

No.  
IN THE  
SUPREME COURT OF THE UNITED STATES

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JOHN GIVENS, Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

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On Petition For Writ Of Certiorari  
To The Appellate Court Of Illinois

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PETITION FOR WRIT OF CERTIORARI

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## **QUESTION PRESENTED FOR REVIEW**

Whether Illinois' proximate cause theory of liability for felony murder, which allows a criminal defendant to be convicted of felony murder when the decedent is killed by a third party, violates the Due Process Clauses and the Cruel and Unusual Punishment Clause of the United States Constitution because it allows for a conviction in the absence of an applicable mental state, creates a mandatory irrebuttable presumption, and punishes a defendant as a murderer in the absence of a mental state.

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The petitioner, John Givens, respectfully requests that a writ of certiorari issue to review the judgment below.

**OPINION BELOW**

The decision of the Illinois Appellate Court on direct appeal is reported at 2018 IL App (1st) 152031-U, but is not published. (App. 1a-22a) The order of the Illinois Supreme Court denying leave to appeal is reported at 119 N.E.2d 1033. (App. 23a)

## **JURISDICTION**

The Illinois Appellate Court issued a decision on direct appeal on October 9, 2018. On November 8, 2018, the appellate court denied a timely-filed petition for rehearing. (App. 24a) On November 13, 2018, the appellate court issued a modified decision upon its denial of rehearing. (App. 1a-22a) The Illinois Supreme Court denied a timely-filed petition for leave to appeal on March 20, 2019. (App. 23a) This Court has jurisdiction over this matter pursuant to 28 U.S.C. §1257(a).



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in relevant part, “No person shall ... be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V.

The Eighth Amendment of the United States Constitution provides, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII.

The Fourteenth Amendment of the United States Constitution provides, in relevant part, “No State shall ... deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, §1.

The Illinois felony murder statute, 725 ILCS 5/9-1(a)(3) (West 2012), provides:

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

## STATEMENT OF THE CASE

### A. Factual Background

John Givens, along with co-defendant Leland Dudley, was charged with felony murder based on the death of a co-offender, David Strong, during the commission of a burglary at an electronics store. (C. 75) The burglary and ensuing shooting were recorded on surveillance cameras located within and outside of the store. (R. GG181; P. Ex. 73AA-1) The men entered the electronics store a little after 2 a.m. on April 30, 2012. (P. Ex. 73AA-1, 2:11:21) A tenant living in an apartment above the store called the police. (R. GG148) Nineteen Chicago police officers responded to the call. (R. HH140) As the officers arrived at the scene, they turned off their sirens to avoid detection. (R. GG238, 244; HH23-24, 40-41, 98) The officers announced their office to the men, but received no response. (R. HH9-10, 21, 101-02) The surveillance footage showed the men loading electronic equipment into a minivan parked inside a garage bay attached to the store. (P. Ex. 73AA-1, 2:35-2:40) There were no windows facing in or out of the garage bay to the street, and the garage door was closed. (P. Ex. 73AA-1, 2:41-2:44)

One of the officers, Officer Lopez, kicked a hole in an interior door leading to the garage bay. (R. GG222-23, 225) Through the hole, Lopez saw the van's lights turn on. (R. GG225-26) Lopez gave a verbal warning to the other officers to get out of the way. (R. GG227, 229) At trial, the officers denied hearing a radio dispatch from a fellow officer minutes before the shooting, warning the others that the van might come out of the garage. (R. HH29-31, 71, 80-81, 92)

Around 2:45 a.m., Dudley backed the minivan out of the garage, hitting the

garage door and another red minivan that was parallel-parked in the garage driveway. (P. Ex. 73AA-2, file 9-d, 2:45:47) Officer Papin was standing near the garage door, and he claimed that he was “hip-checked” by the reversing van but suffered no significant injuries. (R. HH82, 86-87, 94) Papin then ran in the opposite direction and bumped into Officer Curry, who subsequently opened fire on the van, emptying his magazine. (P. Ex. 73AA-2, file 9-d, 2:45:48-50) At least eight officers fired on the van, shooting 77 rounds. (R. HH140-43) The front seat passenger, Strong, was killed, and Givens, the backseat passenger, was shot six times and is confined to a wheelchair. (R. HH85, 109-12) Dudley, the driver, was also shot multiple times but survived. (R. HH150)

Under Illinois’ version of the felony murder rule, a defendant in Givens’ position may be charged with felony murder even if the actual cause of death was the action of a third party, *i.e.*: the commission of a shooting by one or more police officers. Described by Illinois courts and those of other states as the “proximate cause theory,” this permutation of the felony murder rule allows for a co-offender of the underlying felony to be responsible for a death “proximately resulting from the unlawful activity” even if the death was caused by another. *People v. Lowery*, 687 N.E.2d 973, 975-76 (Ill. 1997). Givens’ case was tried before a jury, and the Illinois jury instruction on causation in felony murder cases states that a person commits first degree murder when he commits burglary, and a death results “as a direct and foreseeable consequence of a chain of events set into motion by his commission of the offense of burglary.” (C. 188); Illinois Pattern Jury Instruction-Criminal, No. 7.15A (eff. Jan. 30, 2015) (attached at App. 25a). Further, the instruction states, “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.” (App. 25a)

At trial, Givens argued that the officers used excessive force and therefore Strong’s death was not a foreseeable consequence of the burglary. (R. HH186-87, 191-96) The trial court denied Givens’ request to introduce a Chicago Police Department general order, which prohibits an officer from firing at a moving vehicle when the vehicle was the only force used against the officers, except to prevent great bodily harm or death to another. (R. HH158-60) The order also required the officers to get out of the way of the moving vehicle. (R. HH158-60)

Multiple officers testified that they opened fire on the van because they did not know if Officer Papin had been hurt, and because they thought he might be underneath the van. (R. HH13-14, 28, 64-65) The officers also claimed that they continued to fire when they saw Dudley, the driver, make an up and down movement with his arm, and saw the van lurch forward. (R. GG229-30; HH15-16) The surveillance video shows that after the van struck the red minivan in its path and a squad car, it sunk to the ground. (P. Ex. 79, 3:44) An investigating detective testified that after the shooting, he observed the van’s gearshift in drive. (R. HH144-46)

During deliberations, the jury sent out a note asking if it had to follow the letter of the law, or whether it could interpret the law in a manner of its choosing. (R. MM251) After the trial court informed the jury that it was given the law that applied to the case, the jury rendered a guilty verdict for, *inter alia*, felony murder predicated on burglary. (R. MM251, 253) Givens was sentenced to a term of 20 years in prison for felony murder. (Supp. R. A28)

## B. Proceedings Below

On direct appeal, Givens challenged the constitutionality of Illinois' proximate cause theory of liability for felony murder.<sup>1</sup> (App. 26a-48a) Givens argued that notwithstanding a state's authority to define what constitutes a criminal offense, the proximate cause theory of felony murder violated federal due process because it allowed for a murder conviction in the absence of any *mens rea*. (App. 38a-40a) Historically, a death occurring during the commission of a felony could be considered a murder because the malice element for murder was "constructively imputed" by the malice accompanying the underlying felony. *Id.* In Givens' case, however, he could never share a *mens rea* with the officers who actually killed Strong since the officers were not co-offenders in the underlying felony. *Id.* Illinois' proximate cause theory of felony murder as applied in Givens' case violated a basic tenet of American jurisprudence, namely that an injury can only amount to a crime when inflicted with intention. *Id.* As Illinois' proximate cause theory creates a strict liability offense of felony murder, it violates the due process guarantees of the federal constitution. *Id.*

Additionally, Givens argued that Illinois' proximate cause theory violated due process by creating a conclusive presumption of guilt for murder once the state proves that he committed an underlying, independent predicate felony. (App. 40a-43a) While

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<sup>1</sup> As explained *infra*, at page 8, the Illinois Appellate Court failed to address Givens' federal constitutional claims in its decision. Givens' appellate brief raised seven claims of error. In order to demonstrate that his federal constitutional claims were raised in the Illinois courts, and in the interests of brevity, Givens is attaching a copy of the petition for leave to appeal filed in the Illinois Supreme Court in which he challenged the lower court's decision on his claim that the proximate cause theory of felony murder violated federal due process and the Eighth Amendment.

the jury was instructed that a defendant commits first degree murder when he commits a burglary and a death results as a direct and foreseeable consequence of a chain of events set into motion by the burglary, it was further told that it did not matter whether the death was “intentional or accidental or committed by a third person trying to prevent the commission of [burglary]” and that the state did not have to prove that Givens intended to kill Strong. *Id.* “Direct and foreseeable” was not otherwise defined for the jurors. Givens argued that a reasonable juror would have understood the instructions as mandatory, and that once the juror found Givens guilty of burglary he or she had no choice but to find him guilty of felony murder. *Id.*

Finally, Givens argued that by imposing the same punishment (a 20-year prison term) against him as it would for a defendant found guilty of either intentional or knowing murder, Illinois violated the Eighth Amendment’s prohibition on cruel and unusual punishment. (App. 43a) Givens argued that because Illinois’ proximate cause theory of liability for felony murder created a strict liability offense devoid of any *mens rea*, it was unconstitutional to punish him to the same sentence applicable to those convicted of intentional or knowing murder. *Id.*

In its decision, the Illinois Appellate Court failed to address any of the above arguments. (App. 7a-11a) Instead, the appellate court reiterated that Illinois employs the proximate cause theory of liability for felony murder, and stated that Givens failed to show that the felony murder statute was unconstitutional. (App. 8a-10a) While acknowledging that “felony murder derives its mental state from the underlying offense,” the appellate court indicated that the theory served a deterrent effect and was analogous to tort law. (App. 9a-10a) It also asserted that Strong’s death was a

foreseeable consequence of the burglary. (App. 10a-11a)

Givens filed a petition for rehearing and a petition for leave to appeal, arguing that his due process right to a full and fair appeal was denied by the Illinois Appellate Court's refusal to address his arguments. (App. 37a) He also asked both courts to consider the foregoing arguments under the federal constitution, noting that Illinois courts have never addressed his specific claims. (App. 37a-38a) Both petitions were denied. (App. 23a-24a)

## REASON FOR GRANTING CERTIORARI

**I. Illinois' proximate cause theory of liability for felony murder violates the Due Process Clauses and the Cruel and Unusual Punishment Clause of the United States Constitution because it allows for a conviction in the absence of an applicable mental state, creates a mandatory presumption of guilt, and punishes a defendant as a murderer in the absence of a mental state.**

**A. The Due Process Clause and a state's authority to define and prosecute a crime.**

As this Court has acknowledged, it is generally within the province of the states to determine what conduct constitutes a criminal offense. *Patterson v. New York*, 432 U.S. 197, 201 (1977). Nonetheless, the state's administration of its law may violate the Due Process Clause if "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental." *Patterson*, 432 U.S. at 202, quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958). While this Court has not precisely defined the contours of the Due Process Clause with respect to a state's enactment or administration of its own laws, it has provided some guidance on what it deems "fundamental" to due process under both the Fifth and Fourteenth Amendments.

One tenet typically deemed "fundamental" to the American criminal justice system is that "an injury can amount to a crime only when inflicted by intention." *Morissette v. U.S.*, 342 U.S. 246, 250 (1952). Similarly stated, "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American jurisprudence." *U.S. v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978) (quoting *Dennis v.*



U.S., 341 U.S. 494, 500 (1951)). To that end, criminal statutes which do not include a mental state as an element, thereby creating a strict liability offense requiring no proof of *mens rea*, are generally disfavored. *U.S. Gypsum Co.*, 438 U.S. at 436-38. When this Court has upheld the constitutionality of strict liability offenses, it has done so in limited circumstances such as those involving regulatory measures “where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se*.” *U.S. v. Balint*, 258 U.S. 250, 252 (1922).

In other cases, this Court has determined that a given statute must be read to include a *mens rea* as an element of the offense. *U.S. Gypsum Co.*, 438 U.S. at 437-43. To determine whether a statute must be interpreted to include a *mens rea* as an element, this Court looks to the definition of the offense at common law. *Morissette*, 342 U.S. at 260-63, 273. If the offense as defined at common law was a “crime[] of intendment,” proof of a *mens rea* as an element of the statutory offense is required. *U.S. Gypsum Co.*, 438 U.S. at 437 (“the holding in *Morissette* can be fairly read as establishing, at least with regard to crimes having their origin in the common law, an interpretative presumption that *mens rea* is required.”).

Once this Court determines that a particular offense must include a *mens rea* element, a number of other legal determinations necessarily follow from that holding. Where intent is an element of a charged offense, the determination of whether the accused acted with intent is a question of fact that must be determined by a jury. *Morissette*, 342 U.S. at 274. A fact finder cannot presume intent from the commission of the underlying act, because such a presumption “would conflict with the overriding

presumption of innocence with which the law endows the accused and which extends to every element of the crime.” *Id.* at 275.

Further, as a matter of due process under the Fourteenth Amendment, a state must prove beyond a reasonable doubt the existence of every fact necessary to constitute a criminal offense prior to securing a conviction. *In re Winship*, 397 U.S. 358, 364 (1970). A state may not evade the requirement of *Winship* by shifting the burden to the defendant to negate an essential element of the offense with proof of a lesser mental state. *Mullaney v. Wilbur*, 421 U.S. 684, 691-92, 703 (1975). In sum, as this Court stated in *Apprendi v. New Jersey*, “(1) constitutional limits exist to States’ authority to define away facts necessary to constitute a criminal offense,” and “(2) a state scheme that keeps from the jury facts that expose defendants to greater or additional punishment may raise serious constitutional concern.” 530 U.S. 466, 490-97 (2000) (*quoting and paraphrasing McMillan v. Pennsylvania*, 477 U.S. 79, 85-88 (1986)).

**B. A framework for evaluating Illinois’ proximate cause theory under this Court’s Due Process Clause jurisprudence.**

Justice Thomas’ concurring opinion in *Apprendi* provides a succinct framework in which to analyze whether Illinois’ proximate cause theory of felony murder violates due process. *Apprendi*, 530 U.S. at 499-501 (Thomas, J., concurring). First, this Court must determine what facts constitute the crime of felony murder. As Justice Thomas explained, “[i]n order for an accusation of a crime (whether by indictment or some other form) to be proper under the common law, and thus proper under the codification of the common-law rights in the Fifth and Sixth Amendments, it must allege all elements of

that crime.” *Id.* at 500. Second, “in order for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury (and, under *Winship*, proved beyond a reasonable doubt).” *Id.*

**1. The common law felony murder rule.**

At common law, there were three types of murder, “(1) justifiable, (2) excusable, and (3) felonious.” *Commonwealth v. Redline*, 137 A.2d 472, 475 (Pa. 1958). The third form of murder has always been considered the most serious, and “occurs when a person of sound memory and discretion unlawfully and feloniously kills any human being in the peace of the sovereign *with malice* prepense or aforethought, express or implied.” 137 A.2d at 475 (citations omitted, emphasis in original). The felony murder rule, which is rooted in English common law, developed as an exception to the requirement that the malice essential to murder must be malice prepense or aforethought, express or implied. *Id.* Under the felony murder rule, “an accidental or unintentional homicide committed in the perpetration of or attempt to perpetrate a felony is murder, the malice necessary to make the killing murder being constructively imputed by the malice incident to the perpetration of the initial felony. *Id.*

In tracing the common law origins of the felony murder rule, some courts and commentators cite to Lord Dacres’ case. *People v. Aaron*, 299 N.W.2d 304, 307-08 (Mich. 1980); Birdsong, Leonard, “*Felony Murder: A Historical Perspective by Which to Understand Today’s Modern Felony Murder Rule Statutes*,” 32 T. Marshall L. Rev. 1, 6-7 (Fall 2006). As recounted by the Michigan court, Lord Dacres and his companions formed an agreement to enter a park without permission to hunt, and to kill anyone resisting them. *Aaron*, 299 N.W.2d at 307. While Lord Dacres was not present, a

member of the group killed a gamekeeper who confronted them. *Id.* at 308. Subsequently, Lord Dacres and his companions were convicted of murder and hanged. *Id.* Some commentators assert that Lord Dacres was punished for murder because he and his companions had undertaken an unlawful hunt, and during the course of which a person was killed. *Id.* As the Michigan court construed the case, however, Lord Dacres was liable as a principal for murder because he shared a *mens rea* for the offense as a result of his prior agreement with his companions to kill anyone who resisted the hunt, and because he was “constructively present” during the shooting. *Id.*

## **2. Modern development of the felony murder rule in the states.**

Notably, England abolished the felony murder rule in 1957, but the rule is a common feature of state law in most jurisdictions within the United States. Birdsong, 32 T. Marshall L. Rev. at 16. The majority of states, but not all, have adopted what has been termed the agency theory of liability for felony murder. *People v. Dekens*, 695 N.E.2d 474, 475-76 (Ill. 1998). Under the agency theory, “the doctrine of felony murder does not extend to a killing, although growing out of the commission of the felony, if directly attributable to the act of one other than the defendant or those associated with him in the unlawful enterprise.” *People v. Lowery*, 687 N.E.2d 973, 976 (Ill. 1997) (quoting *State v. Canola*, 374 A.2d 20, 23 (N.J. 1977)). The agency theory of liability is consistent with the historical development of felony murder, in which the malice for the underlying felony supplied the malice necessary to find the commission of a murder, and with this Court’s development of co-conspirator liability. *Redline*, 137 A.2d at 476. It is also consistent with this Court’s jurisprudence on co-conspirator liability.

*Pinkerton v. U.S.*, 328 U.S. 640, 646-48 (1946). When two or more defendants are co-conspirators and are charged with separate overt acts in furtherance of the conspiracy, an act committed by one co-conspirator can be attributed to another without offending due process. 328 U.S. at 646-48. The rationale for the ruling is that “[t]he criminal intent to do the act is established by the formation of the conspiracy,” and “[m]otive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective,” namely, the unlawful agreement. *Id.* at 647. This Court’s holding in *Pinkerton* is consistent with the Michigan court’s interpretation of Lord Dacres’ case, wherein he was liable for the death of the gamekeeper caused by a companion based on the shared *mens rea* created by the agreement to kill one resisting the unlawful hunt. *Aaron*, 299 N.W.2d at 308.

In the early twentieth century, Illinois’ felony murder rule followed the common law: “[n]o 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 someone acting in concert with him, or in furtherance of a common design or purpose.” *People v. Garippo*, 127 N.E. 75, 77 (Ill. 1920) (quoting *Butler v. People*, 18 N.E. 338, 339 (Ill. 1888)). Over time, however, Illinois courts construed the state’s felony murder statute to encompass the proximate theory of liability. In distinguishing the law of accountability from the proximate cause theory of liability for felony murder, the Illinois Supreme Court wrote:

Felony murder seeks to deter persons from committing forcible felonies by holding them responsible for murder if a death results. Because of the extremely violent nature of felony murder, we seek the broadest bounds for the attachment of criminal liability. For that reason, in felony murder, a defendant’s liability is not limited to his culpability for commission of the underlying felony. A defendant may be found guilty of felony murder regardless of a lack either of

intent to commit murder, or even connivance with a codefendant. *People v. Klebanowski*, 852 N.E.2d 813, 821 (Ill. 2006).

As a result of Illinois' adoption of the proximate cause theory of liability, Illinois courts have upheld felony murder convictions when the death of an individual was caused by a police officer. *Klebanowski*, 852 N.E.2d at 823; *Dekens*, 695 N.E.2d at 476-78; *People v. Hickman*, 319 N.E.2d 511, 512-14 (Ill. 1974).

The Illinois Supreme Court has upheld the proximate cause theory under three rationales: (1) that the felony murder rule is analogous to civil tort law, and therefore proximate cause should apply with equal force; (2) that sound public policy supports holding felons liable for "foreseeable" deaths that result from a chain of events they set in motion; and (3) that forcible felonies are so "inherently dangerous" that death should be classified as a murder to protect the public and deter others. *Lowery*, 687 N.E.2d at 976-77. No Illinois court has previously addressed the constitutional challenge raised by Givens.

**C. Illinois' proximate cause theory of liability violates due process because it allows for a murder conviction in the absence of a *mens rea*.**

Under the United States Constitution and this Court's jurisprudence, Illinois' proximate cause theory of liability violates due process. As Illinois courts have stated, the state's version of the felony murder rule is a "strict liability" offense, requiring no proof of a *mens rea* for the murder or a "connivance with a codefendant." *People v. Causey*, 793 N.E.2d 169, 178 (Ill. App. Ct. 2003) (noting that Illinois' felony murder rule is based on strict liability); *Klebanowski*, 852 N.E.2d at 821. As noted above, strict liability offenses are disfavored in the law, and when determining whether *mens rea*

is an element of criminal offense, this Court has looked to the common law definition of the offense. *U.S. Gypsum Co.*, 438 U.S. at 438; *Morissette*, 342 U.S. at 273. The common law origins of the felony murder rule do not support Illinois' proximate cause theory. Even Lord Dacres' case involved felony murder liability for a death caused by a co-conspirator with a shared mental state. *Aaron*, 299 N.W.2d at 308. As another court wrote, "[i]n adjudging a felony-murder, it is to be remembered at all times that the thing which is imputed to a felon for a killing incidental to his felony is *malice* and *not the act of killing*. The mere coincidence of homicide and felony is not enough to satisfy the requirements of the felony-murder doctrine." *Redline*, 137 A.2d at 476 (emphasis in original). In Givens' case, he could share no mental state with the individuals responsible for killing Strong, because the officers were not participants in the underlying burglary. *Id.* at 475-76. Therefore, the mental state necessary to prove Givens' commission of a burglary could not be "constructively imputed" to establish his guilt for felony murder, because neither Givens nor co-offender Dudley killed Strong. *Id.* at 475. As Illinois' proximate cause theory allows for a felony murder conviction under a circumstance where the prosecution can show no applicable *mens rea* for the murder, it violates due process.

Because Illinois' proximate cause theory unconstitutionally eliminates the requirement of a *mens rea* from the offense of felony murder, Givens' prosecution also violated the due process protections guaranteed by *Winship*. 397 U.S. at 364; *Apprendi*, 530 U.S. at 500. By improperly defining felony murder to dispense with the requirement that the prosecution prove any *mens rea*, the state violated Givens' right to have every fact constituting an element of the offense proved to a jury beyond a

reasonable doubt. *Morrisette*, 342 U.S. at 274-75; *Apprendi*, 530 U.S. at 490-97. In essence, Illinois' proximate cause theory allowed the jury to presume that Givens had a *mens rea* for Strong's death based on the commission of the burglary, in violation of the presumption of innocence that attaches to a criminal defendant. *Morrisette*, 342 U.S. at 275.

**D. Illinois' proximate cause theory creates an unconstitutional mandatory presumption of guilt for felony murder.**

In addition, Illinois' proximate cause theory violates due process by creating an impermissible mandatory presumption of a defendant's guilt for felony murder as long as the state proves the defendant committed an underlying, independent predicate felony. *Morrisette*, 342 U.S. at 275; *Sandstrom v. Montana*, 442 U.S. 510, 514-24 (1979). In *Sandstrom*, the defendant was charged with "deliberate murder," which required the prosecution to show that he purposely or knowingly killed another. 442 U.S. at 512. The jury was instructed, however, that "the law presumes that a person intends the ordinary consequences of his voluntary acts." 442 U.S. at 513. This Court held that the jury instruction amounted to an impermissible mandatory presumption because a reasonable juror would have likely concluded that the instruction was conclusive on the element of the defendant's intent, and because it eliminated the requirement that the state prove all essential elements of murder beyond a reasonable doubt under *Winship*. 442 U.S. at 517-18, 520-24.

Similarly, Illinois' proximate cause theory, as embodied in the jury instructions in this case, amounted to an impermissible mandatory presumption of Givens' guilt for felony murder. The jury was instructed that it did not have to find that Givens



intended to kill Strong, and further, that “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.” (App. 25a) The jury was further instructed that “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.” *Id.* The essence of these instructions is that the jury was advised that once it found that Givens had committed a burglary, it had to find him guilty of felony murder.

While Illinois law purports to limit liability for felony murder to deaths that are a “direct and foreseeable consequence,” that phrase is meaningless where it is not defined for the jurors, and where jurors are instructed that it is “immaterial” whether the killing was intentional or accidental or committed by a third party. In practice, Illinois courts have found any death arising during the course of a forcible felony to be foreseeable. *See e.g., People v. Brackett*, 510 N.E.2d 877, 880-82 (Ill. 1987) (death of 85-year-old woman weeks after rape, who suffered from underlying health problems, was foreseeable). A reasonable juror would have understood the instructions as mandatory, that is, once the juror found that Givens committed a burglary he or she had no choice but to find him guilty of felony murder.

Moreover, Givens cannot “rebut” the conclusive presumption of guilt for felony murder based on Strong’s death. Illinois courts have limited the availability of traditional defenses to murder in felony murder cases. *People v. Moore*, 447 N.E.2d 1327, 1330 (Ill. 1983) (self-defense not a defense to felony murder). Although Illinois’ felony murder statute contains the phrase, “without lawful justification,” the Illinois

Appellate Court has held that justification is not an element of felony murder, and “whether or not the person who actually committed the shooting was justified is irrelevant to a defendant’s guilt.” *People v. Martinez*, 795 N.E.2d 870, 873-875 (Ill. App. Ct. 2003). In Givens’ case, he was not permitted to introduce evidence in support of a defense that Strong’s death was not foreseeable because the officers used excessive force by violating the general order prohibiting the officers from firing at a moving vehicle. As Illinois’ proximate cause theory of felony murder creates a mandatory presumption of guilt for any death that results from a forcible felony even if committed by a third party, and relieves the prosecution of its burden to prove beyond a reasonable doubt that the defendant had any conceivable mental state for the killing, it violates due process. *Sandstrom*, 442 U.S. at 515-24; *Francis v. Franklin*, 471 U.S. 307, 313-25 (1985).

**E. Illinois’ proximate cause theory violates due process and the Eighth Amendment.**

Finally, by subjecting Givens to the same punishment for felony murder as those defendants convicted of intentional or knowing murder, Illinois has violated both due process and the prohibition against cruel and unusual punishment. 730 ILCS 5/5-4.5-20(a) (West 2012) (sentencing statute for murder). As outlined above, Illinois’ proximate cause theory has resulted in Givens being found guilty in the absence of a discernible *mens rea*. This Court has held that a defendant convicted of felony murder as an aider and abettor for a death occurring during the course of a robbery cannot be sentenced to death under the Eighth Amendment. *Enmund v. Florida*, 458 U.S. 782, 797-801 (1982). In its ruling, this Court indicated that “American criminal law has long

considered a defendant's intention—and therefore his moral guilt—to be critical to the degree of his criminal culpability.” 458 U.S. at 800, *citing Mullaney*, 421 U.S. at 698. This Court has struck down laws as “unconstitutionally excessive in the absence of intentional wrongdoing.” *Enmund*, 458 U.S. at 800. For instance, this Court cited *Robinson v. California*, 370 U.S. 660, 666-67 (1962), in which it struck down a state law that criminally punished a defendant for being a drug addict in violation of the Eighth and Fourteenth Amendment. 458 U.S. at 800. It also cited *Weems v. U.S.*, 217 U.S. 349, 363-82 (1910), in which this Court vacated a conviction for falsifying a document which carried a 15-year prison sentence in the absence of proof of any intent to injure as it constituted cruel and unusual punishment. 458 U.S. at 800. Similarly, Illinois' proximate cause theory of liability for felony murder, which allows for a 20 to 60 year prison sentence in the absence of any proof of *mens rea* for the offense, violates the Eighth and Fourteenth Amendment. This is particularly so where the jury was prevented from finding a *mens rea* because Illinois' proximate cause theory unconstitutionally removes that element from their consideration, yet it was required to find Givens guilty of an offense on equal footing with other forms of felonious homicide requiring proof of a mental state. *Apprendi*, 530 U.S. at 490.

**II. There is a conflict among the state courts on this issue, and it implicates the proper administration of criminal justice.**

Illinois is in a minority of states that utilize the proximate cause theory of liability for felony murder. At least eight other state courts have upheld felony murder convictions when the death was caused by one other than the participants in the underlying felony. *Witherspoon v. State*, 33 So.3d 625, 627-31 (Ala. Crim. App. 2009)

(co-felon killed by clerk resisting robbery); *State v. Lopez*, 845 P.2d 478, 481-82 (Ariz. 1992) (co-felon killed by police officer); *State v. Jackson*, 697 S.E.2d 757, 759-67 (Ga. 2010) (felony murder statute applied to defendants when co-felon killed by one resisting felony); *Palmer v. State*, 704 N.E.2d 124, 125-26 (Ind. 1999) (co-felon killed by police officer); *State v. Baker*, 607 S.W.2d 153, 155-57 (Mo. 1980) (victim shot by another victim); *People v. Hernandez*, 624 N.E.2d 661, 662-66 (N.Y. 1993) (police officer killed by another officer while resisting felony); *State v. Jennings*, 100 N.E.3d 93, 99 (Ohio Ct. App. 2017) (co-felon killed by victim; appealed denied, 96 N.E.3d 299 (Ohio 2018)); *State v. Oimen*, 516 N.W.2d 399, 404-09 (Wis. 1994) (co-felon killed by victim). In upholding the proximate cause theory of liability, those cases rely on the reasoning employed by the Illinois Supreme Court, and some have quoted those holdings directly. *See e.g., Witherspoon*, 33 So. 3d at 630-31 (*quoting People v. Hudson*, 856 N.E.2d 1078, 1083-84 (Ill. 2006)).

But the majority of states limit the application of felony murder to those deaths caused by either the defendant or a co-offender to the underlying felony. *Davis v. Fox*, 735 S.E.2d 259, 262-65 (Va. 2012) (noting that the agency theory is the majority position, and rejecting state's argument that statute allows for proximate cause theory of liability); *Wooden v. Virginia*, 284 S.E.2d 811, 814-16 (Va. 1981); *Campbell v. State*, 444 A.2d 1034, 1037, 1042 (Md. 1982); *State v. Pina*, 233 P.3d 71, 74-78 (Idaho 2010); *State v. Canola*, 374 A.2d 20, 21-30 (N.J. 1977). In rejecting proximate cause liability, many state courts conclude that it ran afoul of this Court's jurisprudence and the common law definition of felony murder cited in *Commonwealth v. Redline*, 137 A.2d 472, 476 (Pa. 1958). *See e.g., State v. O'Kelly*, 84 P.3d 88, 93-98 (N.M. Ct. App. 2003),

*writ quashed*, 106 P.3d 579 (2005). For example, the New Mexico Court of Appeals declined to interpret its felony murder statute to extend liability when a victim resisting a crime commits a fatal shooting. *O'Kelly*, 84 P.3d at 90, 93-98. In so ruling, the New Mexico court quoted the portion of the Pennsylvania Supreme Court's decision in *Redline* stating, "the thing which is imputed to a felon for a killing incidental to his felony is *malice* and *not the act of killing*," and noted that the agency theory was the majority approach. *Id.* at 93-98.

In addition, and contrary to the reasoning of Illinois courts, other state courts have rejected any reliance on tort law as a ground for upholding the proximate cause theory of liability. *People v. Lowery*, 687 N.E.2d 973, 975-79 (Ill. 1997); *Campell*, 444 A.2d at 1041. For example, the Maryland Supreme Court wrote, "the tort liability concept of proximate cause has no proper place in prosecutions for criminal homicide," and "[b]ecause of the extreme penalty attaching to a conviction of felony murder, a closer and more direct causal connection between the felony and the killing is required than the causal connection ordinarily required under the tort concept of proximate cause." *Campbell*, 444 A.2d at 1041 (citations omitted).

Even states that adhere to an agency theory of liability have further limited their felony murder statutes. In *Commonwealth v. Brown*, 81 N.E.3d 1173, 178-79, 1191-99 (Mass. 2017), the Massachusetts Supreme Court ruled that in order to find one guilty of murder based on participation in an underlying felony where the defendant did not actually commit the killing, the prosecution must show that the defendant either had an intent to kill, to cause "grievous bodily harm," or "that a reasonable person would have known that his actions created a strong likelihood that death would

result.” 81 N.E.3d at 1196; *accord O’Kelly*, 84 P.3d at 94-95. In so ruling, the court indicated that a felony murder rule that punished all deaths “without the necessity of proving the relation to the perpetrator’s state of mind to the homicide, violates the most fundamental principle of criminal law—criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result.” *Brown*, 81 N.E.3d at 1195 (internal quotations and citation omitted).

Illinois’ proximate cause theory, as exemplified by John Givens’ case, “violates the most fundamental principle of criminal law,” because it allows for a murder conviction in the absence of proof of any applicable *mens rea*. Despite the unconstitutionality of the proximate cause theory under basic tenets of the American criminal justice system, Illinois courts have held steadfast to the theory even though the language of the statute does not appear to require it. *Lowery*, 178 Ill. 2d 462, 465-69 (relying on the committee comments to 720 ILCS 5/9-1(a)(3) to uphold the proximate cause theory). The minority of states which also adhere to the proximate cause theory similarly violate this Court’s jurisprudence, with the harsh penalty of punishing one as a murderer in the absence of a mental state. This Court should utilize this case to resolve the conflict among the states, and determine the constitutional scope of the felony murder rule.

## CONCLUSION

For the foregoing reasons, petitioner, John Givens, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Appellate Court.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Kathleen Flynn', with a long horizontal stroke extending to the right.

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