 U.S. 48 (2010).

<sup>10</sup> 567 U.S. 460 (2012).

must be considered when sentencing child offenders to harsh terms of imprisonment like the ones associated with felony murder.<sup>11</sup>

Justice Breyer, joined by Justice Sotomayor concurring in *Miller v. Alabama*, spoke directly to felony murder as applied to children. The Justices declared that felony murder’s reliance on “transferred intent” “. . . is not sufficient to satisfy the intent to murder that could subject a juvenile to a sentence of life without parole.”<sup>12</sup> The Justices further emphasized that “. . . the ability to consider the full consequences of a course of action and to adjust one’s conduct accordingly is precisely what we know juveniles lack capacity to do effectively . . .”<sup>13</sup>

The United States remains virtually the only western country that still recognizes a legal principle that makes it possible “that the most serious sanctions known to law might be imposed for *accidental* homicide.”<sup>14</sup> In Maryland, this widely discarded doctrine is wholly applicable to child offenders. Even though it is important to continue to work to eradicate the myriad of injustices that result from such a doctrine, removing first-degree murder for children under a felony murder theory would represent a crucial step towards reaffirming the State’s commitment to justice. The Bill’s provisions for resentencing child offenders currently serving life sentences under felony murder convictions is another important expression of that commitment.

For these reasons, we urge you to PASS SB 395.

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<sup>11</sup> Linda M. B. Uttal & David H. Uttal, *Children Are Not Little Adults: Developmental Differences and the Juvenile Justice System*, LOYOLA PUBLIC INTEREST LAW REPORTER NO. 3, Summer 2010 (urging that children are not, and cannot be treated as, “little adults”).

<sup>12</sup> *Miller*, 567 U.S. at 490.

<sup>13</sup> *Id.*

<sup>14</sup> Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE LJ. 1325, 1383 (1979).