No. 18-9761

In the Supreme Court of the United States

JOHN GIVENS, PETITIONER,

v.

ILLINOIS, RESPONDENT.

On Petition for a Writ of Certiorari to the Illinois Appellate Court

BRIEF IN OPPOSITION

KWAME RAOUL
Attorney General of Illinois
JANE ELINOR NOTZ*
Solicitor General
SARAH A. HUNGER
Deputy Solicitor General
MICHAEL M. GLICK
Criminal Appeals Division Chief
ERIN M. O'CONNELL
Assistant Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-5376
jnotz@atg.state.il.us

*Counsel of Record

Attorneys for Respondent

QUESTION PRESENTED

Whether certiorari review is warranted of a state intermediate appellate court's unpublished, non-precedential decision that the Constitution allows a State to hold those who intentionally commit forcible felonies responsible for foreseeable deaths caused by their conduct, where that decision turned on the application of settled legal principles without implicating any split in authority.

RELATED CASES

- *People of the State of Illinois v. John Givens*, No. 12 CR 9682, Circuit Court of Cook County. Conviction and sentence entered on June 15, 2015.

- *People of the State of Illinois v. John Givens*, No. 1-15-2031, Illinois Appellate Court, First District. Opinion affirming conviction and sentence filed on October 9, 2018, modified on denial of rehearing on November 13, 2018.

- *People of the State of Illinois v. John Givens*, No. 124331, Illinois Supreme Court. Order denying petition for leave to appeal entered on March 20, 2019.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

ILLINOIS STATUTES INVOLVED

Illinois's first degree murder statute, 720 Ill. Comp. Stat. 5/9-1(a) (2012), provides:

> A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death . . . he is attempting or committing a forcible felony other than second degree murder.

Illinois's criminal code defines "forcible felony," 720 Ill. Comp. Stat. 5/2-8 (2012), as:

> treason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnaping, kidnaping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement and any other felony which involves the use or threat of physical force or violence against any individual.

BRIEF IN OPPOSITION

In 2012, Petitioner John Givens and two accomplices were detected breaking into an electronics store in the middle of the night. Police arrived on the scene, surrounded the store, and ordered them to surrender. But the offenders did not comply. Instead, they attempted to escape by driving a van—which they had continued to fill with stolen goods—through a closed garage door, hitting a responding officer standing on the other side of the door. Other officers, believing the struck officer was injured or trapped under the van, fired their weapons at the van, killing one of petitioner's accomplices. Because Illinois has chosen, as a matter of policy, to hold those who intentionally commit forcible felonies responsible for foreseeable deaths caused by their conduct, petitioner was convicted of felony murder.

Petitioner now seeks review from this Court, arguing that his conviction violates the Due Process Clause of the United States Constitution because Illinois law purportedly makes felony murder a "strict liability" offense and creates a "mandatory irrebuttable presumption" of guilt. The question petitioner presents, however, is based on a misapprehension of Illinois law; contrary to petitioner's suggestion, Illinois's felony murder rule (like the rule in other States) requires the prosecution to prove that the defendant intended to commit a forcible felony. To be sure, consistent with the leeway granted under the Constitution, the States have

taken various approaches to felony murder, but those differences derive from States' unique statutory and common-law schemes, not a disagreement over the dictates of the federal Due Process Clause. Thus, not only is petitioner's question not presented by this case, but the Illinois Appellate Court's resolution of his due process claim also does not implicate a split among state high courts. This Court's review therefore is unwarranted.

There is likewise no basis to review petitioner's Eighth Amendment claim; a twenty-year sentence for felony murder is not grossly disproportionate to his crime. In any event, this case would be a poor vehicle to resolve the Eighth Amendment question, as it was not addressed by the state appellate court below.

STATEMENT

1. Following the death of petitioner's accomplice, David Strong, the State indicted petitioner and his other accomplice, Leland Dudley, for the first degree murder of Strong, alleging that, in committing burglary, "they set in motion a chain of events that caused [Strong's] death." C75. The men were also charged with the aggravated battery of Officer Michael Papin (who was struck by their fleeing vehicle), burglary, and possession of a stolen motor vehicle. C80, C86-87.

2. At the joint jury trial, petitioner and Dudley contested their guilt of felony murder on the theory that the officers' shooting at the van constituted excessive force and thus relieved them of responsibility for Strong's death. See

R.GG134-141 (defendants' opening statements); R.HH183-196 (defendants' closing arguments); see also generally *People v. Jones*, 876 N.E.2d 15, 29 (Ill. App. Ct. 2007) (it is a defense to felony murder that the victim's death "result[ed] from a source unconnected [to] or independent of" the defendant's actions).

The evidence at trial showed that Sergio Hernandez, who lived in an apartment above the electronics store, R.GG144, was awakened by the sounds of someone entering the closed store and called the police to report a burglary, R.GG147-148. Within minutes, officers began arriving on the scene. R.GG150, 214-215; R.HH6. Hernandez met a few of the officers at the back door to the building and let them into a common hallway. R.GG219-220.

One of the officers who entered the building, Daniel Lopez, attempted to kick down an interior door while stating, "police officers, come out, you're surrounded, just come out." R.GG221-223. After kicking in a portion of the door, Officer Lopez got onto his knees and continued stating, "police, step out, you're surrounded." R.GG225. From his position, Officer Lopez heard the slam of doors and the start of a vehicle's engine, and he saw white taillights come on. R.GG225-226. He started to yell to any officers standing outside, "they're going to bust out, get out of the way." R.GG227. Almost immediately, the van crashed through the closed garage door, and Officer Lopez saw "an officer directly ahead of [him] in all blue just

completely disappear." *Ibid.* He fired his gun at the driver six times "to eliminate the threat of the vehicle hurting anybody else." R.GG229-230.

Officer Papin was standing outside, directly in front of the garage door, when he heard the "loud revving of an engine" and an officer yell. R.HH80-81. He had no time to react before the van crashed through the door in reverse and struck him in the hip. R.HH81-82.

Officer Terrance Pratscher was standing "a few feet away" when he saw the van strike Officer Papin. R.HH13-14. Officer Pratscher lost sight of Officer Papin and believed that he had been dragged underneath the van. R.HH14. Officer Pratscher fired his weapon at the driver in an effort to stop its movement. R.HH14-15. The van crashed into another vehicle, lurched forward, then came to a stop. R.HH15-16. Officer Michael Curry was also standing close by when Officer Papin was hit and he, too, responded by firing at the van. R.HH43-46.

3. Petitioner's jury was instructed that "[a] person commits the offense of a burglary when he, without authority, knowingly enters [a] building with intent to commit therein the offense of theft." R.HH235. It was also instructed that "[a] person commits the offense of first degree murder when he kills an individual if, in performing the act which caused the death, he is committing the offense of burglary," R.HH227; and "[a] person commits the offense of first degree murder when he commits the offense of burglary and the death of an individual results as a

direct and foreseeable consequence of a chain [of] events set into motion by his commission of the offense of burglary," R.HH230. To show "that the acts of the defendant caused the death of David Strong," the jury was instructed that the State had to prove that "the defendant's acts" were "a contributing" factor and that "the death did not result from a cause unconnected with the defendant." R.HH229.

The jury convicted petitioner and Dudley of burglary, murder, aggravated battery, and possession of a stolen vehicle. R.MM253.

4. At sentencing, petitioner faced a range of twenty to sixty years for murder. See 730 Ill. Comp. Stat. 5/5-4.5-20(a) (2012). The court considered that petitioner "did not have murder in his heart that day"; although petitioner "had some stealing in his heart, some larceny," petitioner was not "looking for things to end the way they did." Supp. R.A27. Finding that "the minimum sentences will clearly meet the needs of justice in this case," the court sentenced petitioner to twenty years for murder and to concurrent terms on the remaining counts. Supp. R.A28.

5. Petitioner challenged his felony murder conviction by appealing to the Illinois Appellate Court. He argued that "the evidence was insufficient to establish that Strong's death was a foreseeable consequence of his burglary offense because it was directly attributable to the police shooting." Pet. App. 7a. Alternatively, petitioner argued that Illinois's felony murder rule violated due process, and he

urged the court to abandon Illinois's "proximate cause theory" in favor of the "agency theory of liability for felony murder" adopted by some other jurisdictions. *Id.* at 9a.

The appellate court affirmed, deeming it "well-settled that encountering resistance during the commission of a forcible felony, even in the form of deadly force, is a direct and foreseeable consequence of that felony." *Id.* at 8a. The appellate court further noted that it was foreseeable under the circumstances that police would respond with deadly force, given that officers repeatedly announced their presence outside of the electronics store, and petitioner and his accomplices "had reason to know that once the van crashed through the garage door, a police officer would be in the vehicle's path." *Id.* at 10a-11a. The appellate court thus rejected the suggestion that the shooting was not foreseeable, reasoning that the offenders used a vehicle as a "deadly weapon" as they attempted to escape. *Id.* at 11a.

The court also declined petitioner's invitation to jettison Illinois's "proximate cause" theory of felony murder. Acknowledging that some other jurisdictions had taken a different approach to felony murder, the court reasoned that Illinois's "statutory and case law dictate a different," and indeed "preferable, result." *Id.* at 10a. The court explained that "[t]he purpose behind [Illinois's] felony murder statute is to limit the violence accompanying forcible felonies, by automatically

subjecting felons to a murder prosecution . . . when someone is killed during the commission of a forcible felony." *Ibid.* And, here, "the proximate cause theory serves that purpose because defendant committed a forcible felony and Strong was killed as a result of the violence accompanying that felony." *Ibid.*

Although petitioner's appellate brief also asserted that his conviction and sentence violated the Eighth Amendment, see Brief of Defendant-Appellant, *People v. Givens*, No. 1-15-2031, at 23-24, the appellate court's opinion did not expressly address that claim.

6. Petitioner filed a petition for leave to appeal to the Illinois Supreme Court, raising his due process and Eighth Amendment challenges, Pet. App. 38a-44a, but the court denied his petition, *id.* at 23a.

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to decide whether his felony murder conviction violated the Due Process Clause and Eighth Amendment, because the Illinois felony murder statute purportedly does not require the State to prove intent. But that question is not presented by this case. To obtain a conviction for felony murder in Illinois (as in other States), the prosecution must prove that the defendant intended to commit a forcible felony. And it did so here: the State presented evidence showing petitioner's intent to commit burglary and, although not required, petitioner's intentional use of force during the attempted escape. This case,

moreover, does not highlight a debate among the States over the scope of the Due Process Clause's protections, as petitioner claims. This Court's precedents do not preclude States from making the decision to hold felons accountable for deaths foreseeably resulting from their conduct. Thus, any differences in their approaches to felony murder are based solely on policy choices made by state legislatures.

As a final matter, petitioner's Eighth Amendment theory was not passed upon by the state appellate court below and, in any event, lacks merit because his sentence was not disproportionate to his crime.

I. Petitioner's Due Process Challenge To His Felony Murder Conviction Does Not Warrant Certiorari.

A. Petitioner's question depends on a mischaracterization of Illinois's felony murder statute.

Petitioner's due process challenge to his felony murder conviction rests on two mistaken premises: (1) that Illinois makes felony murder a "strict liability" crime; and (2) that the instructions given petitioner's jury on felony murder created a "mandatory irrebuttable presumption" of guilt. Pet. 16-20.

First, in Illinois, felony murder is not a "strict liability" offense in the sense that it attaches criminal liability to an action committed without intent. See *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436-437 (1978). Instead, under Illinois law, "'[f]elony murder derives its mental state from the underlying intended offense.'" Pet. App. 9a-10a (quoting *People v. Jones*, 876 N.E.2d 15, 28 (Ill. App. Ct. 2007)). "[T]o commit felony murder, the defendant need not have had the intent to

kill; rather, the defendant must have had the intent to commit the predicate forcible felony." *People v. Colbert*, 1 N.E.3d 610, 614 (Ill. App. Ct. 2013); see also *People v. Davis*, 821 N.E.2d 1154, 1161-1163 (Ill. 2004) (holding that felony murder provision may be used only to prosecute defendant who had intent to commit predicate felony rather than intent to kill).

The cases cited by petitioner to support his "strict liability" theory, Pet. 16, are not to the contrary. Indeed, to the extent Illinois decisions discuss "strict liability" in connection with felony murder, it is in reference to the lack of a specific intent to kill, not the lack of intent to commit the underlying felony. See *People v. Causey*, 793 N.E.2d 169, 178 (Ill. App. Ct. 2003) (asserting that felony murder is "premised on strict liability" because "[t]he State is not required to prove . . . that the defendant intended to commit murder; it merely must show that the defendant intended to commit the underlying felony"); see also *People v. Klebanowski*, 852 N.E.2d 813, 821 (Ill. 2006) (restating rule that requisite intent is intent to commit underlying felony).

And whether a defendant had the requisite intent to commit felony murder is a question submitted to the jury, as this Court's precedents require. See, *e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (constitutional protections "entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt") (internal

quotations and alteration omitted). Thus, petitioner's jury was instructed that he could be convicted of burglary only if he entered a building with the intent to commit a theft. R.HH235. Petitioner could be convicted of felony murder, in turn, only if he had that intent (such that he was committing burglary) when he set in motion the events causing Strong's death. R.HH227. Therefore, Illinois's felony murder scheme does not impose strict liability.

Second, petitioner's claim that the jury instructions on felony murder created an "impermissible mandatory presumption," Pet. 18, of the type in at issue in *Morissette v. United States*, 342 U.S. 246 (1952), is also incorrect. The Constitution prohibits instructing juries to presume the required intent solely from a defendant's conduct: if the "intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury." *Id.* at 274. Here, as explained, the jury was instructed that to convict defendant of burglary and felony murder, the State needed to prove that petitioner entered the electronics store with the intent to commit a theft. R.HH.230, 235. Relying on the evidence, the jury found that the State had proved this intent. R.MM253. Accordingly, there is no merit to petitioner's contention that Illinois law violates due process because it "relieves the prosecution of its burden to prove beyond a reasonable doubt that the defendant had any conceivable mental state for the killing." Pet. 20.

B. The state appellate court correctly held that petitioner's felony murder conviction did not violate due process.

Petitioner's theory does not warrant review by this Court for the independent reason that the Illinois Appellate Court's decision was correct. Petitioner's conviction under Illinois's felony murder statute—which derives the requisite mental state from the underlying felony—does not run afoul of the Due Process Clause for the simple reason that it required a finding of intent by the jury. See *Apprendi*, 530 U.S. at 477.

Even petitioner assumes that due process is not violated by the "agency" approach to felony murder, which by definition requires that intent to kill be imputed to the defendant. Pet. 17. Instead, petitioner asserts that due process limits States to holding offenders accountable for felony murder to cases where intent to kill can be imputed from a third-party accomplice with whom the defendant shared a mental state. See *ibid.* This distinction—which treats third-party accomplices differently than any other third party—is not based on any federal constitutional principle. On the contrary, this Court has recognized that *mens rea* for murder cannot be narrowly focused on an "intent to kill," as that would exclude murders stemming from a "reckless indifference to the value of human life" or from "knowingly engaging in criminal activities known to carry a grave risk of death." *Tison v. Arizona*, 481 U.S. 137, 157-158 (1987). In the same vein, this Court has rejected attempts by lower courts to require "States to alter their

definitions of felony murder to include a *mens rea* requirement with respect to the killing." *Hopkins v. Reeves*, 524 U.S. 88, 100 (1998) (discussing principle in context of capital punishment). And finally, this Court has favorably described state laws that allow for felony murder convictions absent a specific intent to kill. See *ibid.* (analyzing state felony murder statute that did not require "proof of intent to kill"); *Tison*, 481 U.S. at 154 (noting "apparent consensus" among state courts "that substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an 'intent to kill'").

Accordingly, Illinois's decision to expand the felony murder rule to include all deaths foreseeably arising out of a forcible felony is a constitutionally permissible policy choice entrusted to the States. See, *e.g.*, *People v. Benson*, 480 N.Y.S.2d 811, 814 (N.Y. Sup. Ct. 1984) (explaining, about New York's proximate-cause approach to felony murder, that "in New York, intent to kill is not an element of felony murder," and "[a]ll the courts which have addressed this issue have ruled that the lack of the element of intent does not violate due process of law"); *State v. Brown*, 310 P.3d 29, 38 (Ariz. Ct. App. 2013) (explaining that Arizona's supreme court sustained that State's felony murder rule, which allows felon to be convicted of murder when killing was carried out by someone not participating in underlying felony, against due process and other constitutional challenges). "In our federal

system the administration of criminal justice is predominantly committed to the care of the States." *Rochin v. California*, 342 U.S. 165, 168 (1952). Thus, the Constitution places "restrictions upon the manner in which the States may enforce their penal codes," rather than "restrictions upon the powers of the States to define crime." *Id.*

This does not mean, however, that felony murder is unlimited in Illinois, as petitioner suggests. Pet. 19. It is imposed only if a defendant commits one of a list of enumerated crimes or another felony that "involves the use or threat of physical force or violence." 720 Ill. Comp. Stat. 5/2-8 (2012); see, *e.g.*, *Colbert*, 1 N.E.3d at 614 (mob action is forcible felony); *People v. Graham*, 791 N.E.2d 724, 732 (Ill. App. Ct. 2003) (home invasion is forcible felony). "It is the contemplation that force or violence against an individual might be involved combined with the implied willingness to use force or violence against an individual that makes a felony a forcible felony." *People v. Belk*, 784 N.E.2d 825, 828 (Ill. 2003). Illinois further limits felony murder by the requirement that the death be foreseeable. See, *e.g.*, *People v. Lowery*, 687 N.E.2d 973, 977-978 (Ill. 1997). "[W]hen a felon's attempt to commit a forcible felony sets in motion a chain of events which were or should have been within his contemplation when the motion was initiated," the felon is "held responsible for any death which by direct and almost inevitable sequence results from the initial criminal act." *Id.* at 976.

This case illustrates these principles. Petitioner does not contest that he intended to commit the forcible felony of burglary. 720 Ill. Comp. Stat. 5/2-8 (2012). And his willingness to use force in committing that felony goes well beyond the merely theoretical: petitioner and his accomplices blindly drove a van through a closed garage door to escape a building they knew to be surrounded by police officers. R.GG221-227. Petitioner is therefore responsible for the foreseeable death of Strong that occurred when officers responded to petitioner's use of force with their own force.

Petitioner nevertheless contends that "he was not permitted to introduce evidence in support of a defense that Strong's death was not foreseeable." Pet. 20. But petitioner presented this theory in his closing arguments, R.HH192-196, and the jury was instructed that Strong's death needed to be "a direct and foreseeable consequence of a chain [of] events set into motion by [petitioner's] commission of the offense of burglary," R.HH230. The trial court excluded one piece of evidence—the police department's policy concerning the use of force against vehicles—reasoning that the policy governed "internal matters . . . between the department and the officers that work for it," did not have the force of law, and might confuse the jury. R.HH158-159. Although petitioner argued on appeal in state court that this evidentiary ruling was an abuse of discretion, see Pet. App. 12a-13a (state appellate court's rejection of argument), he does not press that

argument here, and the state courts' purported misapplication of state evidentiary law would not warrant certiorari in any event.

C. Although States differ in their treatment of felony murder as a result of their unique statutory and common-law schemes, these differences present no conflict on any federal constitutional question.

That other States have, consistent with the leeway granted them by the Constitution, see *Patterson v. New York*, 432 U.S. 197, 201-202 (1977), defined felony murder differently than Illinois presents no conflict of federal constitutional dimension, contrary to petitioner's suggestion. See Pet. 21, 24. The differences derive from policy choices enshrined in state statutes and the development of state-specific common law, not from disagreement over any constitutional question. And the States' divergent approaches to felony murder as a matter of state law and policy do not satisfy the criteria for certiorari.

The crux of petitioner's argument on this point is his contention that in rejecting a proximate-cause theory of liability, "many state courts conclude[d] that it [runs] afoul of this Court's jurisprudence." Pet. 22. Petitioner fails, however, to identify a single case so holding. Petitioner cites *State v. O'Kelly*, 84 P.3d 88 (N.M. Ct. App. 2003), a decision of New Mexico's intermediate appellate court, for this proposition, Pet. 22, but that case did not find that a proximate-cause theory

violates the Constitution.[1] Instead, *O'Kelly* underscores that each State's felony murder doctrine rests on its unique statutory scheme and common law development. See 84 P.3d at 97 (recognizing that other States follow the proximate-cause approach to felony murder but explaining that "[a] review of New Mexico case law and policy reveals . . . that the agency approach fits with New Mexico's unique felony murder doctrine").

Other cases cited by petitioner as having rejected the proximate-cause theory of liability for felony murder likewise do not support his argument. None of these cases doubted that felony murder could, consistent with the Constitution, be expanded to hold offenders accountable for a death at the hands of a non-accomplice third party. Instead, these cases ultimately reached holdings under state law. In *Commonwealth v. Redline*, 137 A.2d 472 (Pa. 1958), for instance, the Pennsylvania Supreme Court rejected a proximate-cause theory of felony murder, not because such prosecutions would violate the Constitution, but because it was the province of Pennsylvania's legislature to expand criminal liability in that fashion. *Id.* at 474 (if Pennsylvania "should deem it necessary to the public's safety and security that

---

[1] The appellate court in *O'Kelly* referenced an earlier decision of that State's supreme court, *State v. Ortega*, 817 P.2d 1196 (N.M. 1991), which had stated that *Morissette*, 342 U.S. 246, prompted it to adopt an intent requirement for felony murder "identical to the intent requirement for second degree murder." *O'Kelly*, 84 P.3d at 94. As explained, this Court's precedents, including *Morissette*, do not preclude States from holding offenders accountable absent a showing that the defendant acted with the *mens rea* for murder. See *supra* pp. 10-12.

felons be made chargeable with murder for *all* deaths occurring in and about the perpetration of their felonies," then "the legislature should be looked to for competent exercise of the State's sovereign police power to that end") (emphasis in original).

State supreme courts in West Virginia, Idaho, New Jersey, and Virginia have also concluded that the authority to expand the felony murder doctrine lies with the legislature rather than the courts. See *Davis v. Fox*, 735 S.E.2d 259, 265 (W.Va. 2012) (emphasizing that court would adhere to agency theory "until such time as the Legislature sees fit to . . . amend" felony murder statute); *State v. Pina*, 233 P.3d 71, 78 (Idaho 2010) (stating that "Idaho has consistently applied the agency theory of the felony-murder rule," and "[a]ny change of that rule lies in the province of the legislature"); *Wooden v. Commonwealth*, 284 S.E.2d 811, 816 (Va. 1981) (holding that Virginia statute did not permit felony murder conviction for death caused by third party and noting that expansion of liability "should be accomplished by legislative action rather than by judicial fiat"); *State v. Canola*, 374 A.2d 20, 30 (N.J. 1977) (declining to adopt proximate-cause theory because "if the course of the law as understood and applied in this State for almost 200 years is to be altered so drastically, it should be by express legislative enactment"). Notably, New Jersey's legislature responded to the narrow construction of felony murder adopted in

Canola by amending the statute to *expand* felony murder liability. See *State v. Martin*, 573 A.2d 1359, 1370-1371 (N.J. 1990).

Such variations in state law do not raise any questions of federal law, as is required for this Court's intervention. Rather, as these cases suggest, petitioner's arguments are properly presented to the State's legislative body. See *State v. Oimen,* 516 N.W.2d 399, 407-408 (Wis. 1994) (concerns underlying "agency approach" were "not unreasonable"; however, "that policy determination is one for the legislature to make and the Wisconsin legislature's determination is to the contrary"). This Court should therefore decline petitioner's invitation to limit "the constitutional scope of the felony murder rule," Pet. 24, as it "should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States," *Patterson*, 432 U.S. at 201.

II. Petitioner's Eighth Amendment Claim, Which Was Not Addressed By The Lower Court, Does Not Warrant Certiorari.

Petitioner's alternative theory—that his felony murder conviction violated the Eighth Amendment—likewise does not warrant review by this Court. To begin, petitioner acknowledges that the state appellate court did not address this argument, Pet. 8, the whole of which is contained in a single paragraph in the petition, Pet. 20-21. This Court "ordinarily do[es] not decide in the first instance issues not decided below," *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109

(2001) (per curiam) (internal quotations omitted), and should not make an exception here.

Setting aside that the issue was not passed upon below, review is further unwarranted because petitioner's claim lacks merit. Like his due process challenge, petitioner's Eighth Amendment claim rests on the false premise that petitioner was "found guilty in the absence of a discernible *mens rea*." Pet. 20. But, as explained, see *supra* pp. 8-9, petitioner's felony murder conviction is based on his intent to commit burglary.

Furthermore, petitioner's complaint that Illinois law subjects him "to the same punishment for felony murder as those defendants convicted of intentional or knowing murder," Pet. 20, does not state a claim under the Eighth Amendment. The Eighth Amendment simply implements "the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" *Graham v. Florida*, 560 U.S. 48, 59 (2010) (quoting, with alteration, *Weems v. United States*, 217 U.S. 349, 367 (1910)). That principle is violated only when a punishment is "grossly disproportionate" to the offense for which it is imposed. *Id.* at 59-60; see also *Harmelin v. Michigan*, 501 U.S. 957, 1001-1005 (1991) (Kennedy, J., concurring) (emphasizing that only proper Eighth Amendment analysis is proportionality and holding that life sentence for possession of 650 grams of cocaine was not grossly disproportionate). Here, petitioner cannot possibly establish that

his twenty-year sentence was disproportionate to his crime: murder. See *Oimen*, 516 N.W.2d at 408-409 (concluding that under *Harmelin*, felony murder sentence did not violate Eighth Amendment).

Accordingly, because the lower court did not pass upon the question, and because the claim lacks merit, petitioner's Eighth Amendment claim provides no basis for certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois
JANE ELINOR NOTZ*
Solicitor General
SARAH A. HUNGER
Deputy Solicitor General
MICHAEL M. GLICK
Criminal Appeals Division Chief
ERIN M. O'CONNELL
Assistant Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-5376
jnotz@atg.state.il.us

*Counsel of Record

Attorneys for Respondent

OCTOBER 2019