No. 13-9205

IN THE

Supreme Court of the United States

CORINIO PRUITT,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Tennessee

BRIEF OF *AMICI CURIAE* THE CONSTITUTION PROJECT AND THE EQUAL JUSTICE INITIATIVE IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The Constitution Project is a bipartisan nonprofit organization that promotes constitutional rights and values by forging a non-ideological consensus aimed at sound legal interpretations and policy solutions. While The Constitution Project takes no position on capital punishment, it is deeply concerned with the preservation of our Eighth Amendment right to be free from arbitrary, capricious, and discriminatory imposition of the death penalty. In 2000, The Constitution Project convened a bipartisan, blue-ribbon Death Penalty Committee comprising respected and diverse experts to evaluate procedural safeguards in capital cases and issue consensus recommendations for reform. The Committee's members have extensive and varied experience with the criminal justice system, and include former governors and lawmakers, judges, prosecutors, defense lawyers, victim advocates, and scholars. Consistent with The Constitution Project's mission to bring together unlikely allies, the Committee's members include both supporters and opponents of the death penalty.

In 2005, the Committee issued *Mandatory Justice: The Death Penalty Revisited*, a groundbreaking report expanding on the

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[1] Counsel of record received timely notice of the intention to file this brief, and all parties have consented to the filing of this brief. As required by Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

recommendations of its 2001 publication, *Mandatory Justice: Eighteen Reforms to the Death Penalty*. The 2005 report made several recommendations to ensure that capital punishment is reserved for the most heinous offenses and most culpable offenders. Among other safeguards, the Committee urged jurisdictions to exclude felony murder from death penalty eligibility as application of capital punishment to this class of offenders—*i.e.*, those who did not intend to kill—undermines the retributive and deterrent purposes of the death penalty. *Mandatory Justice* has been widely distributed, and policymakers have relied on its recommendations in considering reforms to death penalty systems. *E.g.*, State of Illinois, *Report of the Governor's Commission on Capital Punishment* 146 & n.16 (2002), *available at* http://illinoismurderindictments.law.northwestern.edu/docs/Illinois_Moratorium_Commission_complete-report.pdf (last visited April 16, 2014).

The Constitution Project's influential role in death penalty reform, its unique focus on felony murder and the death penalty, as well as its role as an amicus curiae in the Tennessee Supreme Court below, give The Constitution Project a strong interest in the resolution of the question presented here. Indeed, this case underscores the need for states to adopt the Committee's recommendation to exclude felony murder as a basis for death penalty eligibility.

The Equal Justice Initiative is a private, nonprofit organization that provides legal representation to indigent defendants and prisoners who have been denied fair and just treatment in the legal system. Since its inception, it has obtained

relief for dozens of death row prisoners in Alabama—the state with the highest death-sentencing rate in the country—who were wrongfully sentenced to death as a result of inadequate counsel, racial bias, and myriad other factors which should never determine the outcome of a capital case. The Equal Justice Initiative also prepares reports, newsletters, and manuals to assist policymakers in reforming the criminal justice system. The Equal Justice Initiative's commitment to ensuring the fair administration of justice and preventing wrongful convictions for capital crimes gives it a strong interest in the resolution of this petition.

SUMMARY OF THE ARGUMENT

Felony murder is a death that occurs during the course of a felony. *E.g.*, Emily C. Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of* Roper*,* Graham*, & J.D.B.*, 11 Conn. Pub. Int. L.J. 297, 312 (2012). Felony murder does not require an intent to kill. *E.g.*, *Hopkins v. Reeves*, 524 U.S. 88, 91-92 (1998); The Constitution Project, *Mandatory Justice: The Death Penalty Revisited* 18 (2005) ("*Mandatory Justice* (2005)") ("[F]elony murder . . . relieves the prosecution of its burden of proving that the defendant had a culpable mental state with respect to death."). Felony murder thus "imposes a type of strict liability on the perpetrator," *People v. Huynh*, 212 Cal. App. 4th 285 (2012), holding a felon "strictly accountable for the consequences of perpetrating a felony" "whether [the] killing is intentional or accidental," *Sanchez-Dominguez v. State*, 318 P.3d 1068, 1075 (Nev. 2014). Thus, for example, in *People v. Stamp*, the defendant was convicted of felony

murder for the death of a bank employee who suffered a heart attack shortly after the defendant robbed the bank at gunpoint. 82 Cal. Rptr. 598, 601-603 (Cal. Ct. App. 1969); *see also White v. Chrones*, No. EDCV-06-329 DOC (JC), 2009 WL 3049205, at *2-4, 12 (C.D. Cal. Sept. 21, 2009) (denying habeas relief to a defendant convicted of second-degree felony murder for the death of a friend who burned himself, and later died from those burns, while the defendant and the friend were disposing of methamphetamine-manufacturing waste, and approving the court's statement that felony murder is "almost strict liability").

Yet some jurisdictions define felony murder as a capital crime, using it as a death-eligibility criterion. In these jurisdictions, an offender who commits a felony during which a death occurs becomes eligible for the death penalty regardless of the offender's mental state with respect to the killing. Including accidental and non-intentional murderers among the death eligible creates perverse outcomes—those least "deserving" of a death sentence can be sentenced to die while premeditated and intentional murderers may avoid capital punishment. Such results are incompatible with the Eighth Amendment.

I. The Eighth Amendment requires "confining the instances in which capital punishment may be imposed," both to ensure that the death penalty is reserved for the most culpable offenders as well as to avoid imposing the death penalty in an arbitrary and capricious manner. To comply with that constitutional directive, a capital punishment scheme must categorically exclude felony murder from death penalty eligibility.

Using felony murder as a death-eligibility criterion creates an unacceptable risk that the death penalty will be administered in an arbitrary and capricious manner. Felony murder expands the death penalty to non-intentional murderers, and thus fails to confine the death penalty to the most culpable offenders. Compounding that flaw, aggravating circumstances applied to this broader pool of death-eligible defendants do not meaningfully distinguish between offenders who are deserving of a death sentence and those who are not. To the contrary, the aggravating circumstances in felony murder cases generate irrational punishments unchained to culpability, increasing the risk that inappropriate factors, such as bias or other prejudices, will influence sentencing.

To eliminate the risk of arbitrary and capricious punishment, felony murder must be categorically excluded from death penalty eligibility. Anything less than a categorical rule is insufficient. So long as felony murder is used as a death-eligibility criterion, there is an unacceptable risk that a non-intentional felony murderer—a defendant with insufficient culpability to warrant death—will be sentenced to die. Moreover, as with juveniles and the intellectually disabled, the brutality of the crime can overpower the mitigating effect of a non-intentional felony murderer's lack of intent. Only a categorical rule can prevent the risk of undeserved executions.

II. At a minimum, if a state defines felony murder as a capital crime, it cannot also use felony murder as an aggravating circumstance. The resulting "double bump-up," in which felony murder is both an eligibility criterion as well as a sufficient

basis to impose a death sentence, authorizes the death penalty for felony murderers regardless of mental state. In other words, a felony murder offender is strictly liable for the death penalty. Such a scheme, however, entirely fails to confine the death penalty to the most culpable offenders. It also unacceptably increases the risk of arbitrary and capricious administration of the death penalty by giving the jury unlimited discretion to choose which felony murderers deserve the death penalty.

ARGUMENT

I. FELONY MURDER MUST BE CATEGORICALLY EXCLUDED FROM DEATH PENALTY ELIGIBILITY.

The Eighth Amendment "proscribes ' . . . cruel and unusual punishments.'" *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008). Capital punishment is cruel and unusual when it is imposed in a wholly arbitrary and capricious manner. *See Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality op.) ("[T]he death sentences examined" in *Furman* "were 'cruel and unusual in the same way that being struck by lighting is cruel and unusual'"—those sentenced to death were "a capriciously selected random handful.").

A capital punishment scheme that defines capital crimes to include felony murder, *i.e.*, murder based on a killing committed in the course of another felony regardless of intent, is cruel and unusual. Such a scheme expands the pool of death-eligible offenders to include non-intentional murderers, creating a substantial risk of arbitrary and capricious punishment. And as petitioner's case aptly

demonstrates, only a categorical exclusion of felony murder can adequately address these risks.

A. Using Felony Murder As A Death-Eligibility Criterion Creates An Unacceptable Risk Of Arbitrary And Capricious Imposition Of The Death Penalty.

Central to the Eighth Amendment is the guarantee that "the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980). Accordingly, "[t]o pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)). A capital sentencing scheme that uses felony murder as a death-eligibility criterion cannot satisfy that constitutional mandate.

1. Using felony murder as a death-eligibility criterion fails to confine the death penalty to offenders who commit the most serious crimes.

To ensure that the death penalty is not administered in an arbitrary and capricious manner, capital punishment "must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper v. Simmons*, 543 U.S. 551, 568 (2005); *see Gregg*, 428 U.S. at 189 ("*Furman* mandates that [a sentencer's] .

. . discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."); Chelsea Creo Sharon, *The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 Harv. C.R.-C.L.L. Rev. 223, 225 (2011) ("[C]onfining the death-eligible class to the most-culpable offenders" is "a means to reduce arbitrariness.")

Using felony murder as a death-eligibility criterion fails to "vindicate the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders." *Roper*, 543 U.S. at 568-69. To start, it dramatically expands the type of offenses eligible for the death penalty. "Felony murders have always comprised a significant portion of all first-degree murders." Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. Rev. 1103, 1127 (1990); *see* Douglas Van Zanten, *Felony Murder, the Merger Limitation, and Legislative Intent in* State v. Heemstra*: Deciphering the Proper Role of the Iowa Supreme Court in Interpreting Iowa's Felony-Murder Statute*, 93 Iowa L. Rev. 1565, 1592 n.23 (2008) (noting "[t]he felony-murder rule's regular application," and "that 'nearly 20 percent of all murders annually are felony murders.'" (quoting Anup Malani, *Does The Felony-Murder Rule Deter? Evidence from FBI Crime Data* 1 (Dec. 3, 2007), *available at* http://graphics8.nytimes.com/packages/pdf/national/malani.pdf)). Indeed, the use of felony murder as a death-eligibility criterion "'has ballooned.'" *Mandatory Justice* (2005) at 19 (quoting Scott Turow, *The Ultimate Punishment: A Lawyer's Reflections on*

Dealing With the Death Penalty 68-69 (2003)). The numerous felonies justifying a conviction for felony murder further expand those eligible for the death penalty. *See Report of Illinois Governor's Commission* at 72 ("[The felony-murder] eligibility factor swept too broadly and included too many different types of murders.").

What is more, in jurisdictions that have expanded the crimes eligible for capital punishment to include felony murder, the expansion ushers some of the least culpable offenders into the pool of those now eligible for the death penalty. Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 Ariz. St. L.J. 763, 776 (1999) ("Typically, the felony murder defendant is factually among the less culpable."). As noted above, to obtain a conviction for felony murder, the prosecution is not required to prove any culpable mental state with respect to the killing. *E.g.*, *Hopkins*, 524 U.S. at 91-92. Defining felony murder as a death-eligible crime accordingly "opens the possibility of a death sentence for a broad array of murders beyond those that are intentionally committed." Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C.L. Rev. 2031, 2085 (2010). That expansion "[cannot] be reconciled with [the] evolving standards of decency and the necessity to constrain use of the death penalty." *Kennedy*, 554 U.S. at 438-39 (excluding child rape from crimes subject to the death penalty, finding "significant the number of executions that would be allowed" for that offense).

2. Using felony murder as a death-eligibility criterion undermines the ability of aggravating circumstances to guide juror decision-making.

A capital punishment scheme must "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Lowenfield*, 484 U.S. at 244. States therefore must distinguish defendants based on their relative culpability. *See Zant*, 462 U.S. at 877 n.15 (explaining that the "reasonably justify" requirement responded to the concern that, pre-*Furman*, "it [was] highly implausible that only the worst criminals or the criminals who commit the worst crimes [were] selected for" death).

Most states rely on statutory aggravating circumstances to perform that narrowing function. *Lowenfield*, 484 U.S. at 244 ("Under the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death."). When applied to a group of defendants that includes both premeditated intentional murderers and non-intentional felony murderers (as occurs when felony murder is a death-eligibility criterion), however, aggravating circumstances cannot "reasonably justify" the death penalty for some defendants compared to others convicted of murder. *Zant*, 462 U.S. at 877. Because aggravating circumstances generally do not narrow based on a defendant's intent, *see* Sharon, *The "Most Deserving" of Death*, at 235-36 (aggravating factors "stray[] from the constitutionally mandated consideration of the comparative culpability of offenders"), they cannot

possibly identify the most culpable offenders from a pool that includes both non-intentional murderers and intentional murderers.

Indeed, they do just the opposite. Consider some jurisdictions' use of prior convictions as an aggravating factor during capital sentencing. In the numerous states that have adopted this aggravator, *see* Death Penalty Information Center, *Aggravating Factors For Capital Punishment By State*, http://www.deathpenaltyinfo.org/aggravating-factors-capital-punishment-state (last visited April 16, 2014), a non-intentional felony murderer who was "previously convicted of" a "crime involving the use or threat of violence to the person" can be sentenced to death, but a defendant without that prior conviction (or other aggravating circumstance) who "kill[s] another person . . . purposely and with deliberate and premeditated malice" cannot. *E.g.*, Neb. Rev. Stat. §§ 28-303, 29-2523(1)(a). The felony murderer's crimes, however, "cannot be said to have reflected a consciousness materially more 'depraved' than that of" a person guilty of intentional, premeditated murder. *Godfrey*, 446 U.S. at 433. "If anything, the latter, which by definition involves a killing in cold blood, involves more culpability." Rosen, *Felony Murder*, at 1129. Accordingly, aggravating circumstances applied to a group of non-intentional felony murderers and intentional murderers fail to "narrow[] the class of death-eligible persons and thereby channel[] the jury's discretion." *Lowenfield*, 484 U.S. at 244-45.

That failure to channel the sentencer's discretion, moreover, "contributes directly to the serious and well-documented problem of racial disparity in the

application of the death penalty. When various decision-makers within the criminal justice system . . . possess too much discretion over capital sentencing within a large pool of death-eligible murders, then overt and hidden prejudices can influence the decision," *Report of the Governor's Council on Capital Punishment*, 80 Ind. L.J. 1, 10 (2005); *see also Furman v. Georgia*, 408 U.S. 238, 255 (1972) (Douglas, J., concurring) ("[T]he discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused.").

This problem is particularly acute for non-intentional felony murderers. Felony murder defendants include "a disproportionately high number of minority defendants convicted of killing white victims." Rosen, *Felony Murder*, at 1129. And "race-of-the-victim discrimination has continued in contemporary death penalty cases." Kotch & Mosteller, *The Racial Justice Act*, at 2104. A recent study noted that, "[i]f one kills a white person, one is far more likely to get the death penalty than if one kills a member of a minority." Death Penalty Information Center, *Struck by Lightning: The Continuing Arbitrariness of the Death Penalty Thirty-Five Years After Its Re-instatement in 1976* 20 (2011). And because non-intentional felony murderers are "in [the] intermediate or low range of culpability," "sentences are more variable and discretionary and race plays a potentially decisive role." Kotch & Mosteller, *The Racial Justice Act*, at 2081; *see also Mandatory Justice* (2005) at 20 ("[T]he application of the felony murder rule in capital cases likely has a racially disparate impact.").

The likelihood of arbitrary imposition of the death penalty in cases involving lessened culpability, as in capital cases based on felony murder, is compounded when "people of color are dramatically underrepresented on juries as a result of racially biased use of peremptory strikes." Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* 14 (2010). These practices are "especially prevalent in capital cases," *id.*, and "[r]esearch suggests that . . . all-white juries tend to spend less time deliberating, make more errors, and consider fewer perspectives," *id.* at 40.

In sum, using felony murder as a death-eligibility criterion creates an unacceptable risk that the death penalty will be imposed in an arbitrary and capricious manner. It expands the reach of the punishment to include non-intentional murderers, and consequently undermines the narrowing function of aggravating circumstances. The result is a system in which juries have no *meaningful* basis to distinguish a non-intentional murderer from an intentional and premeditated one.

B. A Categorical Rule Excluding Felony Murder Is Necessary To Avoid Arbitrary And Capricious Imposition Of The Death Penalty.

As discussed above, "channeling and limiting . . . the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action" and ensuring that the death penalty is reserved for the worst offenders. *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988). This Court has recognized that for some crimes and offenders this channeling and limiting must take the

form of a categorical exclusion. *See, e.g.*, *Roper*, 543 U.S. at 568 (precluding "the death penalty [for] juvenile offenders under 18 . . . is required by the Eighth Amendment"); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) ("[T]he Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender.'").

Underlying these categorical exclusions is the principle that a capital sentencing scheme must eliminate the risk that an offender will receive the death penalty despite insufficient culpability, even if that means a few of the "worst of the worst" avoid the death penalty. Joseph Trigilio & Tracy Casadio, *Executing Those Who Do Not Kill: A Categorical Approach to Proportional Sentencing*, 48 Am. Crim. L. Rev. 1371, 1398 (2011); *Report of the Governor's Council on Capital Punishment*, at 10 ("[I]t is far more important to ensure that the death penalty will not be applied too broadly than it is to ensure that every one of the most heinous crimes will be eligible for the death penalty."). Eliminating that risk requires categorical exclusion where "[a]n unacceptable likelihood exists" that the brutality of the crime "would overpower mitigating arguments" that the offender never intended the death of another during the course of the offense and thus should receive a sentence less severe than death. *Roper*, 543 U.S. at 572-73.

Thus, in *Roper*, this Court categorically prohibited the death penalty for juveniles. Although "it [could] be argued . . . that a rare case might arise in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity, to merit a

sentence of death," according to the Court, that possibility was insufficient "to risk allowing a youthful person to receive the death penalty despite insufficient culpability." *Id.* The Court also concluded that "[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth," "even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." *Id.* at 573. And given that likelihood, a categorical rule was required—"mitigating arguments based on youth" were insufficient. *Id.*

The same is true for felony murder. So long as felony murder is a capital crime, "the possibility always exists that . . . some minimally culpable felony murder defendants, like accidental killers [and others who did not intend to kill] will be sentenced to die." Rosen, *Felony Murder*, at 1116-17. It is of course possible that felony murder in a rare case might warrant the death penalty. But that possibility does not preclude adoption of a categorical rule, particularly since "[t]he unusual felony murder killing that merits a death sentence would necessarily be one [covered by] another eligibility criterion." *Mandatory Justice* (2005) at 22. Moreover, "asking the jury to weigh the defendant's [status as a non-intentional murderer] against the severity of his or her crime and other factors does not sufficiently address the problem of arbitrariness." The Constitution Project, *Mandatory Justice: Eighteen Reforms to the Death Penalty* 12 (2001) ("*Mandatory Justice* (2001)"). Accordingly, felony

murder must be categorically excluded from death penalty eligibility.

C. Petitioner's Case Illustrates The Constitutional Deficiencies Of Using Felony Murder As A Death-Eligibility Criterion And The Need For A Categorical Exclusion.

A capital sentencing scheme that fails to exclude felony murder from death penalty eligibility creates an unacceptable risk of undeserved executions. That risk materialized here.

On August 2, 2005, petitioner and a friend decided to steal a car from a convenience-store parking lot. Pet. App. 3a. When the car's owner, 79-year-old Lawrence Guidroz, came out of the store, petitioner shoved Mr. Guidroz against the car, pushed him to the ground, saw his head hit the pavement, and drove away. *Id.* at 3a, 4a. No firearms or other weapons were used in committing the robbery. *See id.* at 3a. Mr. Guidroz, a 79-year-old who suffered from coagulopathy and severe coronary atherosclerosis, later died in the hospital. *Id.* at 4a, 9a. Once petitioner learned of Mr. Guidroz's death, he turned himself in to police. *Id.* at 8a.

Based on these events, a grand jury indicted petitioner for both first-degree premeditated murder and first-degree felony murder. *Id.* at 3a. The jury found him guilty of the lesser-included offense of second-degree murder, *id.* at 11a, and thus necessarily determined that petitioner did not "intentionally" cause Mr. Guidroz's death, *compare* Tenn. Code Ann. § 39-13-202(a)(1) (defining first-degree murder in part as "[a] premeditated and intentional killing"), *with id.* § 39-13-210(a)(1)

(defining second-degree murder in part as "[a] knowing killing").

Although second-degree murder is not a capital crime, petitioner also was convicted of first-degree felony murder. This conviction made him eligible for a sentence of death, *see id.* § 39-13-202(a)(2), (c), and the prosecution sought the death penalty. At sentencing, the jury found that the aggravating circumstances—petitioner was previously convicted of a robbery, *id.* § 39-13-204(i)(2); the victim was over 70-years-old, *id.* § (i)(14); and the murder was "knowingly committed" in the course of a robbery in which petitioner had a substantial role, *id.* § (i)(7)—outweighed any mitigating circumstances, including that "the Defendant did not intentionally . . . [or] premeditatively kill [the victim]," Pet. App. 95a (second alteration in original), and sentenced petitioner to death, *id.* at 16a.

Although the jury and courts at every stage of review determined that petitioner did not intend to kill, Tennessee's capital punishment system authorized a jury to sentence him to death. Tennessee law provides no "meaningful basis for distinguishing" petitioner's case "from the many cases in which [the death penalty] is not imposed," including *State v. Graham*, No. W2012-00735-CCA-R3-CD, 2013 WL 2395321 (Tenn. Ct. Crim. App. May 31, 2013). Graham killed his ex-girlfriend by shooting her several times in her workplace parking lot. *Id.* at *2-4. He was convicted of first-degree premeditated murder, but received only life imprisonment. *Id.* at *12. There is no culpability-based justification for these outcomes. In short, petitioner's death sentence was arbitrary.

Moreover, petitioner's case shows the need for a categorical rule to prevent such arbitrary and capricious punishment. Once Tennessee classified felony murder as a capital crime, "[t]he risk of arbitrary and capricious results [could] not be adequately addressed." *Mandatory Justice* (2001) at 11. Aggravating circumstances failed to exclude petitioner from the category of defendants supposedly most deserving of death. Indeed, either Mr. Guidroz's age or petitioner's prior robbery conviction would have permitted a death sentence. *See* Tenn. Code Ann. § 39-13-204(i)(2), (i)(14). Any mitigating argument that he did not intend to kill, moreover, apparently was overpowered by the alleged brutality of petitioner's conduct. Only a categorical rule would have prevented petitioner's death sentence.

II. ABSENT A CATEGORICAL EXCLUSION OF FELONY MURDER, FELONY MURDER MUST BE ELIMINATED AS AN AGGRAVATING CIRCUMSTANCE.

For the reasons just discussed, the Eighth Amendment requires that jurisdictions categorically exclude felony murder from death penalty eligibility. Absent a categorical exclusion, however, jurisdictions that use felony murder as a death-eligibility criterion must eliminate felony murder as an aggravating circumstance.

In jurisdictions that use felony murder both as a death-eligibility criterion and an aggravating circumstance,[2] "the felony murder doctrine provides

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[2] At least five states provide a "double bump-up," permitting both capital charges and imposition of, a death

(continued…)

sentence for non-intentional felony murderers who kill: California, Florida, Georgia, Idaho, and Mississippi.

California: Cal. Penal Code § 189 (defining first-degree murder as murder "committed in the perpetration of, or attempt, to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping,. . ."); *People v. Dillon*, 668 P.2d 697, 718 (Cal. 1983) ("[T]he only criminal intent required [for first-degree felony murder] is the specific intent to commit the particular felony"); Cal. Penal Code § 190.2(a)(17) (listing the fact that "[t]he murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, [one of the enumerated] felonies" as a "special circumstance" that would authorize a death sentence, *see* Cal. Penal Code § 190.3); *id.* § 190.2(b) ("[A]n actual killer, as to whom the special circumstance has been found to be true under Section 190.4, need not have had any intent to kill at the time of the commission of the offense which is the basis of the special circumstance in order to suffer death . . . ."); *People v. Andreasen*, 214 Cal. App. 4th 70, 81 (2012) ("There is no requirement of intent to kill for either the felony-murder offense or the robbery felony-murder special circumstance (unless the special circumstance is applied to an aider and abettor).").

Florida: Fla. Stat. § 782.004 (defining as a "capital felony" "[t]he unlawful killing of a human being . . . [w]hen committed by a person engaged in the perpetration, or in the attempt to perpetrate," an enumerated felony); *id.* § 921.141(5)(d) (aggravating circumstances include: "[t]he capital felony was committed while the defendant was engaged . . . in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any [listed felony]").

Georgia: Ga. Code Ann. § 16-5-1(c) ("A person also commits the offense of murder when, in the commission of a felony, he causes the death of another human being irrespective of malice."); *Id.* § 17-10-30(b)(2) (defining aggravating circumstances to include murder "committed while the offender was engaged in the commission of another capital felony or

a 'double bump-up'—first, bumping a non-death

(continued…)

aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of a burglary in any degree or arson in the first degree"); *see also Jefferson v. State*, 353 S.E.2d 468, 475 (Ga. 1987) (concluding that where "the underlying felony of the felony murder conviction is itself a capital felony or aggravated battery, burglary, or arson in the first degree, . . . proof sufficient to establish felony murder [will] also establish the § (b)(2)"—*i.e.*, felony-murder—"circumstance.").

Idaho: Idaho Code Ann. § 18-4004 (authorizing death penalty for first-degree murder); *id.* § 18-4003 (defining first-degree murder to include murder "committed in the perpetration of, or attempt to perpetrate . . . arson, rape, robbery, burglary, ..."); *State v. Pratt*, 873 P.2d 848, 852 (Idaho 1994) ("Felony murder does not include any element of intent."); Idaho Code Ann. § 19-2515(9)(g) (defining aggravating circumstances to include the circumstance where "[t]he murder was committed in the perpetration of, or attempt to perpetrate [an enumerated felony] and the defendant killed, intended a killing, *or* acted with reckless indifference to human life." (emphasis added)).

Mississippi: Miss. Code Ann. § 97-3-19(2) ("The killing of a human being . . . shall be capital murder . . . [w]hen done with or without any design to effect death, by any person engaged in the commission of the crime of" an enumerated felony "or in any attempt to commit such felonies."); *id.* § 99-19-101(5)(d) (aggravating circumstances include that "[t]he capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping"); *id.* § 99-19-101(7) (requiring that the jury "make a written finding of *one or more* of the following" to "return and impose a sentence of death": "(a) [t]he defendant actually killed; (b) [t]he defendant attempted to kill: (c) [t]he defendant intended that a killing take place; (d) [t]he defendant contemplated that lethal force would be employed" (emphasis added)).

eligible case up to the level of death eligibility, and second, bumping up a death eligible case to one for which a death sentence may actually be imposed." *Mandatory Justice* (2005) at 23. Killing while committing a particular felony is sufficient to impose a death sentence *regardless* of a defendant's intent with respect to the killing. In effect, a felony murder offender receives the death penalty based on a strict-liability theory. *Id.*

That result is entirely incompatible with the constitutional requirements for a capital punishment scheme. To begin with, the constitutionally required narrowing never occurs. *McConnell v. State*, 102 P.3d 606, 624 (Nev. 2004) (finding that, even when the felony-murder aggravator applies to fewer felonies than the crime of felony murder, the aggravator "fails to genuinely narrow the death eligibility of felony murderers and reasonably justify imposing death on all defendants to whom it applies"). As a result, there is *no* channeling of the jury's discretion—jurors have virtually unconstrained freedom to impose the death penalty, inviting arbitrary (and potentially discriminatory) results.

The "double bump-up" also fails to reserve the death penalty for the most culpable offenders. Because neither felony murder nor the felony-murder aggravator requires the sentencer to find that the defendant possessed a culpable mental state with respect to the killing, the double bump-up authorizes the death penalty for non-intentional

murderers.[3] Indeed, the double bump-up arguably makes the *least culpable* offenders the *most likely* to receive the death penalty. After all, felony murder is the only criterion that "automatically authorizes death imposition." *Mandatory Justice* (2005) at 23.

Accordingly, if felony murder is used as a death-eligibility criterion, it must, at a minimum, be excluded from the list of aggravating circumstances. *McConnell*, 102 P.3d at 624 ("[I]n cases where the State bases a first-degree murder conviction in whole or in part on felony murder, to seek a death sentence the State will have to prove an aggravator other than one based on the felony murder's predicate felony.").[4]

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[3] Although Tennessee requires a jury to find that the defendant "knowingly committed" the murder for purposes of the felony-murder aggravator, Tenn. Code Ann. § 39-13-204(i)(7), that mental state nonetheless falls short of an intent to kill, *see* § 39-11-301(a)(2) ("knowingly" is a lesser level of culpability than "intentionally"). Thus, Tennessee's use of felony murder as both an eligibility criterion and an aggravating circumstance authorizes a death sentence for a defendant who "knowingly" committed murder, the mental state for a second degree-murder offense, which is not even eligible for the death penalty.

[4] *Lowenfield* is not to the contrary. *Lowenfield* rejected the argument that a death sentence is unconstitutional merely because the "sole aggravating circumstance found by the jury at the sentencing phase was identical to an element of the capital crime of which he was convicted." 484 U.S. at 241. But that overlap was permissible only because, under Louisiana law, the capital-crime definition "narrow[ed] the class of death-eligible murderers" in a constitutionally sufficient manner. *Id.* at 244. And as a result, the aggravating circumstances had no relevance to the "constitutionally required narrowing process." *Id.* at 246.

But in states for which felony murder provides a double bump-up, the legislature has not narrowly defined capital

Failure to do so sanctions perverse results incompatible with the Eighth Amendment's protection against a cruel and unusual punishment administered through arbitrary and capricious imposition of the death penalty.

(continued…)

offenses such that "the jury finding of guilt" performs the narrowing function. To the contrary, as discussed above, defining felony murder as a capital crime *expands* the defendants eligible for the death penalty. *See* Rosen, *Felony Murder*, at 1135 ("*Lowenfield* did not validate the use of felony murder . . . as a narrowing device. In *Lowenfield*, there *was* genuine narrowing.").

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APRIL 17, 2014