MONTGOMERY COUNTY, MARYLAND
WOMEN'S DEMOCRATIC CLUB
P.O. Box 34047, Bethesda, MD 20827 www.womensdemocraticclub.org

House Bill 385
Criminal Law-Felony Murder-Limitation and Review of Convictions for Juveniles
Judiciary Committee – January 21, 2021
SUPPORT

Thank you for this opportunity to submit written testimony concerning an important priority of the **Montgomery County Women's Democratic Club** (WDC) for the 2021 legislative session. WDC is one of the largest and most active Democratic Clubs in our County with hundreds of politically active women and men, including many elected officials.

WDC thanks you for your attention to reducing the penalties for felony murder as applied to children, and WDC commends Delegate Crutchfield and her cosponsors for their leadership in proposing this legislation. The legislation does not go as far as we believe justice requires, because we believe strongly that felony murder should not extend to children at all. However, we appreciate that HB 385 is a step in the right direction.

Culpability is stretched thin under the felony murder rule. The rule allows judges and juries to attribute intent to kill to an individual harboring no such intention. Based on what we know from current brain science, culpability is stretched even further when extended to child offenders. In this testimony, we will briefly describe felony murder and why it exists. We will then reference guidance from the Supreme Court as to why this troublesome doctrine is even more troubling as applied to the actions of children.

Murder is a serious crime carrying our most extreme punishments. When we think of murder, criminal law teaches us to think of intent. Intent, which explores the offender's mindset, accounts for how egregious we consider the killing. The most egregious form of murder is murder in the first degree - a deliberate, pre-meditated and willful killing. But there is an exception. An individual can be charged with first-degree murder without the requisite intent to kill. We call this exception "felony murder."

Felony murder criminalizes deaths that occur during the commission of a felony, regardless of whether the person intended the death, did the killing, or had any idea that the person who did the killing might do so. Felony murder only requires involvement in the underlying felony.

There are already stringent penalties for the underlying felonies. In Maryland, liability for a related death resulting from the commission can be added where there is "agency." Agency is applied to all participants in a crime when one of the partners-in-crime is responsible for a death. For example, if an individual joins in robbing a store, s/he can be found guilty of first-degree murder if their partner kills someone in the store. Liability is imposed even if the first partner stood guard outside and did not know their partner had a weapon. Maryland takes this imputation of intent even further. In Maryland, one can be charged with first-degree murder when an unrelated third-party who is not a perpetrator of the underlying felony commits the homicide. Maryland's highest court has gone so far as to hold that even if a police officer, rather than any of the perpetrators of a felony, fired the fatal shot, the perpetrators can be held criminally liable for the homicide.[1]

What justifies such an extension of intent to an otherwise unintentional killing or to a killing not inflicted by the perpetrators at all? When we punish for crimes, we think of two principles: deterrence and retribution. For deterrence under felony murder, we must assume that the person committing the crime is aware that he will face severe punishment for any death that occurs during its commission and thus will be more careful to forestall such danger or not commit the crime at all. For purposes of retribution, we must view the person committing the crime as responsible for harm caused, even if he did not intend it. With regard to deterrence, we are told that the punishment for the underlying felony is simply not enough and are asked to accept that an unintended or unforeseen act can be

[1] *Lockhart v. State*, 286 Md. 420, 408 A.2d 711 (1979). The Ala[illegible]

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deterred. With regard to retribution, we punish for culpability beyond the act committed by resorting to this flawed legal construction.

The Supreme Court has given us guidance about applying felony murder to child offenders. In *Roper v. Simmons,* the Court acknowledged that youth lack the ability to fully evaluate the consequences of their actions and that they are more susceptible to peer pressure.[2] In *Graham v. Florida,* the Court emphasized that, "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability."[3] Concurring in *Miller v. Alabama,* Justice Breyer, joined by Justice Sotomayor, expanded on juveniles' lack of adult moral culpability:

> As an initial matter, this Court has made clear that this artificially constructed kind of intent does not count as intent for purposes of the Eighth Amendment. We do not rely on transferred intent in determining if an adult may receive the death penalty . . . 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** . . . Justice Frankfurter cautioned, "Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to a determination of a State's duty toward children." [4] (emphasis added).

We are troubled by the existence of a felony murder rule in our state. We are even more deeply troubled that this doctrine extends to children. As the US Supreme Court has made clear, the theory for transferring intent under felony murder is tragically flawed as applied to offenses committed by children. When children commit crimes, we want to deter them and others, and we want retribution—*for the crime committed*. We lose all legitimacy when we rely on fallacious reasoning to impose our most extreme punishments on those whose culpability is so removed from the criminal act we punish.

Thus, while we would prefer stronger legislation, we urge you to pass HB 385. It is better than the law as it currently stands and is a positive first step to reform Maryland's overly harsh and arguably unconstitutional approach to juvenile sentencing.

We ask for your support for HB 385 and strongly urge a favorable Committee report.

Respectfully,

Diana Conway
President

[2] *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005).
[3] *Graham v. Florida*, 560 U.S. 48, 69 (2010).
[4] *Miller v. Alabama*, 567 U.S. 460, 490 (2012).