In the
Indiana Court of Appeals

Appellate Cause No. 20A04-1310-CR-518

Blake Layman, Appellant, v. State of Indiana, Appellee. Levi Sparks, Appellant, v. State of Indiana, Appellee.	))))))))))))))	Appeal from the Elkhart Circuit Court Case No. 20C01-1210-MR-7 Hon. Terry C. Shewmaker

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BRIEF OF *AMICUS CURIAE* INDIANA PUBLIC DEFENDER COUNCIL IN SUPPORT OF THE APPELLANTS

STATEMENT OF THE INTEREST OF AMICUS CURIAE

The mission of the Indiana Public Defender Council is to improve legal representation provided at public expense in Indiana state courts. The Council fulfills its mission, in part, by providing research, training, and consultation on strategy and tactics to trial and appellate public defenders.

The broad interpretation of Indiana's felony murder statute to permit convictions when the victim is a co-perpetrator is inconsistent with the plain language of Indiana's statute, and the associated 45 to 65 year penalty range is disproportionate to the nature of the offense. On behalf of the more than 1,200 Indiana lawyers who accept court-appointed cases, the Council has a strong interest in reconsideration of *Palmer v. State*, 704 N.E.2d 124 (Ind. 1999), in a manner consistent with the plain language of the statute and the Proportionality Clause of Article 1, Section 16 the Indiana Constitution.

The Council's interests are substantively aligned with the Appellants. Although the Council shares the juvenile-specific concerns expressed in the Juvenile Law Center (JLC) amicus, this brief takes a broader approach urging reconsideration of *Palmer* regardless of the age of the defendant.

SUMMARY OF THE ARGUMENT

Indiana's felony murder and accomplice liability statutes do not permit a conviction when a defendant's co-perpetrator is the victim. The proximate cause approach to the felony murder statute adopted by a three-justice majority of our supreme court in *Palmer v. State*, 704 N.E.2d 124 (Ind. 1999), cannot be reconciled with the plain language of the Indiana statutes or the approaches taken by other state appellate courts interpreting their felony murder statutes.

Alternatively, if the proximate cause approach continues to be applied in Indiana, the 45 to 65-year penalty range is disproportionate to the nature of the offense. The defendants' actions were in no way knowing or intentional as it relates to the resulting

death. Considering the criminal code as a whole and the specific conduct at issue in this case, any penalty above the C felony range is disproportionate to the nature of the offense.

ARGUMENT

I. The plain language of the felony murder statute does not permit a conviction when the defendant's co-perpetrator was the victim.

Relying largely on precedent in which the defendant inflicted physical injury on a victim who later died, a three-justice majority upheld a felony murder conviction against a defendant whose co-perpetrator was killed by a law enforcement officer in the course of a kidnapping in *Palmer v. State*, 704 N.E.2d 124 (Ind. 1999). The majority reasoned that "[s]uch conduct clearly raised the foreseeable possibility that the intended victim might resist or that law enforcement would respond, and thereby created a risk of death to the persons present." *Id.* at 126. The Indiana Public Defender Council respectfully urges reconsideration of that holding based on the plain language of the statute as informed by Indiana decisional law outside the felony murder realm and in a manner consistent with the approaches taken by other states in addressing their felony murder statutes.[1]

[1] Although this Court cannot overrule an Indiana Supreme Court case, it can—and appropriately has—expressed its respectful disagreement and urged the Indiana Supreme Court to reconsider precedent. As a panel of this Court explained in *Horn v. Hendrickson*, 824 N.E.2d 690, 695 (Ind. Ct. App. 2005), "our supreme court's words and opinions are not carved in stone, and it is not inappropriate for the parties or the judges of this court to ask the court to reconsider earlier opinions." *See, e.g., Galloway v. State*, 920 N.E.2d 711 (Ind. Ct. App. 2010) (concluding it was compelled by Indiana Supreme Court precedent to affirm, although the court "sympathize[d] greatly" with the defendant's position), *vacated on transfer at* 938 N.E.2d 699 (Ind. 2010); *In re Adoption*

A. *Palmer* is inconsistent with Indiana plain language jurisprudence.

Justice Sullivan, joined by Chief Justice Shepard, succinctly explained why the plain language of the felony murder and accomplice liability statutes do not allow a felony murder conviction when the defendant's co-perpetrator is the victim.

> Our felony murder statute provides: "A person who ... kills another human being while committing or attempting to commit... kidnaping ... commits murder, a felony." Ind. Code § 35-42-1-1. Palmer here did not kill another human being; his co-perpetrator was killed by a law enforcement official. Under the terms of the felony murder statute, Palmer is not guilty of felony murder.
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> Our accomplice liability statute provides: "A person who knowingly or intentionally aids ... another person to commit an offense commits that offense." Ind. Code § 35-41-2-4. A person can be liable for felony murder for aiding another person in the commission thereof. But because Palmer's co-perpetrator did not commit felony murder, Palmer cannot be found to have aided in committing that offense. Under the terms of the accomplice liability statute, Palmer is not guilty of felony murder.

Id. at 128 (Sullivan, J., dissenting).

The dissent's approach is wholly consistent with the long-standing approach of giving plain meaning to Indiana's statutes. Reconsidering *Palmer* and adopting the dissent's approach would be consistent with the "long-cherished principle of the American justice system . . . that a citizen may not be prosecuted for a crime without clearly falling

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of D.C., 928 N.E.2d 602, 608-09 (Ind. Ct. App. 2010) (Barnes, J., concurring) ("[G]iven the controversy surrounding the existing Indian family doctrine, I encourage our supreme court to revisit its applicability in Indiana.").

within the statutory language defining the crime." *Smith v. State*, 867 N.E.2d 1286, 1287 (Ind. 2007). This Court has appropriately applied that principle in cases in which conduct was unseemly or worse—but not criminal under the plain language of a statute. *See, e.g., id.* at 1289 (reversing conviction against a school bus driver working as an independent contractor because he was not a "child care worker" as that phrase is defined by statute and therefore "cannot be prosecuted in this case for the criminal offense of child seduction, a class D felony, as defined by the General Assembly"); *Brown v. State*, 868 N.E.2d 464, 470 (Ind. 2007) (reversing convictions for identity deception against a defendant who pretended to be a disc jockey at a radio station because "the evidence does not establish that the defendant committed the offense by using information specifically identifying another individual human being"); *see also State v. Coats*, No. 49S02-1305-CR-328 (Ind. February 18, 2014) (reversing the denial of an order committing to the Department of Mental Health and Addictions a 70-year-old man suffering from Alzheimer's disease because the trial court failed to follow "the strict statutory framework set forth by the legislature").

Even if the language of the statute were ambiguous, "[t]he rule of lenity requires that criminal statutes be strictly construed against the State." *Ellis v. State*, 736 N.E.2d 731, 737 (Ind. 2000) (quoting *Walker v. State*, 668 N.E.2d 243, 246 (Ind. 1996)). The same principles should apply here to prohibit a conviction for felony murder when the defendant's co-perpetrator was the victim.

B. *Palmer* is irreconcilable with the approaches taken by other states.

States have generally taken two approaches to felony murder when the decedent was a co-perpetrator. The majority of states follow an "agency" view, refusing to impose liability for felony murder when the decedent was killed by someone other than the defendant or a co-felon. In short, the felony-murder rule "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." Joshua Dressler, *Understanding Criminal Law* 521 (6th ed. 2012) (quoting *State v. Canola*, 374 A.2d 20, 23 (N.J. 1977) (summarizing the majority view and collecting cases). A minority of states have followed the *Palmer* approach, which is often referred to as "proximate cause," permitting a conviction for felony murder "for any death that is the proximate result of the felony, whether the shooter is a felon or a third party." *Id.* at 522.[2] In criticizing this approach, Professor LaFave has explained, felony murder liability is

> discordant with rational and enlightened views of criminal culpability and liability, especially inasmuch as the purpose of deterring felons from killing by holding them strictly responsible for killing they or their co-felons commit is not effectuated by punishing them for killings committed by persons not acting in furtherance of the felony.

[2] A few courts have recognized a limited version of the proximate cause approach based on the status of the victim, allowing felony murder convictions when a bystander was killed but not when a co-felon was killed. Dressler, *supra* at 522. Even under this approach, the felony murder conviction in *Palmer* and this case were improper.

Wayne LaFave, *Substantive Criminal Law*, § 14.5(d) at 458 (2d ed. 2003) (internal quotation marks and citations omitted).

The "wide variety of the statutory language" in each state's felony murder statutes arguably makes review of decisional law from other states "not particularly helpful." *State v. Thai Do Hoang*, 755 P.2d 7, 10 (Kan. 1988). Review of state approaches to felony murder *in light of their statutory language*, though, is instructive because it highlights the ways in which Indiana's decisional law is inconsistent with its statutory language.

1. Proximate cause states

Indiana is among approximately thirteen states that follow a proximate cause approach to felony murder, permitting convictions when the death of a co-defendant is the proximate cause of the listed felony, even when the co-perpetrator is the victim.

State	Statutory Language	Statutory Citation	Leading Case
AZ	"A person commits first-degree murder if, while committing…the person or another person *causes the death of any person*"	Ariz. Rev. Stat. § 13-1105(A)(2)	*State v. Lucas*, 794 P.2d 1353 (Ariz. Ct. App. 1990), *vacated with directions to allow defendant to file a new notice of appeal*, at 814 P.2d 784 (Ariz. Ct. App. 1991).
FL	"When a person is killed in the perpetration of, or in the attempt to perpetrate…the person perpetrating or attempting to perpetrate such felony	Fla. Stat. § 782.04(3)	*Mikenas v. State*, 367 So.2d 606 (1978)

	shall be guilty of murder in the second degree, which constitutes a felony of the first degree,		
GA	"In the commission of a felony *causes* the death of another human being irrespective of malice"	Ga. Code Ann. §16-5-1	*State v. Jackson*, 697 S.E.2d 757 (Ga. 2010)
IL	"A person who kills an individual without lawful justification commits first degree murder if, in *performing the acts which cause the death*… he is attempting or committing a forcible felony other than second degree murder"	720 Ill. Comp. Stat. § 5/9-1	*People v. Lowery*, 687 N.E.2d 973 (Ill. 1997)
MO	"Commits or attempts to commit any felony, and, in the perpetration or the attempted perpetration of such felony or in the flight from the perpetration or attempted perpetration of such felony, *another person is killed* as a result of the perpetration or attempted perpetration of such felony or immediate flight from the perpetration of such felony or attempted perpetration of such felony"	Mo. Rev. Stat. § 565.021	*State v. Baker*, 607 S.W.2d 153 (Mo. 1980)
NY	"Acting either alone or with one or more other persons, he commits or attempts to commit…and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, *causes* the death of a person other than one of the participants"	N.Y. Penal Law § 125.25(3) (Gould).	*People v. Hernandez*, 624 N.E.2d 661 (N.Y. 1993)
NJ	"committed when the actor, acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit…and in the course of such crime or of immediate flight therefrom, *any person*	N.J. Stat. Ann. § 2C:11-3	*State v. Martin*, 573 A.2d 1359 (N.J. 1990)

	causes the death of a person other than one of the participants		
NC	"A murder…which shall be *committed in the perpetration* or attempted perpetration of [a listed offense] shall be deemed to be murder in the first degree"	N.C. Gen. Stat. §14-17	*State v. Torres*, 615 S.E.2d 36 (N.C. 2005)
OH	"No person shall *cause* the death of another as *a proximate result* of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second"	Ohio Rev. Code Ann. § 2903.02	*State v. Chambers*, 373 N.E.2d 393 (Ohio Ct. App. 1977)
RI	"Every murder . . . committed in the perpetration of, or attempt to perpetrate, any" listed offense	R.I. Gen. Laws § 11-23-1	*In re Leon*, 410 A.2d 121 (R.I. 1980)
TX	"Commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he *commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual*"	Texas Penal Code Ann. § 19.02 (West)	*Miers v. State*, 251 S.W.2d 404 (Tex. Crim. App. 1952)
WI	"Whoever *causes* the death of another human being while committing or attempting to commit…."	Wis. Stat. § 940.03	*State v. Oimen*, 516 N.E.2d 399 (Wis. 1994)
WY	"Whoever . . . in the perpetration of, or attempt to perpetrate**…***kills any human being* is guilty of murder in the first degree"	Wyo. Stat. Ann. § 6-2-101 (West)	*Jansen v. State*, 892 P.2d 1131 (Wyo. 1995)

The proximate cause approach in each of these states is largely compelled by the language of the state statute. The Ohio statute is the clearest example, using the broad language: "No person shall cause the death of another person as a proximate result of the offender's committing or attempting to commit a felony." Ohio Rev. Code § 2903.02. Most of the remaining statutes use the word "causes,"

and the Arizona statute makes clear that felony murder applies when the defendant or "another person causes the death of *any person*." Ariz. Rev. Stat. § 13-1105(A)(2). Finally, the proximate cause approach is certainly consistent with the passive voice used in the Florida statute that "a person is killed in the perpetration of" a listed felony. Fla. Stat. § 782.04(3).

As explained in part I.A., Indiana's felony murder statute is fundamentally different and does not use the word "cause" or "proximate cause" or apply merely when any person causes the death or any person is killed. Rather, the Indiana statute expressly requires that the defendant or a co-defendant did the actual killing.

2. **Agency approach**

Indiana should join the vast majority of states in which felony murder applies only to killings by the defendant or a co-defendant. Indiana's statutory language is similar to, if not more restrictive than, these states.[3]

[3] Ala. Code § 13A-6-2; Alaska Stat. Ann. § 11.41.100; Alaska Stat. Ann. § 11.41.110; Ariz. Rev. Stat. Ann. § 13-1105; Ark. Code Ann. § 5-10-101; Ark. Code Ann. § 5-10-102; Cal. Penal Code § 189; Colo. Rev. Stat. Ann. § 18-3-102; Conn. Gen. Stat. Ann. § 53a-54c; Conn. Gen. Stat. Ann. § 53a-54d; Del. Code Ann. tit. 11, § 635; Del. Code Ann. tit. 11, § 636; D.C. Code § 22-2101; Idaho Code Ann. § 18-4003; Iowa Code Ann. § 707.2; Kan. Stat. Ann. § 21-5402; Kan. Stat. Ann. § 21-5401; La. Rev. Stat. Ann. § 14:30; La. Rev. Stat. Ann. § 14:30.1; Me. Rev. Stat. tit. 17-A, § 202; Md. Code Ann., Crim. Law § 2-201; Mass. Gen. Laws Ann. ch. 265, § 1; Mich. Comp. Laws Ann. § 750.316; Minn. Stat. Ann. § 609.185; Minn. Stat. Ann. § 609.19; Miss. Code. Ann. § 97-3-19; Mont. Code Ann. § 45-5-102; Neb. Rev. Stat. Ann. § 28-303; Nev. Rev. Stat. § 200.030; N.H. Rev. Stat. Ann. §§ 630:1–630:1-b; N.M. Stat. Ann. § 30-2-1; N.C. Gen. Stat. 14-17; N.D. Cent. Code § 12.1-16-01; Okla. Stat. tit. 21, §§ 701.7–701.8; Or. Rev. Stat. § 163.115; 18 Pa. Cons. Stat. Ann. §§ 2502, 2604; S.C. Code Ann. § 16-3-20; S.D. Codified Laws

As an initial matter, despite "causes" language similar to that found in some of the proximate cause states discussed above, a few states have adopted the more restrictive agency approach in applying their felony murder statutes. *See, e.g.*, Ala. Code § 13A-6-2; Me. Rev. Stat. tit. 17-A, § 202.

The statutory language in the agency states is similar to Indiana's statute in two primary ways. First, some statutes expressly require that the defendant "or another participant" cause the death. *See, e.g.*, Ala. Code § 13A-6-2; Wash Rev. Code Ann. §§ 9A.32.030, 9A.32.050. As explained in Justice Sullivan's dissenting opinion, reading the Indiana's accomplice liability statute in conjunction with our felony murder statute imposes the same requirement. *Palmer*, 704 N.E.2d at 128 (Sullivan, J., dissenting).

Second, other statutes interpreted to adopt an agency approach use "kill" language similar to Indiana's felony murder statute. For example, the Iowa statute requires that a "person kills another person while participating in a forcible felony." Iowa Code Ann. § 707.2. The Nebraska statute requires a defendant "kills another person . . . in the perpetration" of a listed offense. Neb. Rev. Stat. Ann. § 28-303. In a case where defendants shot at police cruisers during a chase and officers shot and killed one of the defendants, the Nebraska Supreme Court ex-

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§ 22-16-4; Tenn. Code Ann. §§ 29-13-202, 29-13 210; Tex. Penal Code Ann. §§ 19.02, 19.03; Utah Code Ann. §§ 76-5-202, 76-5-203; Vt. Stat. Ann. tit. 13, §§ 2301, 23011; Va. Code Ann. §§ 18.2-31, 18.2-32; Wash Rev. Code Ann. §§ 9A.32.030, 9A.32.050; W. Va. Code Ann. § 61-2-1.

plained that it "has never adopted any such theory of felony murder and it is not likely to. Such a theory would constitute an extension of the statute and no act is a crime in Nebraska unless made so by statute." *State v. Rust*, 250 N.W.2d 867, 875 (Neb. 1977).

In short, *Palmer* should be reconsidered in light of the plain language of Indiana's statute, as informed by Indiana decisional law and the approaches of other states in interpreting their similarly or differently worded statutes. A conviction for felony murder under Indiana's statute is not permissible when the defendant's co-perpetrator is the victim.

II. A penalty range of 45 to 65 years is disproportionate to the nature of the offense for defendants who merely burglarized a house believed to be empty and one of their co-defendants was killed by shots fired by the homeowner.

If the felony murder conviction is upheld despite the arguments raised by the Appellants and amici, the propriety of the penalty should be considered. Indiana's Proportionality Clause provides that "all penalties shall be proportioned to the nature of the offense." Ind. Const. Art. 1, § 16. That a sentence falls within the parameters set by the legislature does not relieve courts of "the constitutional duty [under Section 16] to review the duration of appellant's sentence as it is possible for the statute under which appellant is convicted to be constitutional, and yet be unconstitutional as applied to appellant in this particular instance." *Conner v. State*, 626 N.E.2d 803, 806 (Ind. 1993) (quoting *Clark v. State*, 561 N.E.2d 759, 765 (Ind. 1990)). In *Conner*, the defendant was convicted of deal-

ing fake marijuana, a Class C felony, while dealing real marijuana was merely a Class D felony. Our supreme court held that this was "out of proportion to the nature of the offense" and remanded for resentencing to a maximum of three years, the maximum sentence for a D felony. *Id.*

Here, the felony murder charge is designated "murder, a felony," the most severe charge in Indiana, which carries a penalty between 45 and 65 years. Ind. Code §§ 35-42-1-1(2) & 35-50-2-3. The conduct at issue, though, was merely an unarmed burglary of a home believed to be unoccupied at the time. The homeowner—not the defendants—shot and killed one of the co-defendants. The defendants could have been charged with a B felony burglary. But the resulting death pales in comparison to most murder cases, which are charged under subsection one of the statute and require a knowing or intentional killing by the defendant—not simply that death result from a series of events out of the defendant's control or intention.

Indiana punishes at a lower level far more intentional conduct by defendants that result in the death of another person. Moreover, "[g]enerally speaking, a person is criminally responsible for his or her own acts, but not for the actions of others." Dressler, *supra* at 521. In addition, "the felony-murder rule can have little or no deterrent effect when the shooter is a non-felon, since the felon has no control over the actions of the innocent person." *Id.* In short, application of felony murder doctrine to a defendant who had no intent to kill, no knowledge that a killing might take place, and no ability to foresee the independent act is disproportionate to the nature of the offense.

Reckless homicide and involuntary manslaughter are punished as Class C felonies with a sentencing range of two to eight years. Ind. Code §§ 35-42-1-4 & 5, 35-50-2-6 This Court has found a Proportionality Clause violation when "the crimes of neglect of a dependent as a class C felony and neglect of a dependent as a class D felony, each carrying a different sentencing range, can be proven with identical elements." *Poling v. State*, 853 N.E.2d 1270 (Ind. Ct. App. 2006). Here, the resulting death from an unarmed burglary of a home believed to be unoccupied may have been reckless, but the defendants' actions were in no way knowing or intentional as it relates to the resulting death.

Although the proportionality analysis is deferential to these legislative classifications, *Conner* and *Poling* makes clear there are limits. Considering the criminal code as a whole and the specific conduct at issue in this case, any penalty above the class C felony range is disproportionate to the nature of the offense. Remand is appropriate for a sentence not to exceed eight years, the maximum sentence for a Class C felony. *Conner*, 626 N.E.2d at 806.

CONCLUSION

The Indiana Public Defender Council respectfully requests this Court express its disagreement with *Palmer*, explaining that felony murder in Indiana occurs only when a *defendant or co-defendant* kills another person during the course of a listed felony. In addition, because the 45 to 65- year sentencing range is disproportionate to the nature of the offense, remand is appropriate for imposition of a sentence that may not exceed eight years, the maximum sentence for a Class C felony.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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