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Legislative Update:
Amending the Illinois Felony Murder Provision: Is It Enough?

*Nicole Pijon**

I. INTRODUCTION

In the early morning hours of August 13, 2019, a seventy-five-year-old resident was awoken by headlights shining near the driveway of his secluded home in Old Mill Creek, a small town in northern Illinois, just five miles south of the Wisconsin border. After noticing several individuals approach his car, the resident—loaded gun in hand—exited his house to investigate. As the group moved towards him, he noticed an object in one of the stranger’s hands and, out of fear, fired shots in their direction. One of the bullets struck and killed the youngest of the group of six, fourteen-year-old Ja’quan Swopes.

Two days later, the Lake County State’s Attorney announced adult murder charges—not against the shooter, but rather against the teenagers accompanying Ja’quan on that fateful night, whom the news media subsequently dubbed the “Lake County Five.” Initial reactions to the charges were uniform: community members, parents, and juvenile law experts alike were outraged by the filing decision. Media attention and public backlash brought to light the broad reach of Illinois’ felony murder provision, prompting questions as to its soundness. *How can someone be charged with murder when he or she did not pull the trigger?* In contrast to the laws of most states, the Illinois felony murder rule long operated on a theory of proximate cause, as opposed to one of agency. As a result, participants in a forcible felony offense could be charged with murder for *any* resulting death, regardless of who was the but-for cause.

The Lake County Five generated an unprecedented amount of controversy. In response to heightened public scrutiny and criticism from his chief political opponent for reelection, the Lake County State’s Attorney dismissed the charges a month later, transferring the four youngest back to the local juvenile court. Nonetheless, the juveniles’ reprieve from murder charges and resolution of their conduct in a juvenile forum marks the exception, not the rule. The Lake County Five were neither the first nor the last group of young offenders to be prosecuted for a killing committed by a third-party.

The case sparked discourse over the state’s felony murder provision, propelling House Bill 1615 to the forefront of juvenile justice reform discussions. The bill proposed amending the Illinois first-degree murder statute by eliminating deaths caused by third parties as a ground for felony murder prosecution—the first of its kind to advocate for the adoption of an agency approach. Despite collecting strong support, the bill never saw the light of day; the COVID-19 pandemic halted the General Assembly’s endeavors in March 2020. The legislature, however, revived its efforts by including the felony murder amendment provided for in House Bill 1615 in a broader, more comprehensive reform

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package, House Bill 3653. It advanced quickly through both houses, and Governor J.B. Pritzker signed the landmark bill into law on February 22, 2021.

This article describes Illinois' original felony murder provision, demonstrating its use to unfairly prosecute juvenile offenders, and addresses the implications of converting to an agency theory. It embraces House Bill 3653, but contends that its adoption will nevertheless prove inadequate to protect youth from prosecutorial overreach in absence of an absolute felony murder exception for juveniles.

II. AGENCY VS. PROXIMATE CAUSE: WHO CAN THE STATE CHARGE?

Although states remain divided on the nuances of felony murder, all but six have a codified variant of the doctrine. Twenty-five states follow an agency theory, while nineteen—including Illinois, until this year—have adopted a proximate cause approach. While the distinctions between these two positions are striking, both impose liability on the basis of strict liability.

Under a proximate cause theory of felony murder, all participants in a felony are held accountable for any deaths that result, including those caused by third parties. Conversely, the agency approach to felony murder is notably narrower; a state may impose criminal liability only for deaths a defendant or his co-defendant caused during the commission of a felony. This theory of accountability mirrors the common law rule and comports with traditional understandings of culpability, at least with respect to adult offenders. It presumes that “the hand of one is the hand of all” for purposes of criminal responsibility.

The state of Illinois embraced the controversial proximate cause theory of felony murder for nearly 200 years, until the adoption of House Bill 3653. Prior to the bill, an individual could be charged with first-degree murder for a killing they *neither intended nor caused*, so long as the death occurred during “the attempt or commission of a forcible felony other than second-degree murder.” In other words, the felony-murder provision widened the scope of the first-degree murder statute by expanding its application to accidental deaths and deaths caused by third parties. Participants in the predicate forcible felony could thus be charged for deaths caused by victims, police officers, or bystanders. It was, in effect, a form of vicarious liability.

Illinois' felony murder provision was broader than other states employing the proximate cause approach in two respects. First, the language required only that the death occur *during* the attempt or commission of a forcible felony. This “during” requirement focused on the temporal relationship between the underlying felony and the death. Most other states have narrowed their statutes to apply exclusively to deaths occurring *in furtherance* of the commission of the crime—that is, the killing was done to advance or facilitate the underlying felony. Second, while Illinois enumerates particular crimes that constitute forcible felonies, it opened the door for broad application by defining them to include any “felony which involves the use or threat of physical force or violence against any individual.”

The proximate cause theory of felony murder is analogous to the concept of tort liability. The Illinois Supreme Court has reasoned that when a defendant's “attempt to

commit a forcible felony sets in motion a chain of events which were or should have been within his contemplation,” he should be held responsible for any resulting death. This notion of foreseeability should, in principle, function to curb the severity of the felony murder doctrine. But by determining that accidental deaths or deaths caused by third parties should be within one’s contemplation, any protective impact of the foreseeability requirement is effectively nullified. In fact, Illinois’ highest court has noted that a defendant is not required to contemplate that his actions would result specifically in death.

Support for this theory of felony murder hinges on its purported deterrent value. The threat of severe punishment for first-degree murder, it is argued, discourages would-be offenders from engaging in the underlying, unlawful conduct. However, this rationale presumes that would-be offenders, including youth as young as thirteen, understand the full breadth of the felony murder rule. Opponents also challenge the deterrence justification on the basis that a co-defendant lacks control over the actions of third parties.

Following House Bill 3653, third-party nonparticipants are no longer eligible for charges under the felony murder provision. A key portion of the amendment, however, was ultimately excluded from the larger reform package. The amendment, as originally drafted in House Bill 1615, called for revisions to Illinois’ accountability statute, which imposes liability on an accomplice who solicits, aids, abets, agrees, or attempts to aid a defendant in the planning or commission of an offense. Had the amendment adhered to its original language, it would have required the element of knowledge for an accomplice to be held liable for the defendant’s actions. In other words, it would have limited the felony murder provision further by allowing for prosecution if, and only if, an accomplice was aware that the defendant would engage in conduct likely to result in great bodily harm or death.

III. APPLICATION OF FELONY MURDER TO JUVENILE OFFENDERS

A. Due Process Concerns

A basic tenet of criminal jurisprudence is that the government must prove a defendant’s *mens rea* (“guilty mind”) beyond a reasonable doubt to secure a conviction. Requiring proof of criminal intent safeguards from prosecutorial overreach and unwarranted convictions. Although the agency approach limits the scope of felony murder to only the participants in an underlying offense, it nonetheless suffers from the same defect as the proximate cause theory: it substantially eases the state’s burden of proof in criminal prosecutions.

Prosecution for first-degree murder requires evidence of specific intent, meaning that the government must show “that the defendant acted with the intent to kill the victim or with the knowledge that his acts created a strong probability of death or great bodily harm”; however, felony murder does not. Instead, the government need only demonstrate that the defendant possessed the requisite *mens rea* for the predicate felony, such as robbery or burglary, and that the felony was conducted with an “independent felonious purpose” other than the killing itself. In other words, the forcible felony must not be inherent in the act of murder itself. Proof that a defendant attempted to or committed the predicate felony, in effect, creates a conclusive presumption of guilt for murder. It is for this reason

opponents contend that the proximate cause theory runs afoul of due process by impermissibly lowering the state's burden of proof and allowing for prosecution in the absence of the necessary criminal intent.

These due process implications are of particular concern in the context of juvenile delinquency. By reducing the state's burden of proof, the felony murder provision dilutes procedural protections over the state's most vulnerable population and operates in tandem with the state's transfer provisions to serve as a direct avenue to adult court prosecution. If the state files a delinquency petition against a juvenile for charges relating to felony murder, the adult criminal court may assume jurisdiction by one of three ways.

First, the juvenile court judge may waive a juvenile as young as thirteen to criminal court for *any* felony pursuant to the state's discretionary transfer provision. Second, if probable cause exists to believe a juvenile aged fifteen years or older has committed a forcible felony, Illinois law creates a presumption that the juvenile is not a fit and proper subject for juvenile court services. Only juveniles previously adjudicated or found guilty of a forcible felony committed in furtherance of criminal activity by an organized gang are subject to this presumptive transfer mechanism. If these conditions are satisfied, the burden shifts to the juvenile to rebut the presumption by clear and convincing evidence. If the juvenile is unable to show amenability to rehabilitation, the case will be transferred to adult criminal court for prosecution.

Third, the state may prosecute a juvenile under the extended juvenile jurisdiction (EJJ) statute, so long as the juvenile is at least thirteen years of age and is alleged to have committed a felony. Unlike discretionary and presumptive transfers which result in a complete and final transfer of jurisdiction, EJJ is an alternative form of prosecution that uniquely provides for concurrent jurisdictional authority over a minor. The juvenile court imposes both a juvenile and adult sentence, but the latter sentence is stayed and vacated on the condition that the juvenile sentence is successfully completed. If a minor commits a new offense before completing his sentence, juvenile jurisdiction is automatically terminated and the adult sentence is triggered. Should a minor violate the conditions of his juvenile sentence, regardless of how technical that violation may be, it is within the juvenile court's discretion to revoke the stay of the adult sentence.

The felony murder doctrine works in concert with each of the above transfer mechanisms to pave the way for adult prosecution for felony murder or the underlying forcible felony and reduce the prosecutor's burden once in criminal court. The discretionary transfer provision, in particular, is illustrative: for a juvenile as young as thirteen to be criminally prosecuted for first-degree murder, the state need only prove that the juvenile participated in the predicate felony to achieve conviction. Indeed, state prosecutors continue to take advantage of this reduced burden.

In presuming that juveniles are capable of forming the identical *mens rea* as their adult counterparts, the felony murder doctrine ignores the developmental context of adolescent crime. Juvenile offenders, by virtue of their youth, are less culpable. Mounting research confirms that neurobiological systems governing emotional regulation, impulse control, foresight, and evaluation of risks, are underdeveloped in the adolescent brain. Juveniles not only have difficulties contemplating the consequences of their own conduct, but also those of other people. This is a critical consideration in evaluating the policy

behind prosecuting youth for felony murder. Juveniles are malleable, and should be treated as such. Criminal behavior is typically the result of a complex combination of internal factors and environmental influences. Delinquency—even involving violent, dangerous conduct—cannot be viewed in a vacuum.

B. Disproportional Impact on Youth of Color

Importantly, the severity of the felony murder doctrine not only disproportionately affects juvenile offenders, but particularly those of color. Due to a lack of comprehensive data collection, the total number of juveniles serving criminal sentences for felony murder or underlying felonies in Illinois remains unknown. Available data, however, reveals that the juvenile justice system is flawed at its core; Black youth have disproportionate contact with the juvenile justice system at all stages. More than 70% of juveniles committed to the Department of Juvenile Justice are Black, despite the fact that Black youth comprise only 15% of the state's population. Although overall rates of admission to detention centers are decreasing, the overrepresentation of Black youth persists. The same holds true for transfer decisions and EJJ prosecutions. In 2016, 124 juveniles were transferred to adult court in twenty-four Illinois counties; the state's other seventy-eight counties have not disclosed their data. Of those 124 known cases, 65% were Black. In turn, Black youth are likewise overrepresented in the Illinois Department of Corrections.

The felony murder doctrine in itself, especially when based on a proximate cause theory, undermines the rehabilitative purpose of Illinois' juvenile justice system by obliterating due process protections and paving the way for unnecessary criminalization of youth. Although adoption of an agency theory narrows charging eligibility, the statute will nevertheless continue to reach youth unfit for adult prosecution.

IV. HOUSE BILL 3653: POLICY IMPLICATIONS AND RECOMMENDATIONS

House Bill 3653 advanced through the General Assembly with exceptional support, but was also met with strong opposition regarding its other, more controversial portions—namely, those eliminating cash bail and imposing additional police accountability measures. Fortunately, the contention surrounding these parts ultimately did not defeat conversion to an agency theory of felony murder.

The bill proposed two key changes to shift the state to a theory of agency. First, it restricted initiation of felony murder charges solely for deaths caused by “participants” of the offense, thereby eliminating liability for deaths resulting from third-party actions. Second, deaths must occur “in the course of and in furtherance of” the underlying forcible felonies. This causation limitation is considerably narrower than the provision's prior “during” requirement. By requiring killings to be *in furtherance of*, the amendment necessitates a close nexus between the felonious conduct and any resulting death. In short, it follows traditional notions of reasonable foreseeability.

Holding individuals accountable for deaths caused by third parties was unsound policy, rooted in flawed rationales that conflict with basic concepts of culpability. Modifying the Illinois felony murder provision to reflect an agency theory of liability is a

step in the right direction, and it aligns the state with the majority of jurisdictions. Even so, the agency theory brings its own challenges, allowing for a juvenile to be prosecuted for the acts of his accomplices, without distinguishing between intentional and accidental deaths or considering developmental factors.

In the absence of an absolute felony murder exception, juvenile offenders remain vulnerable to adult court transfer and prosecution for felony murder or the underlying forcible felony at a reduced burden of proof. Categorically excluding youth from the doctrine promotes the state's objective of rehabilitating and protecting its youth.

V. CONCLUSION

The felony murder doctrine persists as a major concern in the state's juvenile justice policy, enabling unwarranted criminalization of youth, particularly those of color. Effective accountability demands developmentally-appropriate treatment, not decades behind bars. Youth are entitled to the most stringent protections of the law, yet remain subject to reduced prosecutorial burdens for felony murder. A juvenile felony murder exception is necessary to show that Illinois youth have value in the eyes of the law.

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