No. 18-9761

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN GIVENS, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition for a Writ Of Certiorari

To The Appellate Court of Illinois

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JAMES E. CHADD
State Appellate Defender

PATRICIA MYSZA
Deputy Defender

RACHEL M. KINDSTRAND
Counsel of Record
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stDistrict@osad.state.il.us

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

State Cases:

Statutes:

Other Authorities:

REPLY BRIEF IN SUPPORT OF PETITION

I. Whether Illinois and a minority of states can hold a criminal defendant liable for felony murder based on a killing committed by a third party not involved in the commission of the predicate felony is a recurring and important issue warranting this Court's review.

Petitioner John Givens' case is not unique to Illinois jurisprudence. Since 2011, Givens' case is one of ten others in which a criminal defendant was charged with felony murder, but a police officer actually committed the killing.[1] Most recently, in August, 2019, the Lake County, Illinois State's Attorney charged five teenagers with felony murder based on the death of a sixth teenager.[2] The six teenagers drove a stolen vehicle to Lake County, Illinois, with the intent to commit robberies.[3] When the teenagers began walking up the driveway of a 75-year-old Lake County resident, he opened fire, killing a 14 year old.[4] After public outcry, the prosecutor dropped the felony murder charges against the surviving teenagers pursuant to an agreement with

---

[1] Alison Flowers and Sarah Macaraeg, *Charged With Murder, But They Didn't Kill Anyone–Police Did*, Chicago Reporter, Aug. 18, 2016, at 12, https://www.chicagoreader.com/chicago/felony-murder-police-shooting-investigation/Content?oid=23200575.

[2] Robert McCoppin, *Prosecutor Defends Murder Charge: Says Teens "Ultimately" Responsible for Friend Death in Lake County*, Chicago Tribune, Aug. 16, 2019, at 1, https:www.chicagotribune.com/news/breaking/ct-lake-county-shooting-states-attorney-20190816-yk4sjgwgufgf5pxns76znlyex4-story.html.

[3] *Supra*, n.2.

[4] *Id.*

their families.[5] In a 2015 incident, Alabama police officers responded to a burglary committed by five teenagers.[6] After a police officer shot one of the five teenagers, the surviving teens were charged and convicted of felony murder.[7] A grand jury ruled that the death of the teenager by the officer was a justifiable homicide.[8] When Illinois Attorney General Kwame Raoul was asked about the felony murder rule in light of the Lake County case, he stated, "[i]ndividuals who partake in such activity need to know that if something happens as a result of that, including loss of life, that they will be held responsible for it," but "that doesn't absolve prosecutors from using appropriate discretion as to how they apply these laws."[9]

The State's brief echoes the public comments of Illinois' attorney general. It repeatedly argues that the Constitution grants states "leeway" to prosecute a criminal defendant for felony murder based on a killing actually committed by a third party unconnected to the commission of the underlying felony. (Opp. 1-2, 15-18) The State

---

[5] Jim Newton, Frank Abderholden, and Patrick O'Connell, *Teens' Felony Murder Charges Axed: 5 Were Controversially Charged in Lake County Death of Friend*, Chicago Tribune, Sept. 20, 2019, at 1.

[6] Jamiles Lartey, *Alabama Police Shot a Teen Dead, But His Friend Got 30 Years For the Murder*, The Guardian, Apr. 15, 2018. https:www.theguardian.com/us-news/2018/apr/15/alabama-accomplice-law-lakeith-smith.

[7] *Supra*, n.6.

[8] *Id.*

[9] Will Jones, *Illinois Law Allows Those Involved With Crime to Be Charged With Murder if Someone Dies*, ABC 7 Eyewitness News (online), Aug. 15, 2019. https://abc7chicago.com/il-law-allows-those-involved-with-crime-to-be-charged-with-murder-if-someone-dies/5471018/.

does not explain what provision of the Constitution would allow Illinois or other states to secure a conviction for homicide committed by a third party solely on proof that a defendant committed an underlying felony. It also does not respond to Givens' argument that historically, one could only be convicted of felony murder if the death was actually caused by the defendant or one acting in concert with him during the commission of that underlying felony. (Pet. 14-15) Instead, the State refers to "policy choices" reflected in state statutes or "state-specific common law," but it never identifies what policy would support Givens' conviction for felony murder under the circumstances of his case. (Opp. 8, 12, 15) Moreover, the plain language of Illinois' felony murder statute does not require adherence to the proximate cause theory, and Illinois courts originally followed the agency theory in felony murder cases. 720 ILCS 5/9-1(a)(3) (West 2012); (Pet. 15). The State also asserts that it may hold a defendant liable for felony murder based on deaths "foreseeably arising out of a forcible felony." (Opp. 12) It fails to acknowledge, however, that under Illinois law, any death is deemed "foreseeable," as illustrated by the jury instruction provided to Givens' jury: "It is immaterial whether the killing is intentional or accidental or committed by a third person trying to prevent the commission of the offense of burglary." (Pet. App. 25a)

The State's failure to squarely address Givens' challenges to the proximate cause theory under the Due Process Clauses and the Cruel and Unusual Punishment Clause mirrors the Illinois Appellate Court's decision. (Pet. App. 7a-11a) As the State acknowledged, despite being fully briefed, the appellate court failed to address Givens' challenge to his felony murder conviction under the Eighth Amendment. (Opp. 18-20) Further, Givens' constitutional challenges to the proximate cause theory were not

raised "alternatively" as the State claims in its brief. (Opp. 5-6) When the appellate court failed to address the constitutional claims he asserts before this Court, Givens filed petitions with the Illinois Appellate Court and Illinois Supreme Court seeking review. In those petitions, Givens argued that the failure to address his constitutional challenges to the proximate cause theory of liability for felony murder deprived him of his due process right to a full and fair appeal. (Pet. App. 28a-29a); *see e.g., Evitts v. Lucey*, 469 U.S. 387, 393-405 (1985). After both petitions were denied, Givens sought this Court's review.

The fate of criminal defendants in Illinois and in a minority of other states should not depend on prosecutorial discretion, as suggested by Illinois' attorney general, nor should Givens be denied review of his claims because of the intransigence of Illinois courts. Prosecutors are routinely charging felony murder when a third party actually causes a death, despite the criminal defendant's lack of an appreciable *mens rea* for murder.[10] Because this case presents a recurring and important issue, this Court should grant review.

II. There is a conflict among state courts implicating the Due Process Clauses of the Fifth and Fourteenth Amendments.

The State argues that the petitioner has not demonstrated a conflict among state courts because he has cited no cases applying this Court's precedent to an evaluation of a state's felony murder rule, and because the state courts considering the scope of their respective felony murder rules have relied upon "state-specific common law." (Opp. 15-18) In a footnote, however, the State acknowledges that one of the cases

---

[10] *Supra*, n.1.

cited in the petition relied upon *State v. Ortega*, 817 P.2d 1196, 1201-05 (N.M. 1991), wherein the New Mexico Supreme Court relied upon *Morissette v. U.S.*, 342 U.S. 246, 274 (1952), and *Sandstrom v. Montana*, 442 U.S. 510, 522-24 (1979), to hold that its felony murder statute must be interpreted to require proof of the defendant's intent to kill. (Opp. 16 n.1; Pet. 22-23)

In fact, the New Mexico Supreme Court evaluated nearly identical arguments and concluded, consistent with Givens' claims, that its felony murder statute required a *mens rea* for the murder. *Ortega*, 817 P.2d at 1201-05. In *Ortega*, the defendant was convicted of felony murder stemming from the stabbing deaths of two young women whom the defendant and an accomplice intended to rob. *Id.* at 1199-1201. On appeal, the defendant argued, *inter alia*, that his conviction for felony murder was unconstitutional under the Due Process Clause of the Fourteenth Amendment because it allowed for a murder conviction and sentence in the absence of a *mens rea*. *Id.* at 1199, 1201-04. He further argued that under this Court's jurisprudence, New Mexico's felony murder statute created an unconstitutional strict liability offense because it did not require proof of a *mens rea* for murder, and instead created an unconstitutional mandatory presumption of intent based on the commission of an underlying felony. *Id.* at 1199, 1202-03.

In construing its felony murder statute, the New Mexico Supreme Court wrote: "We follow the lead of the United State Supreme Court in construing our statute on felony murder–a statute which at most is silent on the necessity of an intent-to-kill element, and certainly does not expressly negate any such requirement–as requiring proof that the defendant intended to kill (or had the state of mind otherwise generally

associated with *mens rea*)." *Ortega,* 817 P.2d at 1204. The court relied on *Morissette,* 342 U.S. at 250-51, for the propositions that strict liability crimes are disfavored and that "an injury can amount to a crime only when inflicted by intention." 817 P.2d at 1204. It further held that such an interpretation was required under *Sandstrom v. Montana,* 442 U.S. at 522-24, because the state could not, consistent with the defendant's due process rights, rely on proof of the defendant's intent to commit the predicate felony or proof that he committed the predicate felony to establish a presumption of intent for murder. *Id.* at 1204-05. Thus, the State's own citation supports the existence of a conflict. (Opp. 16 n.1)

Additionally, the state cases considering the scope of liability for felony murder do not rely on "state-specific common law;" they rely on the same pool of English common law and decisions from their sister states. For example, in *State v. Pina,* 233 P.3d 71, 77 (Idaho 2010), the Idaho Supreme Court cited to English common law for the proposition that the felony murder rule originally applied "to only those acting jointly and in concert with the actual killer for the common purpose of the underlying felony." Therefore, the Idaho Supreme Court relied on the "lens of English common law" to determine that its state statute limited the application of the felony murder rule to those in an agency relationship with the actual killer. *Pina,* 233 P.3d at 77. In *State v. Bonner,* 411 S.E.2d 598, 599-604 (N.C. 1992), the North Carolina Supreme Court engaged in a lengthy review of various decisions of its sister courts to uphold a prior ruling limiting the felony murder rule to the agency theory of liability. It discussed the New Jersey Supreme Court's decision in *State v. Canola,* 374 A.2d 20, 30 (N.J. 1977), and quoted favorably from the opinion: "[I]t appears to us regressive to

extend the application of the felony murder rule beyond its classic common-law limitation to acts by the felon and his accomplices, to lethal acts of third persons not in furtherance of the felonious scheme." *Bonner*, 411 S.E.2d at 603. It also noted that in *Commonwealth v. Redline,* the court rejected the expansion of the felony murder rule to impose liability on an accomplice for the otherwise justifiable homicide of a co-felon. *Id.* at 603, *quoting Redline*, 137 A.2d 472, 483 (Pa. 1958) ("How can anyone, no matter how much of an outlaw he may be, have a criminal charge lodged against him for the consequences of the lawful conduct of another person?").

Even if other state court decisions have made the unremarkable observation that a state legislature may amend its criminal statutes, such an observation does not mean that the proximate cause theory is constitutional. A state does not have completely unfettered discretion to define what constitutes a criminal offense. *Morissette*, 342 U.S. at 260-63, 273; *U.S. v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978). Illinois and a minority of other states that adhere to the proximate cause theory deviate from English common law, thereby unconstitutionally eliminating the *mens rea* requirement for murder and the requirement that all elements of an offense be proven beyond a reasonable doubt. (Pet. 11, 12, 16-17)

III. Illinois' proximate cause theory of liability for felony murder is unconstitutional.

The State's response does not adequately address Givens' arguments. It simply asserts that in felony murder cases, it must prove that the defendant had the requisite mental state for the underlying felony. (Opp. 8-10) But in all cases of felony murder, the State must prove the commission of the underlying felony (including the requisite

mental state), otherwise there would be no offense of felony murder. The specific question presented by this case is whether the State can constitutionally apply its felony murder rule to convict a defendant for a death caused by a third party who shares no mental state for the underlying felony. The State asserts that the petitioner has provided no constitutional principle which would "limit 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." (Opp. 11) Its assertion is untrue.

Proof of a *mens rea* for a criminal offense is the rule rather than the exception under Anglo-American jurisprudence, and when a statute is silent on whether it contains a *mens rea*, this Court looks to the common law to determine the elements of the offense. *Morissette*, 342 U.S. at 251-52, 260-63, 273; *U.S. Gypsum Co.*, 438 U.S. at 437; *Staples v. U.S.*, 511 U.S. 600, 605 (1994) ("[W]e must construe the statute in light of the background rules of the common law *** in which the requirement of some *mens rea* for a crime is firmly embedded."). At common law, the felony murder rule did not apply to a death committed by one unconnected with the underlying felony. *Redline*, 137 A.2d at 476; *Butler v. People*, 18 N.E. 338, 339 (Ill. 1888) ("No person can be held responsible for a homicide unless the act was either actually or constructively committed by him. And in order to be his act it must be committed by his hand, or by some one acting in concert with him, or in furtherance of a common design or purpose."). The common law rule is consistent with *Pinkerton v. U.S.*, 328 U.S. 640, 646-48 (1946), in which this Court held that an overt act committed by a co-conspirator in furtherance of the conspiracy can be attributed to another conspirator because the

mental state necessary for the crime was established by the formation of the conspiracy. The agency theory of liability is consistent with common law and with *Pinkerton*, because all accomplices in the underlying felony shared a *mens rea*, and a death actually caused by one accomplice can rightly be attributed to all accomplices. 328 U.S. at 647. When a third party unconnected with the underlying felony actually causes the death, however, there can be no shared *mens rea*. Under this Court's jurisprudence, a felony murder conviction obtained in the absence of proof of an applicable *mens rea* violates due process. *Morissette*, 342 U.S. at 273-76; (Pet. 16-18).

To that end, Illinois' proximate cause theory creates a strict liability offense because Givens could share no mental state with the officers who killed Strong. The mental state necessary to prove the burglary could not be constructively imputed to establish Givens' guilt for felony murder, because neither Givens nor his co-offender, Leland Dudley, killed Strong. *Redline*, 137 A.2d at 475-76. The State's efforts to deny that felony murder is a strict liability offense are unavailing, because Illinois case law describes felony murder as "premised on strict liability." (Opp. 8-9); *People v. Causey*, 793 N.E.2d 169, 178 (Ill. App. Ct. 2003) ("The State is not required to prove that the defendant could foresee the death or that the defendant intended to commit murder; it merely must show that defendant intended to commit the underlying felony."). The prosecutor's closing arguments to Givens' jury also reflect that felony murder is a strict liability offense. He argued: "Once you determined that these chain of events were set into motion by the fact that they committed a burglary, the rest is history," and, "Simply because these defendants couldn't anticipate the sequence of events that might have happened once they went in there and committed a burglary, it doesn't mean it

wasn't foreseeable." (R. HH199-01) Illinois' proximate cause theory of felony murder is the epitome of strict liability because it allows a jury to find a defendant guilty of murder in the absence of any appreciable mental state.

The State offers no persuasive response to Givens' claim that Illinois' proximate cause theory creates an unconstitutional mandatory presumption. (Opp. 10) As exemplified by the jury instructions, the jury was required to presume Givens' guilt for murder solely on proof that he committed a burglary and in the absence of proof of any appreciable mental state for Strong's death. *Sandstrom*, 442 U.S. at 517-18, 520-24; (Pet. 18-20). It does not address Givens' arguments that he cannot rebut the conclusive presumption of guilt for felony murder because Illinois courts have eliminated the availability of traditional defenses to murder, other than to point out that defense counsel argued Strong's death was unforeseeable during closing arguments. (Pet. 19-20; Opp. 10, 14) While the State claims that felony murder is limited by "foreseeability," it ignores the jury instruction allowing for a felony murder conviction even if the death was "accidental," *i.e.*, unforeseeable. (Pet. App. 25a; Opp. 13)

Furthermore, the facts of Givens' case do not demonstrate that he should be held responsible for Strong's death under the felony murder rule because Strong's death was "foreseeable." (Opp. 13-15) The State references the trial court's ruling preventing the defense from introducing evidence of the Chicago Police Department's General Order G03-02-03, which prohibits an officer from firing at a moving vehicle when that vehicle is the only force used against him or her unless necessary to prevent the death or great bodily harm to another officer. (Sup. C. 43) Otherwise, the order requires an officer to get out of the way of a moving vehicle. (Sup. C. 43) Givens' unsuccessful efforts to

supplement the appellate record with information indicating that the officers on the scene violated that order are documented in Givens' petition for leave to appeal, specifically: that the officers were given a radio warning that the van was coming out of the garage about a minute beforehand, and that Officer Papin was told to get out of the way of the garage by a fellow officer. (Pet. App. 32a, 34a) When Dudley reversed the van out of the garage, the officers on the scene knew that there was nowhere for the van to go because the tenant's red minivan was parallel parked in the garage driveway, and because a squad car parked in the street blocked its egress. (P. Ex. 73AA-2, file 5-2, 2:42:01, 2:45:47-50) When Papin claimed to be "hip checked" by the van, he spun around and into Officer Curry, then ran west. (2:45:48, 2:45:50) Subsequently, Curry fired 18 rounds at the van. (R. HH46-47, 59-60) A total of eight officers fired 77 rounds at the van, killing Strong. (R. HH140-43) There is ample reason to reject the State's claim that Strong's death was foreseeable in light of the officers' failure to follow their own order and the excessive use of force against a front seat passenger who had no control over the van. (Opp. 14) Even the jury had difficulty convicting Givens under the circumstances of this case, as shown by their note during deliberations. (R. MM251) The facts of Givens' case highlight the unlimited nature of felony murder liability in Illinois, and support his claim that the proximate cause theory is unconstitutional.

Finally, none of the cases cited by the State support the constitutionality of the proximate cause theory of felony murder. (Opp. 11-13) In *People v. Benson*, 480 N.Y.S.2d 811 (N.Y. Sup. Ct. 1984), the court considered a broad challenge to the state's felony murder statute and did not address the proximate cause theory. (Opp. 12) In

State v. Brown, 310 P.3d 29, 38 (Ariz. Ct. App. 2013), the court did not fully address the defendant's due process claim or his claim that his conviction violated his right against excessive punishment. In *Tison v. Arizona*, this Court considered whether the petitioners could properly be sentenced to death absent a specific intent for the killings, and the portion of this Court's opinion cited by the State dealt with a consideration of the degree of culpability necessary for the imposition of capital punishment. 481 U.S. 137, 139-58 (1987); (Opp. 11). Notably, in *Tison*, the petitioners were accomplices to their father's commission of a robbery and attendant shooting following a prison break, and the propriety of their felony murder convictions was not at issue. 481 U.S. at 139-42. In *Hopkins v. Reeves*, this Court considered, and rejected, an argument that the jury should have been instructed on second degree murder or manslaughter where they were not lesser included offenses of felony murder under Nebraska law. 524 U.S. 88, 96, 99-101(1998). The portion of *Hopkins* quoted by the State involved this Court's comments on a misconstruction of *Tison* and *Enmund v. Florida*, 458 U.S. 782 (1982), and the quantum of proof of a defendant's culpability that must be shown before imposing the death penalty. 524 U.S. at 100; (Opp. 12).

IV. This case is an appropriate vehicle for this Court's review.

All of Givens' federal constitutional claims were thoroughly presented to Illinois state courts. (Pet. App. 27a-48a) Although the Illinois Appellate Court failed to adequately address Givens' constitutional challenges (as the State particularly acknowledges with respect to his Eighth Amendment claim), his claims were properly preserved for this Court's review. *Cf., Adams v. Robertson*, 520 US 83, 86-87 (1997) (discussing requirements for properly presenting federal claims for this Court's review).

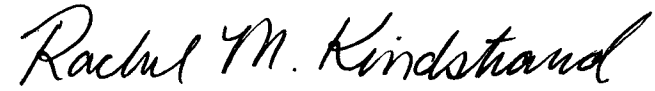
Despite the failure of the state courts to consider Givens' constitutional claims, the record rebuts any presumption that they were not properly raised in the state courts, and the State does not argue to the contrary. *Street v. New York*, 394 U.S. 576, 583-85 (1969); *U.S. v. Williams*, 504 U.S. 36, 41-45 (1992) (rejecting the respondent's challenge to the case on the basis the issue had not been pressed or passed upon in the lower courts; discussing the disjunctive nature of the rule).

This Court has already recognized that it may consider the scope of penalties attached to a particular offense in determining whether proof of a *mens rea* is required. *Staples*, 511 U.S. at 616. Despite the lack of an appreciable *mens rea* for murder, Illinois sentences those convicted under the proximate cause theory to the same range of sentences as those convicted of intentional or knowing murder. 730 ILCS 5/5-4.5-20(a) (West 2012). This Court has already ruled that the death penalty generally constitutes cruel and unusual punishment when applied to an accomplice convicted of felony murder who did not commit the homicide, was not present when the homicide took place, and did not otherwise participate in a plot to murder. *Enmund*, 458 U.S. at 795-800. By extension, punishing Givens as an intentional murderer for the death of his co-offender Strong at the hands of police, where there is no applicable *mens rea* or evidence that any of the men were armed, is excessive under the Eighth and Fourteenth Amendments. Unlike the Wisconsin statutes at issue in *State v. Oimen*, 516 N.W.2d 399, 408 (Wis. 1994), Illinois' sentencing laws give judges no discretion to impose a sentence for felony murder that is lesser than what is required for intentional or knowing murder. 730 ILCS 5/5-4.5-20(a); (Opp. 19-20).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,



RACHEL M. KINDSTRAND
Counsel of Record
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stDistrict@osad.state.il.us

COUNSEL FOR PETITIONER