IN THE
COURT OF APPEALS OF INDIANA

CASE NO. 20A04-1310-CR-518

BLAKE LAYMAN Appellant/Defendant	))	Appeal from the Elkhart County Circuit Court
v.	)	Cause No. 20C01-1210-MR-7
STATE OF INDIANA Appellee	))	The Honorable Terry C. Shewmaker, Judge

LEVI SPARKS Appellant/Defendant	))	Appeal from the Elkhart County Circuit Court
v.	)	Cause No. 20C01-1210-MR-5
STATE OF INDIANA Appellee	))	The Honorable Terry C. Shewmaker, Judge

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BRIEF OF THE APPELLANT
BLAKE LAYMAN

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BRIEF OF THE APPELLANT BLAKE LAYMAN

STATEMENT OF ISSUES

Most children mature into adulthood through formative experiences during adolescence. 16-year-old Blake, however, became an adult in a split second: when a homeowner shot and killed his friend. Blake and his teenage friends, known as the "Elkhart Four," come before this Court as adults convicted of murder after committing an unarmed burglary where no innocent person was hurt.

I. Is Indiana's direct-filing statute unconstitutional on its face because it violates a juvenile defendant's state and federal constitutional right to due process of law? If not on its face, is Indiana's direct-filing statute unconstitutional as applied in this case, given that the boys' intent and their actions constituted unarmed burglary, an offense that requires a hearing be held before waiver to adult court?

II. Based on what is now known about adolescent brain development and its effect on juvenile criminal activity, is Indiana's direct-filing statute unconstitutional because it denies juveniles equal protection provided under the Fourteenth Amendment to the U.S. Constitution, and privileges and immunities guaranteed by the Indiana Constitution's Article 1, Section 23?

III. Does Indiana's felony murder statute permit a conviction where a co-felon was killed by a non-participant? If so, does it still permit a conviction when the felon is a juvenile who is incapable of foreseeing all the potential consequences of his actions?

IV. Does Indiana's imposition of a mandatory minimum sentence of 45 years for juveniles convicted of felony murder constitute cruel

and unusual punishment and run afoul of the Eighth Amendment?

V. Does a penalty range of 45 to 65 years for reckless behavior resulting in death violate the Proportionality Clause of the Indiana Constitution?

VI. If the penalty range was not disproportionate, was Blake's 55-year sentence inappropriate in light of the unusual nature of the offense as well as Blake's character?

STATEMENT OF CASE

This is an appeal from an adult conviction and resulting 55-year sentence after Blake was found guilty by a jury of felony murder.

STATEMENT OF FACTS

Blake Layman lived at home with his mother and two younger siblings. [*See* PSI, pg. 5]. His mother was a single mom who worked fulltime to support her family while putting herself through college. [R. at 1285]. As often occurs in single-parent households, at a young age Blake became responsible for helping care for his two younger siblings. He assumed this responsibility at the age of only 5. [App. 98].

Blake's younger sister, Destiny, was born with inoperable brain cancer when Blake was just 6 years old, and Blake's familial responsibilities increased. [App. 98]. When Blake was 13 years old, Destiny began 52 straight weeks of chemotherapy, which took a heavy toll on Blake and his family. [App. 106]. Blake attended numerous doctor's appointments, stayed several nights in the hospital, and helped his mother by waking up in the middle of the night to administer Destiny's medication. [App. 108].

During the year that Destiny underwent chemotherapy, Blake received an informal adjustment for theft of a bicycle. [R. at 1284]. He also began using marijuana. [*See* PSI, pg. 6]. In the 10th grade, Blake was expelled for fighting. [PSI, pg. 5]. But he enrolled in an alternative school to continue his pursuit of a high-school diploma. [PSI, pg. 5]. He also worked part-time at Wendy's during that time; his manager there described him as an "outstanding" employee. [App. 119].

When he was not taking care of his younger siblings, Blake spent time with his friends, 17-year-old Levi Sparks and 18-year-old Anthony Sharp. [*See* PSI, pg. 5]. Blake was doing just that on October 3, 2012. During that time, Levi was staying at 16-year-old Jose Quiroz's home on Frances Avenue in Elkhart. [R. at 706-07]. Blake, Anthony, and 21-year-old Danzele Johnson were visiting Levi and Jose on that day, and they smoked marijuana together. [R. at 710-12; PSI, pg. 6].

At some point that afternoon, the boys decided to burglarize a house. Two of the boys knocked on doors at two houses down the street before deciding to burglarize the house across the street, which they believed was empty at the time. [Ex. 40, pgs. 4-6]. Levi chose to remain at Jose's house. [R. at 931-32]. Unbeknownst to the boys, Rodney Scott was home at the time, asleep upstairs. [R. at 1058]. His doorbell was broken, and he could not hear a knock at the door from his bedroom. [R. at 1057]. He was awakened by Danzele kicking in his back door. [R. at 1058]. Scott grabbed his cell phone and gun, and he headed downstairs. [R. at 1059-61].

Upon seeing the boys inside his house, Scott immediately began firing. [R. at 1065]. Anthony, who was in the kitchen at the time, ran outside. [R. at 1065]. Jose, Blake, and Danzele scrambled to a bedroom closet. [R. at 1070]. Scott fired at least two shots at the boys while they hid in the closet.[1] Scott held them at gunpoint in the closet while he dialed 911. [R. at 1070]. While waiting for police to arrive, Jose and Blake periodically begged to come out of the closet because Danzele was dying. [R. at 1071].

When police arrived, Jose attempted to flee by running out of the closet and jumping through a glass window; he sustained minor injuries as a result. [R. at 1076]. Police found Blake inside the closet after they heard him yelling for help and repeatedly apologizing; he had been shot in the leg. [R. at 567-

[1] Testimony from a detective at the scene revealed that two shots were fired into the closet, one of which traveled through the closed closet door. [*See* R. at 663-67]. No blood was found outside the closet. [R. at 1111].

68]. Danzele had already died; distraught by the passing, Blake repeated over and over again while being treated for his injuries, "I watched [Danzele] die." [R. at 571, 1037]. Scott's watch and wallet, which had been sitting on the kitchen counter by the back door, were later found in the closet; a knife from his kitchen was found outside near a neighbor's trash receptacle.[2]

The State chose to charge Blake and the others with felony murder for their friend's death, and filed the case directly in adult court. [App. 9]. Blake, Anthony, and Levi were tried together, over objection, before a jury.[3] The issue of the boys' ability to foresee the full consequences of their actions arose almost immediately during jury selection. [*See* R. at 138-39]. However, the State objected to defense counsel's line of questioning on the subject, arguing that the law presumes children at least sixteen years of age to be competent. [R. at 138-42]. The trial court sustained the State's objection. [R. at 143].

From opening statements through closing arguments, the main dispute at trial was whether Danzele's death was a foreseeable consequence of the boys' actions. Regarding that issue, the jury was instructed as follows:

> Where the accused reasonably should have foreseen that the commission of or attempt to commit the contemplated felony would likely create a situation which would expose another to

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[2] The testimony suggests that after Anthony heard Scott descending the stairs, he grabbed a knife from the kitchen for protection; but upon hearing gunfire, Anthony ran out of the home and discarded the knife near the neighbor's trash receptacle. Scott did not see Anthony with the knife.

[3] Jose pleaded guilty as charged in exchange for a fixed term of 55 years, 10 years of which were suspended to probation. [Ex. 41].

> the danger of death at the hands of a nonparticipant in the felony, and where death in fact occurs as was foreseeable, the creation of such a dangerous situation is a mediate or immediate cause of the death of the victim.

[App. 73].

During deliberation, the jury had several questions, three of which were related to the issue of foreseeability:

> "Do we need to determine [whether] or not 'they' (defendants) thought there was a high probability or if we (jurors) thought there was a high probability?" [Emphasis in original];
>
> "Can we have a clearer definition of 'feasibility' and 'foreseeable?' Does the 'foreseen' of danger of death have to be before the commission of the felony as part of the planning stage; should or can it occur as the commission of the felony progresses?"; and
>
> " . . . and how specific does the foreseen knowledge have to be? . . . spoken of . . . planned for as in ' . . . in case of . . . ?' After all, danger is inherent in every step we take."

[App. 131-32]. The trial court informed the jury that the law did not permit the court to provide an answer, but that the answers could be found in the evidence and instructions presented to the jury. [App. 133].

Blake, Levi, and Anthony were found guilty as charged. [R. at 1274-75]. When asked by the trial court at sentencing what Blake was thinking that day, he responded:

> [BLAKE:] Your Honor, at the time I wasn't - I wasn't really using my head.
> [COURT:] Seemed like a good idea at the time.
> [BLAKE:] To be honest with you, when I look back on it, I don't even remember thinking about it at all. I just remember going - going with what was going on

around me, which I was being a follower, Your Honor.

[COURT:] And I suppose if the other four were going to jump off a cliff you'd jumped off the cliff too?

[BLAKE:] No, I'm not saying that -

[COURT:] You wouldn't do that. That's different.

[BLAKE:] I'm just saying I was - I went with what was around me.

[COURT:] I mean, you understand - intellectually you understand there are consequences for your actions. Right?

[BLAKE:] I do, Your Honor.

[COURT:] Did you understand it then?

[BLAKE:] I did. I just wasn't thinking of the consequences. I wasn't thinking of the gravity of my actions.

[R. at 1325-26].

The trial court imposed a sentence of 55 years in prison. This appeal ensued.

SUMMARY OF ARGUMENT

"[C]hildren cannot be viewed simply as miniature adults." *J.D.B. v. North Carolina*, ___ U.S. ___, 131 S. Ct. 2394, 2404 (2011). Yet only moments after Danzele's passing, Blake became a "miniature adult" in the criminal justice system. Despite recent U.S. Supreme Court jurisprudence holding that "kids are different" and a well-established body of research on adolescent brain development that proves even children in their late teens do not possess the biological capacity to properly weigh the risks and foresee the consequences of their impulsive actions, Blake was treated like an adult.

Blake's treatment as a miniature adult deprived him of due process and due course of law guaranteed by our Federal and State Constitutions. Rather than providing Blake with the opportunity to present evidence as to why he should be allowed to remain in the juvenile system to obtain rehabilitative services, the prosecutor chose to file Blake's case directly in adult court.

Similar to younger juveniles, Blake lacked the ability to foresee the potential negative consequences of his actions. By requiring that Blake's case be filed directly in adult court but providing a 15-year-old who committed an intentional murder a waiver hearing, Indiana's automatic waiver statute deprived him of equal protection guaranteed by the U.S. Constitution, and privileges and immunities afforded by the Indiana Constitution.

Additionally, Indiana's felony murder statute was not applicable in this case. A plain reading of the statute shows that it applies only when Blake or his friends were responsible for actually killing the decedent. Prior precedent from our Supreme Court holding otherwise should be overruled or, in the alternative, should not be followed with juveniles, given that they are incapable of foreseeing the risks inherent in their actions.

Finally, Blake's 55-year-sentence was improper and unconstitutional. First, it was disproportionate to the nature of the offense and, thus, violated the Proportionality Clause of the Indiana Constitution. The actions that Blake took, while possibly reckless, were not akin to knowing or intentional

murder. Rather, Blake's actions were comparable to reckless homicide or involuntary manslaughter, both Class C felonies. Thus, any sentence exceeding 8 years is disproportionate to the nature of the offense. Further, applying a mandatory minimum sentence of 45 years—that cannot be suspended for any reason—to Blake is cruel and unusual punishment. The mandatory minimum sentence was intended for adults who intended to kill, and Blake is a juvenile who had no intention to kill, making his moral culpability twice diminished from those for whom the statute was intended.

Alternatively, Blake's sentence was inappropriate, given the nature of the offense and his character. Blake does not dispute that the homeowner was justified in using deadly force to protect his home. But the fact that the homeowner chose to use deadly force did not change the nature of the affirmative acts that Blake took: he broke into and entered a home while unarmed when he thought it was unoccupied. This, coupled with Blake's young age, called for a minimum sentence.

ARGUMENT

Courts have historically recognized that juveniles are different from adults; that their lack of emotional maturity and sense of responsibility call for unique treatment under the law. *Roper v. Simmons*, 543 U.S. 551, 569 (2005). Nearly every state prohibits juveniles from voting, entering into

binding contracts, drinking alcohol, smoking cigarettes, and serving on juries. *Id.* But it was not until 2005 that the U.S. Supreme Court made a radical shift towards recognizing the unique treatment that juveniles deserve in criminal prosecutions. In *Roper v. Simmons*, the High Court held that the Eighth Amendment's prohibition of cruel and unusual punishment forbid the imposition of the death penalty for juveniles. *Roper*, 543 U.S. at 568. The Court cited with approval a growing body of neuroscientific research conducted on adolescent brain development. *Id.* This research concluded that juveniles' brains are not only biologically different, but also anatomically deficient, as compared to the brains of adults. *See* Brief of the American Medical Ass'n et al. as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005).[4] These deficiencies are particularly pronounced when factors such as stress, emotions, and peer pressure become part of the equation. *Id.* at 7-8.

More specifically, the neuroscience research relied upon by the *Roper* court demonstrated that the frontal lobe of a juvenile's brain is not fully developed, even as late as 18 years of age. *Id.* at 16. This part of the brain is responsible for a person's reasoning, impulse control, cost-benefit calculation, judgment, etc. *Id.* Because this part of the brain is not fully developed,

[4] A copy of the brief can be found at www.ama-assn.org//resources/doc/legal-issues/roper-v-simmons.pdf (last checked Feb. 21, 2014).

juveniles are more prone to engage in risky behavior and less capable of controlling their impulses than adults are. *Id.* at 5-6, 8.

Additionally, juveniles do not weigh the costs and benefits of their actions in the same way that adults do. *Id.* at 8-9. The research shows that juveniles do perform cost-benefit analyses; but as a result of their anatomic deficiencies they skew the balancing, which results in poor judgment. *Id.* at 6. In sum, because juveniles' cognitive functioning is significantly less developed than that of adults, so is their level of understanding of the consequences of their actions. *Id.* at 21-22.

In recognition of these biological differences, the *Roper* court stated,

> Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.

Roper, 543 U.S. at 570.

Relying on an even larger body of research, the High Court in *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011 (2010), held that the Eighth Amendment forbid the imposition of life without parole for juveniles convicted of a non-homicide crime. Neuroscientific research that had been done since *Roper* found that even juveniles in their late teens "who have developed general cognitive capacities similar to those of adults show deficits in these aspects of social and emotional maturity." *See* Brief of the American Psychological Ass'n et al. as Amici Curiae Supporting Petitioners, *Graham v.*

Florida, 560 U.S. 48 (2010), at 9.[5] Most importantly, the research confirmed that:

> [J]uveniles differ from adults in their ability to foresee and take into account the consequences of their behavior. By definition, adolescents have less life experience on which to draw, making it less likely that they will fully apprehend the potential negative consequences of their actions.

Id. at 11-12. In fact, these differences between juveniles and adults have become so established that the U.S. Supreme Court now believes citation to social science and cognitive authorities is no longer necessary. *See J.D.B.,* 131 S. Ct. at 2403 n.5.

A year later in *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455 (2012), the High Court held that mandatory life without parole for juveniles, regardless of the severity of the offense, constituted cruel and unusual punishment in violation of the Eighth Amendment because such a sentence did not allow for consideration of the fundamental impact the juvenile's age had on commission of the crime.

Likewise, no consideration was given to the fundamental impact that Blake's age had on commission of the crime in the instant case. From the initial decision the State made to charge him in adult court to the total lack of mitigation Blake's age had on his lengthy sentence, Blake was treated as a "miniature adult" throughout this case.

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[5] A copy of the brief can be found at www.apa.org/about/offices/ogc/amicus/graham-v-florida-sullivan.pdf (last checked Feb. 21, 2014).

I. The Use of Indiana Code Section 31-30-1-4 to Waive Blake Into Adult Court Without Hearing or Related Rights Violated the Federal and Indiana Constitutions

Application of Indiana Code section 31-30-1-4 to Blake's case resulted in a deprivation of his due process rights. In this Court's recent opinion in *Gingerich v. State*, 979 N.E.2d 694 (Ind. Ct. App. 2012), *trans. denied*, the prevailing law regarding due process was stated as follows:

> The Due Process Clause of the United States Constitution and the Due Course of Law Clause of the Indiana Constitution prohibit state action which deprives a person of life, liberty, or property without the 'process' or 'course of law' that is due, that is, a fair proceeding. The same analysis is applicable to both federal and state claims. An essential principle of due process is that deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case. Once it is determined that the Due Process Clause applies, the question remains what process is due. Also, predicate to an analysis of whether the process provided was fair is a determination that the claimant had a protectable life, liberty, or property interest at stake.

Id. at 710 (citations and punctuation omitted).

A. Statutory Waiver Results in a Prosecutor's Discretionary Act

Indiana Code section 31-30-1-1 provides that a juvenile court has "exclusive original jurisdiction over proceedings in which a child is alleged to be a delinquent child under IC 31-37." However, Indiana Code section 31-30-1-4 excludes from that exclusive original jurisdiction alleged violations of certain statutes, including the statute alleged to have been violated here: Indiana Code section 35-42-1-1 (murder). The prosecutor determines when, and when not, to allege a violation of a statute. A legal scholar succinctly

summarized this concept by stating: "In a statutory exclusion situation, the charging decision is the prosecutor's." Eric K. Klein, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 Am. Crim. L. Rev. 371, 397 (1998).

The irony is that, by allocating to the State the decision of whether to prosecute certain children in adult court, our legislature has left the decision in the hands of the court officer least likely to weigh in the favor of protecting the rights of the juvenile:

> Such "prosecutorial discretion is without adequate procedural check." The prosecutor is not required to hold a hearing before he decides whether to file a waiver petition. And since the prosecutor's main function is to enforce the law his view of whether a juvenile may respond to treatment is colored. The prosecutor's decision as to which offense to charge a juvenile with and thereby seek waiver may be distorted if the offense has aroused public opinion; "well publicized cases usually result in pressure on the juvenile authorities to permit prosecution in the adult criminal courts".

Jacqueline Simmons, *Waiver in Indiana—A Conflict with the Goals of the Juvenile Justice System*, 53 Ind. L.J. 601, 610-11 (1977-78).

That being said, leaving the decision of whether adult court or juvenile court is proper to the prosecutor's discretion has not insulated that state act from constitutional scrutiny. "When a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution." *Lafler v. Cooper*, 556 U.S. ____, 132 S. Ct. 1376, 1387 (2012) (*quoting Evitts v. Lucey*, 469 U.S. 387 (1985)).

B. Blake Had a Liberty Interest at Stake

Because Blake could have been subjected to the exclusive jurisdiction of the juvenile court, as opposed to adult court, Blake's liberty interest is the same as any other child. As this Court explained in *Gingerich*:

> Ind. Code § 31-30-3-4 implicates valid liberty interests held by Gingerich. As he notes, Ind. Code § 31-30-1-1 vests "exclusive jurisdiction" in the juvenile court over a child who is alleged to, before becoming eighteen years of age, commit a delinquent act. Also, Ind. Code § 31-30-3-4 provides for a "full investigation and hearing" prior to juvenile jurisdiction being waived. Thus, at the outset of the filing of the delinquency petition Gingerich enjoyed the panoply of protections associated with being tried in the juvenile system, and he was entitled to a full investigation and hearing prior to the court ordering waiver.

Gingerich, 979 N.E.2d at 710-11.

This is consistent with the Supreme Court's explanation of what is at stake when waiving a juvenile to adult court in the seminal case of *Kent v. United States*, 383 U.S. 541, 556 (1966): "It is clear beyond dispute that the waiver of jurisdiction is a critically important action determining vitally important statutory rights of the juvenile." The fact that the state actor deciding to process Blake in adult court was a prosecutor, rather than a juvenile court judge, does not detract from the nature of Blake's liberty interests at stake.

C. Indiana Code Section 31-30-1-4 is Unconstitutional on Its Face

The philosophy of the juvenile justice system is founded on the principle that juveniles are inherently less guilty than adult offenders and,

therefore, more malleable, or more amenable to change. Stacy Sabo, *Rights of Passage: An Analysis of Juvenile Court Jurisdiction*, 64 Fordham L.R. 2425, 2430-31 (1996). Thus, they are deserving of reformative services. The purpose of transferring certain juveniles to adult court is based upon the rationale that those offenders are beyond amenability to the rehabilitative treatment that juvenile courts have to offer, and they pose a danger to the community. *Id.* at 2426. Thus, waiver statutes such as Indiana Code section 31-30-1-4 exclude certain juveniles from juvenile court jurisdiction, typically for capital or violent offenses. *See id.* at 2444.

As previously discussed, the U.S. Supreme Court has developed and expanded the concept that juveniles are different in its decisions in *Roper*, *Graham*, and *Miller*. The commonality of these cases is that they refer to juveniles under the age of 18 uniformly: *Roper* declaring that the death penalty is prohibited by the Eighth Amendment for all juveniles; *Graham* declaring that life without parole for non-homicidal offenses is prohibited for all juveniles; and *Miller* concluding that application of mandatory life without parole statutes to all juveniles is cruel and unusual punishment.

Both Federal and State judicial decisions contain broad language highlighting the importance of judicial waiver hearings and associated rights, which, in light of the shift seen in *Roper*, *Graham*, and *Miller*, should be applicable to all persons under age 18, no matter what their offenses:

> [T]here is no place in our system of law for reaching a result of

> such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if society's special concern for children, as reflected in the District of Columbia's Juvenile Court Act, permitted this procedure.

Kent, 383 U.S. at 554. *See also Vance v. State*, 640 N.E.2d 51, 55 (Ind. 1994) (noting that juveniles are entitled to basic requirements of due process and fair treatment during waiver hearings, including the right to present evidence on his behalf).

Moreover, a judicial waiver hearing does not unreasonably burden the State, nor does it prevent those juveniles who are beyond the help of the juvenile court from being transferred to adult court. It simply provides for an individualized assessment that results in reasonable assurance that juveniles for whom the juvenile court is appropriate stay in that forum. These concepts should apply equally to all children who have allegedly committed offenses before reaching the age of 18.

While it is true that certain federal authorities have held that statutory waiver or prosecutorial waiver is not violative of Federal due process,[6] these cases are not binding upon Indiana courts.[7] The persuasive

[6] *See U.S. v. Quinones*, 516 F.2d 1309 (1st Cir. 1975) ("Congress could legitimately vest in the Attorney General discretion to decide whether to proceed against a juvenile as an adult and that the exercise of such discretion does not require a due process hearing.") (*citing Cox v. U.S.*, 473 F.2d 334 (4th Cir. 1974) and *U.S. v. Bland*, 472 F.2d 1329 (D.C. Cir. 1972)).

value of these decisions is also suspect as this issue has not been addressed directly by the Supreme Court, and the statutory authority addressed by these decisions has been amended to provide significantly more procedural protection to juveniles.[8] Most notably, the decisions predate the recent opinions of *Roper*, *Graham*, and *Miller*, which underscore the reasons for treating juveniles different from adults.

Finally, a number of legal scholars argue that statutory or legislative waiver systems, such as Indiana Code section 31-30-1-4, are antithetical to the goals and values underpinning juvenile law, deprive juveniles of deserved due process, and should be eliminated. *See* Rachel Jacob, *Waiving Goodbye to Due Process: The Juvenile Waiver System*, 19 Cardozo J.L. & Gender 989, 1011 (2012-13) ("To adequately protect the due process rights of juveniles, judicial waiver must be reformed and both prosecutorial and statutory waiver must be eliminated."); William Hannon, *Judicial Waiver as the Only Equitable Method to Transfer Juvenile Offenders to Criminal Court*, 22 Notre Dame J.L., Ethics & Pub. Pol'y 193, 208 (2008) ("Whatever minimal benefits

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[7] Decisions of Federal circuit courts, even as pertaining to federal law, are not binding upon state courts. *Jackson v. State*, 830 N.E.2d 920, 921 (Ind. Ct. App. 2005), *trans. denied*.

[8] The statute relied upon in *Quinones*, *Cox,* and *Bland*, 18 U.S.C. § 5032, which provided complete prosecutorial discretion by the Attorney General in charging juveniles as adults in federal court, has been amended to provide significant due process to juveniles such as Blake. Now there must be a detailed certification by the Attorney General regarding the propriety of prosecution in adult court, and a concurrence by the district court, after a hearing, that "adult prosecution is appropriate" "in the interest of justice." 18 U.S.C. § 5032.

are gained through consistency and expediency in automatic waiver cannot outweigh the harm done to thousands of nonviolent youth offenders who are excluded from juvenile court jurisdiction with no hearing because of the over-inclusive nature of such statutes."); Joshua T. Rose, *Innocence Lost: The Detrimental Effect of Automatic Waiver Statutes on Juvenile Justice*, 41 Brandeis L.J. 978 (2003) ("These automatic waiver provisions undermine the rehabilitative backbone of the juvenile justice system by broadly sweeping juvenile offenders that are amenable to rehabilitation into the confines of the adult criminal court system."); Thomas Mescall, II, *Legally Induced Participation and Waiver of Juvenile Courts: A Therapeutic Jurisprudence Analysis*, 68 Rev. Jur. U.P.R. 706, 713 (1999) ("In short, both legislative waiver and prosecutorial waiver disregard any assessment of the individual juvenile. As a result, some waived juveniles will be inappropriately prosecuted in adult criminal courts largely due to such factors as age and offense criteria."); Sabo, *supra* at 2454 ("In view of its monumental importance, the decision [of waiver into adult court] should be made only after a full and impartial consideration of the juvenile's individual circumstances and best interests . . . prosecutorial and legislative waiver do not provide a forum for this examination[.]"); Simmons, *supra* at 614 ("In order for our waiver law to be compatible with the long accepted *parens patriae* philosophy of the juvenile court system it must be amended to allow more certainty that those children we decide must be waived to the adult

court are truly beyond the rehabilitative care of the juvenile court.").

For all of these reasons, Indiana Code section 31-30-1-4 violates the Due Process and Due Course of Law Clauses contained in the Federal and Indiana Constitutions.

D. In the Alternative, Indiana Code Section 31-30-1-4 is Unconstitutional as Applied

Even if this Court holds that Indiana Code section 31-30-1-4 is not unconstitutional on its face, for depriving all juveniles aged 16 and older of due process, the statute is unconstitutional as applied to this case. Here, 16-year-old Blake was prosecuted in adult court based upon an allegation of felony murder, wherein the underlying felony alleged was burglary. [App. 9]. Indiana Code section 31-30-1-4 provides that for children at least 16 years of age, "[t]he juvenile court does not have jurisdiction over an individual for an alleged violation of [certain violent crimes, including] . . . (2) IC 35-42-1-1 (murder)." Indiana Code section 35-42-1-1 includes felony murder, wherein a person who "kills another human being while committing or attempting to commit" a list of various felonies, including burglary, commits murder.

The key disparity between these statutes that has resulted in an illogical and unjust result is that burglary may be used to support a charge of felony murder, but burglary is not a crime excluded from juvenile court jurisdiction by statute. *See* Ind. Code § 30-31-1-4. To the contrary, a charge of burglary requires a waiver hearing and all the procedural protections that

accompany that right. *See* Ind. Code ch. 31-30-3.

Unlike other types of murder in Indiana, an actual intent to kill is not required for felony murder; rather, the intent to commit the underlying felony is "transferred" to the felony murder charge. *See, e.g., Pittman v. State*, 885 N.E.2d 1246, 1258 (Ind. 2008). Here, the State was allowed to prosecute Blake in adult court without conducting a waiver hearing, based on an allegation that Blake had the *mens rea* only to commit burglary, an offense for which the juvenile court would have had original exclusive jurisdiction. Ind. Code § 31-30-1-1.

Because Blake's intention was to commit an offense that did not fall within the automatic waiver offenses detailed in Indiana Code section 31-30-1-4, automatic waiver to adult court without a hearing is illogical. The consideration of whether a juvenile is amenable to the rehabilitative offerings of juvenile court should be based on a consideration of the offense the juvenile intended to commit. Blake's mindset will ultimately determine whether he can be rehabilitated, and to ignore his mindset at the time of the offense would result in an injustice.

For these reasons, Indiana Code section 31-30-1-4, as applied in this case, violates the Due Process and Due Course of Law Clauses contained in the Federal and Indiana Constitutions.

II. Application of Indiana's Statutory Waiver Procedure Denied Blake Equal Protection as Guaranteed by the Fourteenth Amendment to the U.S. Constitution and Privileges and Immunities as Provided by Indiana Constitution Article 1, Section 23

The Equal Protection Clause of the Fourteenth Amendment provides that, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Article 1, Section 23 of the Indiana Constitution provides that, "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." These provisions are not coextensive and should be given independent interpretation and application. *Ledbetter v. Hunter, et al.*, 652 N.E.2d 543, 550 (Ind. Ct. App. 1995).

A. Equal Protection Clause of the Fourteenth Amendment

"Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer v. Evans*, 517 U.S. 620, 633 (1996). The Fourteenth Amendment's promise that no person shall be denied equal protection of law must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. *Id.* at 631. "We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as

it bears a rational relation to some legitimate end." *Id.*

Because age is not a classification which has historically been given heightened scrutiny review[9], Blake contends that his right to equal protection was violated because Indiana Code section 31-30-1-4 does not survive a rational basis inquiry. "To withstand equal protection review, legislation . . . must be rationally related to a legitimate government purpose." *Cleburne*, 473 U.S. at 446. Essentially, the State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. *Id.*

Here the classification created by Indiana Code section 31-30-1-4 is a subset of juveniles, those who are subjected to having their cases directly filed into adult court. This classification only applies to 16- and 17-year-old juveniles who have been alleged to have committed one of the several offenses enumerated in Indiana Code section 31-30-1-4, including murder. This is juxtaposed to other juveniles, who may commit these same offenses, but simply by virtue of being chronologically younger are afforded at least a chance at the rehabilitative services that juvenile courts have to offer.

The goal or purpose of automatic waiver statutes is derived from the "view that juveniles of a certain age that have committed certain offenses should be automatically waived to criminal court, because they are unable to

[9] "We have declined, however, to extend heightened review to differential treatment based upon age[.]" *City of Cleburne, Texas, et al. v. Cleburne Living Center, Inc., et al.*, 473 U.S. 432, 441 (1985).

be rehabilitated through the juvenile justice system." Rose, *supra* at 993. "The legitimate government objective is to protect society from violent, harmful youth that would otherwise (absent automatic waiver provisions) be released from the custody of juvenile detention" too early. *Id*.

However, the legitimacy of this objective is dubious as each of the alleged offenders included in the classification created by Indiana Code section 31-30-1-4 would be subject to judicial waiver, if appropriate, upon motion by the prosecution and after full investigation and hearing. *See* Ind. Code ch. 31-30-3. Thus, since each juvenile in the class created by the automatic waiver statute who deserves to be waived to adult court can be waived through reasonable procedures, the only remaining legitimate interest is judicial economy (or the avoidance of providing procedural safeguards). That being said, the provision of procedural safeguards is always going to be at loggerheads with notions of judicial economy. To rely upon the notion of judicial economy to foreclose the fundamental rights espoused in *Kent*, calls into the question the legitimacy of this state interest.

Further, the distinction between 16- and 17-year-old juveniles and those that are younger, sometimes only by days or months, is suspect in light of the recent developments that show that the juvenile brain is not fully developed until after that age range. [10] "Scientists have found that

[10] "The qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Roper*, 543 U.S. at 574. An overview of how brain

adolescents as a group, even at later stages of adolescence, are more likely than adults to engage in risky, impulsive, and sensation-seeking behavior." Brief of the American Medical Ass'n et al. as Amici Curiae in Support of Neither Party, at 2 (cited with approval by *Graham*, 130 S. Ct. 2026).[11] This is in large part why the High Court created prohibitions against the imposition of capital punishment (*Roper*), life without parole for non-homicidal offenses (*Graham*), and mandatory life without parole for all juveniles under the age of 18 (*Miller*), for all persons under the age of 18, no matter how heinous the individual circumstances of their crimes, or how ingrained in criminal behavior they had become. 16- and 17-year-olds are still: subject to peer pressure, impulsive, likely to engage in risky behavior, and unable to think through consequences the way adults do. Therefore, the concept that all juveniles age 16 to 17 that commit the offenses listed in our automatic waiver statute are beyond rehabilitation is a fallacy; and, in turn, the juxtaposition of 16- and 17-years-olds to their slightly younger counterparts is not rationally related to a legitimate state interest.

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development influences juvenile decision making can be found at: http://www.ted.com/talks/sarah_jayne_blakemore_the_mysterious_workings_of_the_adolescent_brain.html (last checked Feb. 21, 2014).

[11] A copy of the brief can be found at www.aacap.org/App_Themes/AACAP/docs/Advocacy/amicus-curiae/Graham_v_Florida_Amici_Brief.pdf (last checked Feb. 21, 2014).

B. The Privileges and Immunities Clause Contained in Article 1, Section 23 of the Indiana Constitution

The inquiry under our Privileges and Immunities clause applies the same level of scrutiny to "any and all" unequal privileges or immunities. *Ind. High Sch. Ath. Ass'n v. Carlberg*, 694 N.E.2d 222, 239 (Ind. 1997) (*quoting Collins v. Day*, 644 N.E.2d 72 (Ind. 1994)). That level of scrutiny examines whether "the disparate treatment . . . [i]s reasonably related to inherent characteristics which distinguish the unequally treated classes." *Id*. That being said, the challenger to a statute bears the burden to negate every reasonable basis for the classification, because of the substantial deference owed to any enactment. *Id*.

Here the analysis is similar, if not the same, to the rational basis review. As *Roper*, *Graham*, and *Miller* have established, the inherent characteristics of juveniles that make them worthy of a chance of treatment in juvenile court does not change for 16- and 17-year-olds—i.e. 16- and 17-year-olds do not have inherent characteristics that make them different from 15-year-olds or maybe even younger juveniles. They are subject to the same, if not greater, impulses to engage in risky behavior, they are subject to the same desires to go along with peer pressure, and they are similarly unable to foresee the long-term consequences of their actions.

And again, since judicial waiver procedures are available to ferret out those who do not belong in the juvenile court system, there is no legitimate

reason for the statute, other than the elevation of judicial economy above procedural rights of paramount importance. Therefore, for the same reasons that Indiana Code section 31-30-1-4 does not pass muster under rational basis review, the disparate treatment caused by automatic waiver is not reasonably related to inherent characteristics which distinguish the unequally treated class.

III. The Felony Murder Doctrine was Improperly Applied in This Case

While the felony murder doctrine has its roots in English common law, it was not recognized in colonial American or common law when this country was founded. Emily C. Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of Roper, Graham & J.D.B.*, 11:2 Conn. Pub. Int. L.J. 297, 303 (2012). But in the 1800s, states enacted such statutes, although they were narrowly tailored to apply only where the defendant himself had an actual intent to inflict injury during the felony. *Id.*

Gradually, other states, including Indiana, broadened the scope of the felony murder doctrine by increasing the number of underlying predicate felonies to include less serious offenses[12], and by expanding the reach of accomplice liability to hold even minor participants accountable to the same extent as the principal[13]. *Id.* at 304-05.

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[12] *See, e.g.,* P.L.296-1989, § 1 (adding four new underlying predicate felonies).

[13] *See* Ind. Code § 35-41-2-4 (stating that a person "who knowingly or intentionally aids, induces, or causes another person to commit an offense commits

Today, Indiana's felony murder doctrine applies when a person (or his accomplice) "kills another human being while committing or attempting to commit" one of seventeen enumerated felonies. Ind. Code § 35-42-1-1. Unlike other types of murder, an actual intent to kill is not required; rather, all that is required is intent to commit the underlying felony. *See, e.g., Pittman*, 885 N.E.2d at 1258.

A. Expansion of the Doctrine to a Co-Felon's Death Caused by a Non-Participant

Perhaps the greatest expansion of Indiana's felony murder doctrine occurred when a panel of this Court extended application of the doctrine to the death of a co-felon. The first step in that direction was *Sheckles v. State*, 684 N.E.2d 201 (Ind. Ct. App. 1997), *trans. denied*, where the defendant attempted to collect a loan from a bar patron by means of force. A gun battle ensued between the defendant and a bartender coming to the patron's aid. Another patron in the bar was killed as a result of the gunfire exchange. The evidence at trial showed that the patron died from a bullet shot from the defendant's gun, but on post-conviction the defendant argued that his trial counsel was ineffective for failing to show that the patron died from a bullet fired by the bartender. *Id.* at 203-04.

In deciding whether the defendant suffered prejudice as a result of his counsel's alleged deficient performance, the *Sheckles* court discussed the two

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that offense . . . ."). Felony murder can be based on accomplice liability. *Wieland v. State*, 736 N.E.2d 1198, 1202-03 (Ind. 2000).

approaches taken by states in deciding whether a felon is responsible for the death of a co-felon by the hands of a non-participant: the agency approach and the mediate proximate cause ("MPC") approach. *Id.* at 204-05.

1. The Agency Approach

The vast majority of states follow the agency approach, which holds that a felon cannot be held criminally responsible for the killing of another, whether it is a co-felon or an innocent bystander, by a non-participant in the felony. *Id.* at 204-05. This approach is based on the belief that such a homicide is justified and, thus, "[h]ow can anyone, no matter how much of an outlaw he may be, have a criminal charge lodged against him for the consequences of the lawful conduct of another person?" *Commonwealth v. Redline*, 137 A.2d 472, 509 (Pa. 1958). Application of the felony murder doctrine under this approach is limited to homicides actually committed by either the felon or his agent.

2. The Mediate Proximate Cause ("MPC") Approach

A minority of jurisdictions employ the MPC approach, which holds that a felon is responsible for any death that is a foreseeable consequence of the felon's actions. *Sheckles*, 684 N.E.2d at 204. This approach is based on the belief that felons set into motion a chain of events, and that they should be responsible for any consequences that follow. The felony murder doctrine under this approach is broadly applied to the killing of anyone, including a co-felon by a non-participant, during the commission of a felony.

3. The *Sheckles* Court Applied the MPC Approach, Which was Later Approved of by Our Supreme Court

In applying the MPC approach, the *Sheckles* court relied upon *Watson v. State*, 658 N.E.2d 579 (Ind. 1995). In *Watson*, the defendant and another individual repeatedly hit and kicked a defenseless, heavily intoxicated man, who later died from his injuries. The court rejected the defendant's contention that the State was required to prove that he was the sole cause of the victim's death, instead holding that the defendant was criminally responsible if he proximately caused the defendant's death. *Id.* at 580-81.

Relying upon the rationale in *Watson*, the *Sheckles* court held that the defendant was criminally responsible for the killing of an innocent bystander at the hands of a non-participant resisting the felony:

> Where the accused reasonably should have foreseen that the commission of or attempt to commit the contemplated felony would likely create a situation which would expose another to the danger of death at the hands of a nonparticipant in the felony, and where death in fact occurs as was foreseeable, the creation of such a dangerous situation is an intermediary, secondary, or medium in effecting or bringing about the death of the victim.

Sheckles, 684 N.E.2d at 205.

Citing with approval to this language in *Sheckles*, our Supreme Court extended the reach of the felony murder doctrine even further to the killing of a co-felon by a non-participant in *Palmer v. State*, 704 N.E.2d 124 (Ind. 1999) and *Jenkins v. State*, 726 N.E.2d 268 (Ind. 2000). In both cases, the defendant was convicted of felony murder for the killing of a co-felon by a non-

participant resisting the felony. *See also Exum v. State*, 812 N.E.2d 204 (Ind. Ct. App. 2004), *trans. denied*.

B. Palmer *and* Jenkins *Should be Overruled*

Our Supreme Court's decisions in *Palmer* and *Jenkins* should be overruled for two reasons: first, they do not comport with a plain reading of the language of the felony murder statute; and second, the holding in *Watson* and in similar cases is not applicable in this context, so the Supreme Court's reliance on it in *Palmer* was misplaced.

1. Indiana's Felony Murder Statute Expressly Applies Only to Those Killings Committed by A Felon or His Co-Felons

Indiana Code section 35-42-1-1 provides, in relevant part, "A person who . . . kills another human being while committing or attempting to commit . . . burglary . . . commits murder, a felony." Here, neither Blake nor his co-felons killed Danzele. Under a plain reading of the statute, Blake cannot be guilty of felony murder. Even if the language of the statute is ambiguous, the rule of lenity requires that "penal statutes be construed strictly against the State and any ambiguities resolved in favor of the accused." *Meredith v. State*, 906 N.E.2d 867, 872 (Ind. 2009).

Moreover, application of the statute in this case is inconsistent with its legislative intent. Had our legislature intended to include any killing that occurred during one of the enumerated felonies, it would have crafted the statutory language to define felony murder as follows: *A person commits*

murder, a felony, if the commission or attempted commission of . . . burglary . . . contributes to the death of any person. See, e.g., Ind. Code § 35-43-2-1 (elevating burglary to a Class A felony "if it results in bodily injury or serious bodily injury to any person other than a defendant.")

2. The Holding in *Watson* and in Other Similar Cases is Not Applicable in the Context of the Death of a Co-Felon by a Non-Participant

In *Watson* and in the other cases cited by the *Palmer* court, there was no dispute over whether the defendant intended to inflict injury; he did. The issue in dispute was whether an intervening cause between the defendant's intentional infliction of injury and the victim's death broke the chain of criminal responsibility. *See, e.g., Watson*, 658 N.E.2d at 580 (rejecting defendant's contention that victim's heavy intoxication, coupled with an unrelated beating of victim by non-participant earlier that day, was intervening cause of victim's death); *Reaves v. State*, 586 N.E.2d 847, 850-54 (Ind. 1992) (rejecting defendant's contention that victim's immobilization in hospital, and not defendant's act during robbery of causing blood clot to form between victim's heart and lungs, led to victim's death); *Pittman v. State*, 528 N.E.2d 67, 69-70 (Ind. 1988) (rejecting defendant's contention that victim's preexisting health conditions were responsible for victim's death, rather than non-life-threatening stab wound inflicted by defendant); *Sims v. State*, 466 N.E.2d 24 (Ind. 1984) (rejecting defendant's contention that unnecessary surgery as a result of injuries defendant inflicted led to victim's death).

In those cases, there was no question that criminal responsibility should lie for the defendant's intentional infliction of injury; the only question was the extent of the injury inflicted. But in the context of a co-felon's death at the hands of a non-participant, reliance upon *Watson* and other similarly situated cases is misplaced. When a co-felon is killed by a non-participant, there is no dispute over whether the non-participant, and not an intervening cause, was the reason for the co-felon's death. Rather, the issue is whether the defendant should be held criminally responsible for the actions of another. This is not a proper application of the MPC approach.[14]

C. Even if Indiana Should Retain the MPC Approach for Adults, It Should Nevertheless Apply the Agency Approach to Juvenile Offenders

Based on the research conducted on adolescent brain development and cited with approval by the U.S. Supreme Court in *Roper*, *Graham*, and *Miller*, it is now firmly established that:

> [J]uveniles differ from adults in their ability to foresee and take into account the consequences of their behavior. By definition, adolescents have less life experience on which to draw, making it less likely that they will fully apprehend the potential negative consequences of their actions.

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[14] Research in cognitive psychology reveals that "after-the-fact causal attributions are consistently overestimated . . . ." *See* Martin Lijtmaer, *The Felony Murder Rule in Illinois: The Injustice of the Proximate Cause Theory Explored via Research in Cognitive Psychology*, 98 J. Crim. L. & Criminology 621, 637 (2007-08). This is due in large part to two cognitive biases: the hindsight bias and the outcome bias. *Id.* "The hindsight bias refers to the phenomenon that people overestimate the predictability of past events." *Id.* at 638. The outcome bias refers to the tendency of people to judge the quality of a decision by its outcome (i.e., a bad outcome was the result of a bad decision). *Id.* at 641.

Brief of the American Psychological Ass'n, at 11-12. Or, stated differently, juveniles do not foresee the potential negative consequences of their actions like adults do.

No better demonstration of this can be found than in the facts of this case. Blake and his friends chose one afternoon, after smoking marijuana, to burglarize a home. [*See* PSI, pg. 6]. They collectively decide to knock on doors to find a home that is empty. [Ex. 40, pgs. 4-6]. An adult, however, would understand that such a method is unreliable because there are a number of reasons why a homeowner might not respond to a knock at the door (they are not expecting visitors, they do not hear the knock, they are taking a bath, they are upstairs napping, etc.).

Rather than choose a home in a neighborhood where no one would recognize them, Blake and his friends chose a home right across the street from where Jose was living. [Ex. 40, pgs. 4-6]. After breaking into the home, one of the boys grabbed the homeowner's wallet off the kitchen counter. An adult would have seen the wallet on the counter and assumed someone was home. But that thought never crossed the boys' minds.

After the homeowner came downstairs and shot at the boys, they scrambled to a closet, where they were held at gunpoint until police arrived. [R. at 1070]. Despite a high risk of being shot by the homeowner or seriously injured by broken glass, Jose nevertheless jumped through a plate glass window in an attempt to flee from police. [R. at 1076].

At sentencing, when the trial court asked why Blake committed burglary that day, Blake was unable to articulate any reason for his actions, other than to say that he "wasn't using [his] head," he didn't even "remember thinking about it at all," and he was just "going with what was going on around [him] . . . being a follower." [R. at 1325-26]. But most notably, when asked whether he understood that his actions had consequences, Blake responded, "I did. I just wasn't thinking of the consequences. I wasn't thinking of the gravity of my actions." [R. at 1326].

The actions that Blake and his friends took that day demonstrated precisely what the neuroscientific research had already proved: even juveniles as old as Blake and his friends engage in very risky behavior, are less capable of controlling their impulses, and do not possess the same level of understanding that adults do regarding the potential consequences of their actions.

Furthermore, juveniles in adult court will have juries comprised of adults, not juveniles. Just as juveniles process information differently than adults, adults process information differently than juveniles. It is impossible for adults to determine whether a juvenile should have foreseen the consequences of his actions, which is what jurors must decide under the MPC approach.

Again, there is no better demonstration of this impossibility than what occurred in this case. During deliberation, the jury asked the following questions to the trial court, all related to the issue of foreseeability:

> "Do we need to determine [whether] or not 'they' (defendants) thought there was a high probability or if we (jurors) thought there was a high probability?" [Emphasis in original];
>
> "Can we have a clearer definition of 'feasibility' and 'foreseeable?' Does the 'foreseen' of danger of death have to be before the commission of the felony as part of the planning stage; should or can it occur as the commission of the felony progresses?"; and
>
> " . . . and how specific does the foreseen knowledge have to be? . . . spoken of . . . planned for as in ' . . . in case of . . . ?' After all, danger is inherent in every step we take."

[App. 131-32].

The jury's questions, particularly the first one, highlight the inherent difficulty with adults applying the MPC approach to a case involving juveniles. How can an adult possibly determine whether a 16-year-old should have foreseen certain consequences? This is precisely why our Constitution requires that criminal defendants be tried to a jury of their peers. But juveniles cannot serve on juries because they do not possess the mental capacity to make an informed decision about someone's guilt or innocence. The same can be said about adults: they do not possess the mental *in*capacity to make an informed decision about a juvenile's guilt or innocence.

For these reasons, Indiana should adopt the agency approach with respect to the felony murder doctrine for all criminal defendants, but certainly for juveniles.

IV. The Imposition of Mandatory Minimum Sentences to Juveniles Convicted of Felony Murder is Cruel and Unusual Punishment

Because Blake was convicted as an adult for murder, he was required to serve a minimum sentence of at least 45 years, none of which could be suspended. *See* Ind. Code §§ 35-50-2-2, -3. Blake was sentenced to a term of 55 years for his crime, the advisory sentence for an adult convicted of intentional murder, although he was 16 when the offense occurred and did not intentionally or knowingly kill Danzele. As such, the sentence is contrary to our highest court's pronouncement that "when compared to an adult murderer, a juvenile who did not kill or intend to kill has a twice diminished moral culpability." *Graham*, 130 S. Ct. at 2027. Essentially, the trial court's sentence was indicative of the position that it took from the outset of the jury trial (as early as voir dire), that because the juveniles were in adult court, they would be treated as adults for all purposes. [*See* R. at 138-43].

> A sentencing statute that requires, regardless of the defendant's age, that a certain sentence be imposed based on the conviction violates a juvenile's substantive right to be sentenced based on the juvenile's culpability. When the only inquiry made by the sentencing court is to consult the legislature's mandatory punishment for the crime, without any further inquiry into whether the punishment is appropriate for a juvenile, for no other reason than it is appropriate for an adult, the Constitution requires more.

Martin Guggenheim, *Graham v. Florida and A Juvenile's Right to Age-Appropriate Sentencing*, 47 Harv. C.R.-C.L. L. Rev. 457, 490-91 (2012).

The Eighth Amendment to the U.S. Constitution prohibits the imposition of cruel and unusual punishments. "For the most part, the Court's precedents consider punishments challenged not as inherently barbaric but as disproportionate to the crime." *Graham*, 130 S. Ct. at 2021. There are two general classifications to cruel and unusual punishment claims: (1) challenges to the length of term-of-years sentences given all the circumstances in a particular case; and (2) implementation of the proportionality standard on categorical restrictions on the death penalty. *Id.* *Graham* was the first categorical challenge to a term-of-years sentence. *Id.* at 2023. In doing so, the Court relied primarily upon its independent judgment and considered the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. *Id.* at 2026. "In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals. " *Id.*

In *Miller*, the Supreme Court found mandatory life without parole sentences for juveniles violative of the Eighth Amendment because they preclude consideration of the juvenile's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences[.]" 132 S. Ct. at 2468. Similarly, applying the unique characteristics of juveniles to understand their lesser culpability and

combining that with the fact that neither Blake, nor his friends, intended to kill Danzele, makes the imposition of a mandatory minimum sentence intended for adults who intentionally murder excessive. Such treatment does not serve legitimate penological goals and should be categorically excluded by the Eighth Amendment.

V. The Treatment of Blake's Conduct as Murder is a Disproportionate Penalty that Violates the Indiana Constitution

The Proportionality Clause of Article 1, Section 16 of the Indiana Constitution provides that "[a]ll penalties shall be proportioned to the nature of the offense." Where a criminal sanction is so severe and entirely out of proportion to the gravity of the offense committed that it shocks the public sentiment and violates the judgment of reasonable people, the sanction runs afoul of the Proportionality Clause. *Pritscher v. State*, 675 N.E.2d 727, 731 (Ind. Ct. App. 1996). Simply because a sentence falls within the range set by the General Assembly does not relieve courts of their duty to review the length of the sentence under the Proportionality Clause; it is possible for a statute to be constitutional on its face but unconstitutional as applied in some cases. *See Conner v. State*, 626 N.E.2d 803, 806 (Ind. 1993); *Clark v. State*, 561 N.E.2d 759, 765 (Ind. 1990).

There is no dispute in this case that Blake committed an unarmed burglary of a home when he believed the homeowner was away. Blake's actions, while possibly reckless, were certainly not akin to a knowing or

intentional murder. Reckless homicide and involuntary manslaughter, both Class C felonies, punish reckless behavior that results in death. *See* Ind. Code §§ 35-42-1-4, -5. Any sentence above the Class C felony range of 2 to 8 years is disproportionate.

VI. Blake's 55-Year Executed Sentence is Inappropriate

Indiana Appellate Rule 7(B) provides, "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender."

Felony murder is treated in Indiana as one of these most serious offenses. In recognition of this, the General Assembly set the minimum sentence at 45 years. The nature of the offense in this case does not warrant a sentence above the minimum. Danzele, the oldest member of the group, kicked in the door to Scott's home and entered first. [R. at 1058]. Blake and his other friends were years younger than Danzele; as Blake told the trial court during sentencing, he was not thinking about the consequences of his actions, he was just being a "follower." [R. at 1325-26].

The sole intent of the boys that day was to commit unarmed burglary. The boys tried to identify a house where no one was home by knocking on the door before breaking in. [Ex. 40, pgs. 4-6]. They did not bring any weapons along during the commission of the burglary. Moreover, no innocent lives were lost as a result of the burglary. Unfortunately, Danzele lost his life

during the felony, but blame certainly cannot be placed on the homeowner for defending his home in the manner that he did.

Blake's character also renders any sentence above the minimum as inappropriate. Blake had taken on numerous familial responsibilities beginning at an early age, in part due to his younger sister's illness. He had no criminal history other than an informal adjustment several years prior as a result of taking a bicycle. [R. at 1284]. Like many other high-school students, he was working to obtain a diploma and was employed part-time at Wendy's. His supervisor described him as an "outstanding" employee. [App. 119].

Blake has always shown remorse for what happened that day. When police arrived at the scene of the burglary, Blake repeatedly apologized for his actions. [R. at 567-68]. He never denied his involvement in the burglary that day or tried to minimize his role in the offense. But he chose to take the matter to trial because he felt the felony murder statute had been improperly applied in his case.

His decision to go to trial, however, did not minimize the remorse he felt for Danzele's death. At his sentencing, he gave the following statement:

> Your Honor, I'd like to start out by saying I'm truly sorry to Rodney Scott for what happened that day. I also want to apologize to Danzele Johnson's family for the loss of their son, my friend. I understand on October the 3rd many lives were changed forever. I wish there [was] some way I could go back and change what happened that day but I can't. I'm not here to

> make excuses for my actions. I'm here to take responsibility for them.
>
> I understand if me and my friends had made different choices that day Danzele would still be alive, and Rodney Scott wouldn't have to carry the burden of taking another man's life.
>
> I pray Rodney Scott can find it in his heart to forgive me for my wrongdoings. As I stand before you today a young man on the way to becoming an adult, I'd just like to apologize to all the families that were [a]ffected by my actions on October the 3rd. My sincere apologies to all of you.

[R. at 1310].

Most importantly, Blake was only 16 years of age at the time. "[W]hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." *Graham*, 130 S. Ct. at 2027. In *Evans v. State*, 497 N.E.2d 919 (Ind. 1986), an adult defendant and three friends robbed two men leaving a restaurant. During the robbery, the defendant and his friends threw cement blocks at the two men; one man suffered serious bodily injury to his face, while the other man was killed. The defendant had a lengthy juvenile history involving at least one violent offense. He had just been released from the Boys' School, and it appeared his pattern of violent criminal activity would continue. Yet he received a sentence of only 50 years. *Id.* at 920-21, 923.

Unlike the defendant in *Evans*, Blake was not an adult; he did not inflict any injury on another; and he had no pattern of violent criminal activity. And yet Blake received a sentence that was 5 years longer than the

adult defendant in *Evans*. For all of these reasons, a 55-year sentence in this case is inappropriate.

CONCLUSION

Based on the foregoing arguments and authority, Blake respectfully requests that this Court vacate his conviction for felony murder. If his conviction is affirmed, remand is appropriate to impose a sentence not to exceed eight years, the maximum allowable sentence for a Class C felony. Or, in the alternative, Blake respectfully requests that his sentence be reduced to 45 years.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this Brief contains no more than 14,000 words, according to Microsoft Word 2010's word count function.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon the following, via U.S. Mail, postage prepaid, this 21st day of February, 2014.

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