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VIA MyMGA
Maryland House of Delegates
Judiciary Committee
Attn: Chair Luke H. Clippinger
6 Bladen St.
Annapolis, Maryland 21401

Re: Bill No. HB 385
Felony Murder Reform
Judiciary/Judicial Proceedings Committee
January 21, 2021 Hearing Date
Position: SUPPORT

Dear Chair Clippinger:

I am a Maryland attorney in private practice who was appointed by the Office of the Public Defender to represent a juvenile named Dawnta Harris on appeal of his conviction for felony murder and sentence of life imprisonment with the possibility of parole.

Mr. Harris was just 16 years old when he drove away from the scene of a first-degree burglary being committed by three other juveniles. Officer Amy Caprio of the Baltimore County Police Department responded to the scene and pursued Mr. Harris in the vehicle. Mr. Harris stopped the vehicle in front of Officer Caprio as she was standing outside of her patrol car. As Mr. Harris began to open his door to exit the vehicle, Officer Caprio shot her firearm at the driver's seat, causing Mr. Harris to drive off in fear that he would be killed. Tragically, Officer Caprio was run over and killed in the process.

At trial, the State never pursued a theory of premeditated, deliberate, or intentional killing. Rather, the State only sought and received a conviction for felony murder.

My research for Mr. Harris's appeal has opened my eyes to the science, the Supreme Court opinions, and the national consensus which all support abolishing first-degree felony murder for juveniles.

I strongly support House Bill 385 because I believe that the bill fits squarely in the direction that this nation is headed when it comes to felony murder reform.

Legislation In Other States Demonstrates A Trend Towards Eliminating Or Downgrading Felony Murder for All Age Groups.

Maryland Courts have said that "the felony-murder rule is a legal fiction in which the intent and the malice to commit the underlying felony is 'transferred' to elevate an unintentional killing to first degree murder..." *State v. Allen*, 387 Md. 389, 401 (2005) (citation omitted). There need not be an intent to kill nor an intent to cause harm to the victim. *Finke v. State*, 56 Md. App. 450, 481 (1983), *cert. denied*, 299 Md. 425 (1984), *cert. denied*, 469 U.S. 1043 (1984). "[T]here is no need to prove wilfulness, deliberation and premeditation." *Newton v. State*, 280 Md. 260, 268 (1977) (internal citations omitted).

The reduced quantum of proof in establishing first-degree murder has caused the felony-murder doctrine to be called "[o]ne of the most controversial doctrines in the field of criminal law..." Erwin S. Barbre, Annotation, *What Felonies are Inherently or Foreseeably Dangerous to Human Life for Purposes of Felony-Murder Doctrine*, 50 A.L.R.3d 397, 399 (1973).

The United States Supreme Court has noted that current legislation provides objective evidence of contemporary national values. *Graham v. Florida*, 560 U.S. 48, 62 (2010). Current legislation nationwide demonstrates a shift towards eliminating or limiting the severity of the felony murder rule in the United States.

For instance, many states now require independent mental states to be proven other than the malice from the underlying offense itself, such as: Arkansas[1], Delaware[2], Iowa[3], Kentucky[4], Michigan[5], Massachusetts[6], New Hampshire[7], New Mexico[8], and Vermont[9].

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[1] Ark. Code Ann. 5-10-102 (2017) (death must be caused under circumstances manifesting extreme indifference to the value of human life).
[2] Del. Code., Title 11, § 636 (death must be caused recklessly in the course of a felony).
[3] IA. Stat. §§ 707.1.; 707.2; *State v. Ramirez*, 616 N.W.2d 587, 592 (2000) (abrogated on other grounds) (requiring malice aforethought not merely proof of intent to commit the underlying felony).
[4] Ky Rev Stat, § 507.020 (death must be intentional or with wantonness with extreme indifference).
[5] *People v. Aaron & People v. Thompson & People v. Wright*, 409 Mich. 672, 299 N.W.2d 304 (1980) (malice cannot be inferred from the intent to commit the underlying felony alone).
[6] *Commonwealth v. Brown*, 477 Mass. 805 (2017) (requiring finding of actual malice, not merely constructive malice).
[7] N.H. Rev. Stat. Ann., §§ 630:1, 630:1-b (death must be caused knowingly).
[8] *State v. Marquez*, 376 P.3d 815, 820 (N.M 2016) (defendant must intend to kill or know his acts created a strong probability of death or great bodily harm).
[9] 13 V.S.A. § 2301; *State v. Bacon*, 163 Vt. 279, 291 (1995) (requiring wanton disregard for human life with respect to the murder itself).

Some states have downgraded the severity of the offense and therefore, the potential penalty, such as Alaska[10], Minnesota[11], New York[12], Ohio[13], Pennsylvania[14], and Wisconsin[15].

Hawaii has actually eliminated the felony murder rule in its entirety.[16] Hawaii has condemned dispensing with the need to prove the culpability of a mental state of murder and notes that the rule does not serve a legitimate deterrent function since the actor has already disregarded the presumably sufficient penalties imposed for the underlying felony.[17]

Florida passed legislation altering its juvenile-sentencing scheme so that a juvenile convicted of felony murder may not be sentenced to life imprisonment until after a sentencing hearing that is in accordance with Fla. Stat. Ann. § 921.1401. *See* Fla. Stat. Ann. § 775.082(b) (2014). Specifically, the sentencing court *must* consider ten factors relevant to the offense and the defendant's youth and attendant circumstances. Fla. Stat. Ann. § 921.1401. If the sentencing court then determines that a life sentence is appropriate, the juvenile will be automatically entitled to a review of his sentence after 25 years. Fla. Stat. Ann. § 921.1402(2)(a).

The United States is not the only country making sweeping reforms as it relates to felony murder. Objective evidence of a "social and professional consensus" that a form of punishment is cruel and unusual may include trends and views from outside the United States. *See Atkins v. Virginia*, 536 U.S. 304, 316-17, n.21 (2002); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) England abolished its version of felony murder in 1957.[18] India likewise has abolished its version of felony murder.[19] The Canadian Supreme Court eliminated accessorial felony murder liability because such punishment runs counter to "the principle that punishment must be proportionate to the moral blameworthiness of the offender."[20]

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[10] Alas. Stat. § 11.41.110 (a)(3).
[11] Minn. Stat. Ann., §§ 609.185, 609.195 (third-degree murder with a sentence of not more than 25 years).
[12] N.Y. Penal Law, § 125.25 (McKinney).
[13] Ohio Rev Code Ann, § 2903.04 (the death of another proximately resulting from the offender's commission or attempt to commit a felony is involuntary manslaughter).
[14] Pa. Cons. Stat. Ann., tit. 18, § 2502 (Purdon).
[15] Wis Stat Ann, §§ 940.02(2), 939.50(3)(b) (Class B felony which is punishable by imprisonment not to exceed 20 years).
[16] *See* Haw. Rev. Stat. Ann. § 707-701.
[17] *Id.* (commentary section).
[18] English Homicide Act. 1 (1957), 5 and 6 Eliz. 2, c.11.
[19] Indian Penal Code §§ 299, 300 and comments (Ranchhoddas 1951).
[20] R. v. Martineau, [1990] 2 S.C.R. 633 (Can.).

Felony Murder Becomes More Controversial When Applied To Juveniles Because Juveniles Have Lessened Capacity And Lessened Culpability Than Their Adult Counterparts.

The criticism of the felony murder rule has grown stronger when applied to juveniles. *See generally*, Erin H. Flynn, Comment, *Dismantling the Felony-Murder Rule: Juvenile Deterrence and Retribution Post- Roper v. Simmons*, 156 U. Pa. L. Rev. 1049 (2008).

In *Miller v. Alabama*, 567 U.S. 460 (2012), Supreme Court Justice Breyer explained that the rationale of transferred intent in the context of felony murder fails when applied to juveniles. "[I]n the context of felony-murder cases, the question of intent is a complicated one. 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." *Miller*, 567 U.S. at 491 (Breyer, J. concurring) (internal citation omitted). "[T]his type of 'transferred intent' is not sufficient to satisfy the intent to murder that could subject a juvenile," as in *Miller*, to a sentence of life without parole. *Id.* The Supreme "Court has made clear that this artificially constructed kind of intent does not count as intent for purposes of the Eighth Amendment." *Id.* (Breyer, J. concurring).

Justice Breyer further explained that:

> At base, the theory of transferring a defendant's intent is premised on the idea that one engaged in a dangerous felony ***should understand*** the risk that the victim of the felony could be killed, even by a confederate...Yet 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.

Id. at 492 (Breyer, J., concurring) (citing majority at 470-473) (emphasis added).

In *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court identified three general differences between juveniles and adults which "demonstrate why juvenile offenders cannot with reliability be classified among the worst offenders." 543 U.S. at 569.

(1) A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults, and result in impetuous and ill-considered actions and decisions;

(2) Juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure, in part because juveniles have less control, or less experience with control, over their own environment; and

(3) The character of a juvenile is not as well formed as that of an adult, the personality traits of juveniles are more transitory, less fixed.

Id. at 569-70.

The Supreme Court determined that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult..." *Id.* at 570.

In a later decision, the Supreme Court again recognized that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *See Graham v. Florida*, 560 U.S. 48, 68 (2010).

In yet another decision, the Supreme Court held that even for homicide offenses, individualized sentencing is required for the sentencer to have the ability to consider the "mitigating qualities of youth" because "youth is more than a chronological fact." *Miller v. Alabama*, 567 U.S. 460, 476 (2012). Juveniles have "lessened culpability" and greater "capacity for change." 567 U.S. at 471. "[W]e know" that juveniles are less culpable of the offense and less deserving of punishment than adults who commit the same offense. *Miller*, 567 U.S. at 492 (Breyer, J. concurring).

A Juvenile Charged With Felony Murder Has Diminished Culpability

"[W]hen compared to an adult murderer, a juvenile offender who did not kill, or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis." *Graham*, 560 U.S. at 69.

First, a juvenile convicted of felony murder is not as culpable as a juvenile convicted of premediated murder because of this issue of artificial transferred intent that replaces the mental state. Thus, all homicides are not the same. "It is fundamental that causing harm intentionally must be punished more severely than causing the same harm unintentionally." *Enmund v. Florida*, 458 U.S. 782, 797 (1982).

Second, a juvenile convicted of felony murder is not as culpable as an adult convicted of felony murder because of the juvenile's physiological shortcomings making them as a class, less culpable than adults. *Roper v. Simmons*, 543 U.S. at 569; *Graham*, 560 U.S. at 68, *Miller*, 567 U.S. at 471; *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982).

Underlying all rationales for imposing felony murder liability is the assumption that an individual who takes part in a felony should understand, foresee, and thus reasonably assume the risk that someone might get killed during the commission of a felony. However, what is "reasonably foreseeable" to an adult is likely not "reasonably foreseeable" to a child. *See J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011). Juveniles lack impulse control, the ability to plan ahead, and the ability to avoid risks. This is based on the adolescent's brain not being fully matured in the regions and systems relating to higher-order executive functions. *Miller*, 567 U.S. at 472, n. 5 (citing Brief for American Psychological Association et al. as *Amici Curiae* 4).

Hence, an adolescent is more willing to act as an accomplice in an "inherently dangerous" felony. *See Miller*, 567 U.S. at 471; *see also Roper*, 543 U.S. at 569. Holding an adolescent liable for murder because he or she should have been able to "reasonably foresee" the same risks as an adult is illogical.

Further, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure" than adults. *Roper*, 543 U.S. at 569 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). Juveniles have limited "contro[l] over their own environment." *Roper*, 543 U.S. at 569. As "[m]id-adolescence is marked by decreased dependency on parental influence and increased dependency on peer influence," an adolescent's decision to participate in a felony is more often driven by fear of ostracism than rational thinking. Alison Burton, A Commonsense Conclusion: Creating A Juvenile Carve Out to the Massachusetts Felony Murder Rule, 52 HARV. C.R.-C.L. L. REV. 169, 186-87 (2017) (internal citation omitted).

Diminished Penological Justification for Juveniles Charged with Felony Murder

The Supreme Court has determined that the "distinctive attributes" of juvenile offenders "diminish the penological justifications for imposing the harshest sentences" on juveniles. *Miller*, 567 U.S. at 472.

A juvenile sentenced to life imprisonment for felony murder will serve more years and a greater percentage of his life in prison than an adult offender; thus, a juvenile and an adult would receive the same punishment in name only. *Graham*, 560 U.S. at 70.

Transferring intent to juvenile accomplices results in a disproportionate assignment of culpability given their reduced blameworthiness and moral culpability. "[W]hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." *Graham*, 560 U.S. at 69.

"Two primary justifications are given for the felony murder rule: deterrence and retribution." Alison Burton, Note, *A Commonsense Conclusion: Creating a Juvenile Carve Out to the Massachusetts Felony Murder Rule*, 50 Harv. C.R.-C.L. L. Rev 169, 172 (2017). Yet, both of these justifications are unsuitable when considering juveniles.

The *Miller* Court recognized that "the case for retribution is not as strong with a minor as with an adult" and that deterrence does not work in the context of a juvenile because "the same characteristics that render juveniles less culpable than adults – their immaturity, recklessness, and impetuosity, make them less likely to consider potential punishment." *Id.* at 472 (internal citations omitted). *See also Graham*, 560 U.S. at 72 (citing *Roper*, 543 U.S. at 571).

House Bill 385 Aptly Recognizes The Shortcomings Of Felony Murder When Applied To Juveniles While Continuing To Hold The Juvenile Accountable For His Actions In A Meaningful Way.

House Bill 385 is not a "get out of jail free" card. By contrast, the bill still holds the juvenile accountable for his actions and merely reduces the crime from first degree murder to second degree murder thus reducing the maximum potential sentence from life imprisonment to 40 years imprisonment. 40 years imprisonment is still an extraordinary period of incarceration for a juvenile who will be losing the prime years of his life to prison. Acquiring formal education, attaining gainful employment, and beginning a family are all usually accomplished before a person is in his mid-50s. But at least this gives a juvenile a chance to live some of their adult life from behind bars.

House Bill 385 aligns with the reforms taken by other States that have downgraded the severity of felony murder and the possible maximum penalty.

House Bill 385 ameliorates the flaws in requiring a class of individuals with diminished capacities from being held as culpable as their adult counterparts.

House Bill 385 would still permit the State to seek a first-degree murder conviction for an intentional murder committed by the juvenile.

I support this bill because it strikes an appropriate balance between downgrading a form of first-degree murder which is riddled with flaws due to the supplanting of artificial intent for a class of people with diminished capacities, while still allowing the prosecution of first-degree murder for those juveniles who commit a premeditated, deliberate, or intentional killing.

A juvenile who does not intend to kill a person, or who does not actually kill the person, should not be convicted of first-degree murder and sentenced to life imprisonment. A juvenile who does not fully appreciate the likely consequences of his actions, who is influenced by his peers, and who is still maturing, should not be punished to the same extent as an adult who is similarly convicted of felony murder. The Supreme Court has said so on multiple occasions. The science drove those opinions. Many states and countries have begun to eliminate or downgrade felony murder for adults. Maryland would be wise to be at the forefront by eliminating felony murder for all juveniles.

Therefore, I strongly urge the passage of this felony murder reform bill.

Sincerely,

Megan E Coleman

Megan E. Coleman