IN THE
COURT OF APPEALS OF INDIANA

CAUSE NO. 20A04-1310-CR-518

BLAKE LAYMAN,	)	Appeal from the Elkhart Circuit Court,
	)	
APPELLANT (DEFENDANT BELOW),	)	
	)	Cause No. 20C01-1210-MR-7
VS.	)	
	)	
STATE OF INDIANA,	)	Hon. Terry C. Shewmaker, Judge,
	)	
APPELLEE (PLAINTIFF BELOW).	)	
LEVI SPARKS,	)	Appeal from the Elkhart Circuit Court,
	)	
APPELLANT (DEFENDANT BELOW),	)	
	)	Cause No. 20C01-1210-MR-5,
VS.	)	
	)	
STATE OF INDIANA,	)	Hon. Terry C. Shewmaker, Judge,
	)	
APPELLEE (PLAINTIFF BELOW).	)	

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF THE ISSUES

I. Assuming Defendants had preserved the issue, whether Indiana's felony murder statute and its sentencing range should apply to them.

II. Assuming Defendants had preserved the issue, whether the United States or Indiana Constitutions prevent their prosecution, convictions, and sentences for felony murder.

III. Whether sufficient evidence supports Sparks' conviction for felony murder.

IV. Whether Defendant's sentences are inappropriate to their offenses and character.

STATEMENT OF THE CASE

On October 9, 2012, the State charged Blake Layman and Anthony Sparks ("Defendants") with felony murder (App. 2, 4-5). Defendants were tried to a jury from August 19, 2013, through August 22, 2013, and found guilty (Tr. 1274). On September 12, 2013, the trial court sentenced Layman to fifty-five years, and sentenced Sparks to fifty years, to be served in the Department of Correction (App. 127, 146)

Defendants filed their notices of appeal on October 11, and 15, 2013 (Docket). Notices of completion of the transcript were issued on December 26, 2013, and notices of completion of the clerk's record were issued on October 15, 2013 (Docket) After receiving an extension of time, Defendants filed their briefs and a joint Appendix on February 21, 2014, serving the State by mail (Docket). On February 28, 2014, this Court granted leave to the Indiana Public Defender ("IPD") and the Juvenile Law Center ("JLC") to appear and file briefs as *amici curiae* (Docket). On January 24, 2014, Sparks' and Layman's appeals were consolidated into this case (Docket). On March 25, 2014, this Court granted the State leave to file an oversized, consolidated brief (Docket). On March 26, 2014, the State filed an emergency motion for extension of time to file its brief due to an illness in the undersigned's family, which was granted to April 4, 2014 (Docket).

STATEMENT OF THE FACTS

On the morning of October 3, 2012, Jose Quiroz was at his residence at 1922 Frances Avenue in Elkhart with Blake Layman and Levi Sparks (Tr. 595, 706, 710, 921-22; Exhibit 40). They decided to commit a burglary and to scout the neighborhood looking for homes that were not occupied (Tr. 921-22). Quiroz later explained that burglarizing an occupied home is more dangerous because the presence of a homeowner can result in injuries and more severe legal

consequences (Tr. 875). They walked north from Quiroz's residence to Tracy Lehman's house at 1904 Frances Avenue (Tr. 594-95, 599, 745; Exhibit 8 & 9). Lehman later recounted that she was taking a bath upstairs in her home when she heard someone knock on her front door (Tr. 745-47). Later investigation showed that Sparks had knocked on the door (Tr. 922-23; Exhibit 40). Lehman's dogs barked, and Lehman heard one or more people pacing on her front porch (Tr. 746-48). Lehman heard a second knock on her door while the dogs continued barking, and after some time she heard the sound of people leaving her front porch (Tr. 746-48). Sparks told Quiroz that the house was not a proper target for a burglary, "Because of the dogs" (Tr. 924). The group checked, and then discounted, a second target house because someone was home (Tr. 924).

Michael Couch lived at 1920 Roys Avenue, which was on the same block and slightly southwest of Rodney Scott's house on 1919 Frances Avenue (Tr. 595-96, 740-41, 1050; Exhibits 8 & 9). At approximately 2:20 p.m., Couch saw two of the group walk through the alley separating Couch's and Scott's house (Tr. 738). They disappeared from Couch's view behind a garage, and then reappeared walking north until they left the alley and walked between Scott's house and the house of Scott's next-door neighbor, Julia Leazenby, at 1913 Frances Avenue (Tr. 739-41, 592-94, 944).

Rodney Scott had been laid off from his regular employment (Tr. 1055-56). He had awakened at approximately six o'clock that morning and watched television in the downstairs portion of his house until nine o'clock, when he became sleepy and returned to his upstairs bedroom (Tr. 1055-56). Scott used a powered breathing mask to sleep, and later recounted that the construction and layout of his house and its front porch meant that persons upstairs could not always hear someone knocking on the front door (Tr. 1056-57). The doorbell to Scott's home

was not functioning; Scott had installed a wireless doorbell, but it only chimed on the first floor of the residence (Tr. 1057).

Quiroz, Layman and Sparks decided to target Scott's house for the burglary (Tr. 921-22, 925, 1036). Quiroz later recalled that they summoned Sharp and his cousin, Danzele Johnson, to "help . . . get into the house" (Tr. 925). Sharp and Johnson arrived and spent some time socializing with Quiroz, Layman and Sparks (Tr. 712-13). They were present when Quiroz's mother, Rebecca McKnight, left the residence to lunch with a friend (Tr. 714). McKnight later recalled that they were also on the porch of the house (Tr. 714, 933). Sharp later told police that during this meeting Quiroz and Johnson discussed where the money was and where the police were (Tr. 963). The group left to burglarize Scott's house (Tr. 926-27). Sparks later explained that he remained outside Scott's residence with a cell phone in the event that the police or visitor arrived at Scott's house (Tr. 573-74, 934; Exhibit 14A). Quiroz was also equipped with a cell phone (Tr. 935).

Quiroz, Layman, Johnson and Sharp entered Scott's home by kicking the rear door to Scott's kitchen (Tr. 644-45, 822, 845, 926-27, 1034; Exhibits 17 & 18). That door was made of steel and Scott kept it locked when he was sleeping (Tr. 1052-54). The force of the entry ripped enough of the door's frame away to allow entry through the doorway into the kitchen (Exhibits 17-19). The group began looking for things to steal (Tr. 926-27). A knife block was in the kitchen (Tr. 646-47, 1079-81; Exhibits 20-22). Scott later recounted that he did not use the knives in that knife block and described the knives and block as a "waste of money" (Tr. 1079-81). They took Scott's watch and his wallet from the kitchen counter near the knife block (Tr. 669-71, 673, 1000; Exhibits 37, 38A & 38B).

Scott, who had been upstairs sleeping, awoke and looked at a clock, which told him that it was 2:30 p.m. (Tr. 1058). Scott later recalled, "As soon as I sat up on the side of the bed, there was this boom, and my whole house just shook" (Tr. 1058). Scott heard a second loud booming noise and felt another vibration (Tr. 1059). He picked up a cell phone and suddenly remembered that a burglary had occurred in the neighborhood earlier that week (Tr. 1059).[1] Scott retrieved a handgun from his bedroom and opened the door (Tr. 1063). After seeing that no one was outside his bedroom Scott, who weighed approximately 270 pounds, decided to go loudly down the wood stairs in case there were burglars inside the first floor of his home (Tr. 1063). Scott went down the stairs and strode through the living room of his house, looking to see if anyone was on the first floor (Tr. 1065).

When Scott walked to the dining room, he saw someone in his kitchen turning around and fleeing out the back door of the house (Tr. 1064-65). Scott saw two burglar standing at the door to the bedroom adjacent to Scott, who was between them and the kitchen exit door (Tr. 1065). Scott, who was holding his handgun down at his side, was afraid of being hurt or killed (Tr. 1066. 1095). Scott did not know if the burglars were armed (Tr. 1066). He decided to frighten them immediately and cause them to remain in the bedroom, before they attacked him and before the man who had fled from his kitchen could return (Tr. 1066, 1068). Scott began firing his handgun, aiming low in the area of the floor (Tr. 1058, 1100). A later examination of Scott's residence confirmed that his shots struck several locations that were approximately one to two feet from the floor (Tr. 652-53, 655, 657, 660, 663-65; Exhibits 25, 27, 30 & 32).

The two burglars in Scott's view fled into the bedroom's closet and closed the door behind them (Tr. 1070). Scott used his cell phone to call 911 (Tr. 1070). After the dispatcher told Scott that

[1] Scott's testimony to this thought was given under a limiting instruction that prevented the jury

the police were en route, the closet door opened (Tr. 1071). Scott shouted, "Keep the door closed" and "Don't open up that door" (Tr. 1071). The door opened again and Scott saw one of the burglars go to the floor (Tr. 1071). Quiroz told Scott that the burglar who had fallen to the floor had been shot (Tr. 1071). Scott relayed this fact to the dispatcher and requested an ambulance (Tr. 1071). At this point, Scott later explained, he recognized Quiroz as a neighbor because, "I watched him grow up. I watched his family move into that house" (Tr. 1075). Scott addressed this fact to Quiroz, but Quiroz claimed he was not from the area (Tr. 1075).

A third man, who Scott had not seen before, emerged from the closet, holding his leg and asking if he could sit on the bed (Tr. 1073). That man was later identified as Layman (Tr. 711-12, 824, 845, 1029, 1073). Scott refused to allow the man out of the closet and told him to remain where he was (Tr. 1073). Quiroz put his head out of the closet and Scott told Quiroz to remain where he was (Tr. 1075). The police arrived and entered the house (Tr. 1076). Scott put his handgun down and said, "They're right there in the bedroom by the closet" (Tr. 1076).

Scott later recalled that Quiroz "flew out of the closet, pushed over the armoire that was in front of the window, went over the top of the two that was there on the floor, and just crashed through the window" of the bedroom (Tr. 527, 949-50, 1076; Exhibits 13, 30). The officer turned and left the house in pursuit of Quiroz (Tr. 1078). The dispatcher told Scott to exit the house (Tr. 1078-79). Scott followed the dispatcher's directions and those of other officers and was recovered safely (Tr. 562-63, 1078-79). Officers entered the house and arrested Layman, who was treated for a leg wound (Tr. 568-69, 1029; Exhibit 10). Johnson died at the scene from a gunshot wound (Tr. 656, 661-62, 822, 927, 1083; Exhibits 10, 31-32).

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from considering it for any purpose other than Scott's thought processes (Tr. 1059-61).

Carol Black was driving a school bus carrying dozens of children who had been dismissed for the day from nearby Hawthorne Elementary School (Tr. 756). As her bus stopped neared the intersection of Frances and Blaine Avenues, Black saw a police cruiser drive past her bus (Tr. 759). After the police cruiser had left the area, Black saw a white male with short hair walking north on Roys Avenue across Blaine Avenue (Tr. 760; Exhibit 1). Black noticed that the white male kept looking behind him until he had crossed Blaine Avenue, at which point he began running away (Tr. 760). The white male was Sparks, who had abandoned his cell phone at the scene of the burglary (Tr. 572-73, 934-35; Exhibits 2-3, 10). As Black continued her route by driving down Blaine Avenue, she saw Quiroz, who she saw was a dark-complected male, emerge from an alley and run past her bus before turning onto Roys Avenue (Tr. 540-42, 761; Exhibit 10). Two police officers were pursuing this man (Tr. 761).

The man was Quiroz, and the officers were Elkhart Police Corporal James Ballard and Corporal Florea, who had responded to the dispatch of a burglary with shots fired (Tr. 533, 537-38). They had chased Quiroz on foot and in a police cruiser through alleys and yards in the area (Tr. 540-42). They apprehended Quiroz as he was running back toward Frances Avenue (Tr. 540-42). Officers saw that Quiroz's hands and arms were covered in blood, and the blood on Quiroz was inconsistent with the small cuts he had on his hands (Tr. 542-43).

Unlike Quiroz and Sparks, Sharp fled to the south of Scott's residence (Tr. 540-42, 612-13, 648, 760, 984; Exhibit 10). Sharp had fled while holding a knife he had taken from the knife block in Scott's kitchen (Tr. 593-94, 644, 1081). This was determined by the fact that Peter Campiti, a neighbor who lived south of Scott's house, found a knife laying in his backyard on the day of the burglary (Tr. 593-95, 606, 613). The knife had not been there before (Tr. 606, 613). Campiti reported finding the knife to police, who took it into evidence (Tr. 640; Exhibit 11). The

knife was the same shape, color and style to the knives the knife block in Scott's kitchen (Tr. 640, 646-48; Exhibits 11, 21-22). It was the only knife missing from Scott's knife block (Tr. 1079-1081).

SUMMARY OF THE ARGUMENT

Argument for Waiver of Issues I and II. In order to present the matter for this Court's convenience, the State has consolidated Defendants' and *amici*'s numerous arguments and begins the State's reply by explaining that the statutory and constitutional issues presented by Defendants, and supported by *amici* are waived. These arguments, which are invitations to make significant and novel revisions to Indiana's felony-murder statutes and juvenile law, and which involve extensive claims regarding neuroscientific evidence, social-science data, and the Defendants' emotional, psychological and mental status, should have been presented to and developed in the trial court before seeking review in this Court. Our Supreme Court has held that Defendants' failure to present those claims to the trial court grants this Court discretion to decline review of both sets of issues. This Court should exercise that discretion. Further, Defendants do not present their claims as fundamental error and review under that exception is likewise waived. This will not leave Defendants without a remedy, because it will enable them to present their new claims in a proper forum that can receive evidence and provide an initial venue for the creation of an adequate record and arguments formed on that record.

I.

Assuming Defendants had not waived, the issue, Defendants have failed to show that Indiana's felony murder statute and its sentencing range do not apply to them. Defendants misapprehend the nature of Indiana's felony-murder jurisprudence, which has consistently employed an overall test of foreseeability to determine liability. Even jurisdictions which

Defendants claim follow another felony-murder scheme employ foreseeability to greater or lesser degrees. The consistent history of Indiana's law in this regard shows that *Palmer v. State*, *infra*, is not a rogue decision nor inconsistent with the history of Indiana law on the subject or the text of the felony murder statute. To the contrary, *Palmer* is an predictable and logical application of Indiana law. Defendants' related claims, that Article 1, Section 16 of the Indiana Constitution requires a revision of Indiana's felony-murder and sentencing statutes in their case, are also without merit. The Legislature has reasonably determined that felonies creating foreseeable deaths are more serious than felonies or misdemeanors which do not create such deaths.

II.

Assuming Defendants had not waived the issue, the United States and Indiana Constitutions do not prevent their prosecution, convictions, and sentences for felony murder. in the criminal courts of Elkhart County Defendants' claims that the United States Supreme Court has forbidden the application of Indiana's felony murder and related sentencing statute to persons of their alleged diminished mental, emotional, and psychological status, is not supported by United States Supreme Court's decisions on which they rely. Defendants' claims that the United States Supreme Court established a freestanding constitutional right to alternative-court treatment under lesser standards of responsibility for persons who can -- without regard to chronological age -- be described as 'juveniles' are also without merit. Neither the United States Supreme Court nor our Supreme Court has created such a right.

III.

Sufficient evidence supports Sparks' conviction for felony murder. Sparks incorrectly claims the evidence established that he was not involved in this offense. The evidence shows that he was a willing and responsible participant in the crime.

IV.

Defendant's sentences are not inappropriate to their offenses and character. Defendants received advisory, or near-advisory, sentences for their offense. The facts of their participation and characters warrant these sentences and do not justify a downward revision.

ARGUMENT

Argument for Waiver of the Claims Addressed in Issues I and II, infra.

"Error can only be predicated on questions presented to and ruled upon by the trial court," *Wells v. State*, 441 N.E.2d 458, 463 (Ind. 1982), and defendants are obliged to notify the trial court of an intention to interpose a claim in avoidance of criminal liability. *Bigger v. State*, No. 02A03-1308-CR-315, slip op. at 1 (Ind. Ct. App., March 26, 2014). Defendants claims that the felony murder statute was "improperly applied"[2] -- echoed on appeal by Indiana Public Defender and the Juvenile Law Center[3] -- allegedly because defendants' conduct should not fall within the prohibitions of Indiana's felony-murder statute, are claims that the "facts stated do not constitute an offense" which must be asserted in a motion to dismiss under Indiana Code Section

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[2] *See* Layman, 20-28; Sparks 20-28. Layman's brief will be cited as "(Layman)," Sparks' Brief will be cited as "(Sparks)". The briefs of IPD and JLC will be cited in the same manner.

[3] Indiana Public Defender *Amicus* Brief, 1-11. *Amicus* Juvenile Law Center also raises similar claims of statutory construction in an alternative argument with respect to younger offenders only. Juvenile Law Center Brief, pp. 16-17.

35-34-1-4(a)(5).[4] *See Wine v. State*, 637 N.E.2d 1369, 1373-74 (Ind. Ct. App. 1994) (holding claim that charged conduct fails to state an offense is a proper grounds for a motion to dismiss); *Faulisi v. State,* 602 N.E.2d 1032, 1036 & n.4 (Ind. Ct. App. 1992) (claims that conduct does not fall within the charged offense must be brought by way of a motion to dismiss); *Galbraith v. State*, 468 N.E.2d 575, 578 (Ind. Ct. App. 1984) ("Although Galbraith frames this issue as a lack of sufficient evidence to support his conviction, his claim is actually premised on a belief the facts alleged in the information do not constitute an offense, i.e., firemen are not covered by the endangerment provision of class B felony arson"). Defendants chose not to raise their present concerns at trial, either by way of a motion to dismiss or even some argument over the jury instructions defining their offenses and the State's burden of proof (Tr. 1136-38). Defendants' claims are therefore waived. *Wine*, 637 N.E.2d at 1373-74; *Sewell v. State*, 973 N.E.2d 96, 101 (Ind. Ct. App. 2012)*; Adams v. State*, 804 N.E.2d 1169, 1172 (Ind. Ct. App. 2004); *Faulisi*, 602 N.E.2d at 1036 n.4; *Galbraith*, 468 N.E.2d at 578.

Likewise, Defendants do not attempt to claim that these issues raise questions of fundamental error, which is an extremely narrow exception to the rule that an error raised for the first time on appeal will not be reviewed.[5] *Sobolewski v. State*, 889 N.E.2d 849, 856 (Ind. Ct. App. 2008). Review for fundamental error is therefore waived. Ind. Appellate Rule 46(A)(8)(a), 46(C);*Curtis v. State*, 948 N.E.2d 1143, 1148 (Ind. 2011); *Hollingsworth v. State*, 987 N.E.2d 1096, 1099 (Ind. Ct. App. 2013), *trans. denied* As non-parties, *amici* are bound by Defendants' waiver. *See Dunkelbarger Const. v. Watts*, 488 N.E.2d 355, 360 (Ind. Ct. App. 1986) ("An

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[4] Layman's brief concedes the sufficiency of the evidence to convict him (Layman 1-2). Sparks challenges the sufficiency of the evidence, but only under present law and not under the parties' proposed rephrasing of the felony-murder statute (Sparks, 19-20).

[5] (Layman, 20-28; Sparks 20-28).

amicus curiae is not a party and has no standing. Its status is that of a neutral advisor. It has no control over the proceedings and must take the case as it finds it upon the issues formed by the parties."); *United States v. Michigan*, 940 F.2d 143, 165-67 (6th Cir. 1991) (holding grant to *amici* of ability to raise claims was an "illusive trial court-created mutant" that would convert courts into "a free-wheeling forum of competing special interest groups capable of frustrating and undermining the ability of the named parties/real parties in interest to expeditiously resolve their own dispute and . . . complicating the court's ability to perform its judicial function."). Defendants' and *amici*'s claims regarding the alleged 'proper' interpretation of Indiana's felony-murder statute are waived and not before the Court on appeal. *Wine*, 637 N.E.2d at 1373-74; *Sewell*, 973 N.E.2d at 101; *Adams*, 804 N.E.2d at 1172; *Dunkelbarger*, 488 N.E.2d at 360; *Galbraith*, 468 N.E.2d at 578.

Defendants also attempt to Indiana and federal constitutional challenges, namely claims that Indiana's statute defining the jurisdiction of the juvenile courts;[6] a criminal prosecution violates younger offenders' right to be tried by a 'jury of their peers';[7] challenges to applying the felony-murder statute to offenders over fifteen years of age;[8] and objections to applying Indiana sentencing statutes to offenders over fifteen years of age.[9] Challenges to the constitutionality of a statute must be raised in the trial court, and the failure to do so waives such issues on appeal. *Adams v. State*, 804 N.E.2d 1169, 1172 (Ind. Ct. App. 2004) (citing *Payne v. State*, 484 N.E.2d 16, 18 (Ind. 1985)); *Szpunar v. State*, 783 N.E.2d 1213, 1219 (Ind. Ct. App. 2003); Ind. Code §

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[6] (Layman, 9-12, 13-16, 16-18, 19 & nn. 6-8, 21-23, 24-25, 27-28; Sparks, 7-9, 11-13, 14-17, 26-27; JLC, 8-11; 12-14).

[7] (Layman, 36-37; Sparks, 15-17, 26-27).

[8] (Layman, 10-13, 35; Sparks, 5-7, 26; JLC, 5-7, 8-11 & n.3, 12-14, 16-17, 20-21; IPD, 12-14).

[9] (Layman, 40-41; Sparks, 17; JLC, 13-14, 20-21)

35-34-1-4(b); Ind. Code § 35-34-1-6(a)(3). None of Defendants' claims were noticed to the State or the courts prior to the filing of Defendants' appellate briefs. These claims are waived. *Adams*, 804 N.E.2d at 1172. Defendants do not even attempt to argue under the fundamental-error exception, and such claims are also waived. Ind. App. R. 46(A)(8)(a); *Curtis*, 948 N.E.2d at 1148; *Hollingsworth*, 987 N.E.2d at 1099.[10]

This Court has occasionally addressed waived claims in the context of constitutional challenges involving clearly-defined and well-established rights and sufficiently-developed records, *see, e.g.*, *Sewell v. State*, 973 N.E.2d 96, 101 (Ind. Ct. App. 2012) (addressing *ex post facto* challenge); *Price v. State*, 911 N.E.2d 716, 719 (Ind. Ct. App. 2009) (addressing vagueness challenge), or when our Supreme Court had previously authorized retroactive application of a new rule. *Lawrence v. State*, 665 N.E.2d 589, 592 (Ind. Ct. App. 1996). In such cases, our Supreme Court has acknowledged that "the constitutionality of a statute *may* be raised at any stage of the proceeding including raising the issue sua sponte by this Court." *Morse v. State*, 593 N.E.2d 194, 197 (Ind. 1992) (rejecting claim that statute criminalizing sale of drugs near school property was unconstitutional because it did not require the presence of children) (emphasis supplied). However, our Supreme Court has declined to regard this observation as a holding that relieves parties of the need to prepare and present constitutional challenges for consideration in trial court. For example, in *Endres v. Ind. State Police*, 809 N.E.2d 320 (Ind.

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[10] Even if review for fundamental error had been available on appeal, Defendants' constitutional arguments allege only prejudicial error implicating alleged constitutional rights -- such as the proposition that adults are constitutionally prohibited from judging younger offenders, or an alleged constitutional right to be relieved of criminal liability due to age -- which are largely creations of Defendants' own briefs (Layman, 9-12, 26-27, 36-37; Sparks, 7-9, 9-12, 11-12, 13-16, 17-19 & nn. 6-8, 21-23 24-25, 27-28; JLC, 8-11; 12-14). None of these allegations rises to the level of fundamental error. *See Absher v. State*, 866 N.E.2d 350, 355 (Ind. Ct. App. 2007) ("The mere fact that error occurred and that it was prejudicial will not satisfy the fundamental error rule . . . Likewise, it is not enough . . . to urge that a constitutional right is implicated").

2004), our Supreme Court reversed this Court's evaluation of a claim that religious freedom rendered police employment policies unconstitutional because the relevant facts and issues had not been presented to the trial court. *Id.* at 321-22. In *Chidester v. Hobart*, 631 N.E.2d 908 (Ind. 1994), our Supreme Court held that equal protection and due process claims were waived because they had not been presented in the trial court. *Id.* at 913.

The results in *Morse*, *Endres*, and *Chidester* were most recently explained in *Plank v. Community Hosp.*, 981 N.E.2d 49 (Ind. 2013), in which our Supreme Court unanimously held that requiring timely presentation of errors in the trial court is essential to due process and the administration of justice. *Id.* at 53 (quoting *Freytag v. Comm'r.*, 501 U.S. 868, 895 (1991) (Scalia, J., concurring)). Our Supreme Court therefore clarified *Morse* as recognizing the sound disrection of reviewing courts to accept waived constitutional claims in appropriate cases. *Id.* at 53-54. The Court noted that Plank's failure to assert constitutional claims during the pendency or trial of his case waived review. *Id.* at 54. This Court should reach the same result regarding Defendant's claims.

Defendants were charged on October 9, 2012 (App. 1); obtained counsel on or about October 12, 2012,[11] and were tried on August 19, 2013 (App 2, 4-5). They were sentenced on September 19, 2013 (App. 6). Delay in asserting a clearly-available constitutional claim is one factor weighing against review. *Plank*, 981 N.E.2d at 53. A second factor which requires waiver is the complexity of the claim and the need for a record to join a dispute and present evidence regarding the claim in the trial court. *Id.* As will be discussed more fully, *infra*, Defendants seek

[11] Appellants' "Joint Appendix" appears to contain only the chronological case summary for Layman's case (App. 1, 4). The State will accept Appellants' assertion, by filing the Joint Appendix, that the procedural history present in the Appendix applies equally to each defendant. In the event it should appear otherwise, however, the State would request leave to file an amended brief.

the rewriting Indiana's felony-murder statute into what they claim to be a 'better' statute with respect to alleged diminished-capacity defendants; they also want trial courts to impose alternative sentences below the range for murder whenever the facts of a murder allegedly warrant a finding of 'recklessness.' Further, they would like a revision of Indiana's juvenile-justice code and constitutional jurisprudence to include 'due process' or 'equal protection' rights to juvenile disposition, apparently for anyone who can claim to resemble Defendants' alleged emotional or psychological immaturity regardless of a defendant's actual age. Alternatively, Defendants would accept a rule revising Indiana's felony-murder statute to exempt such persons, and/or a rule abolishing the sentencing range applicable to murder for these individuals. Along the way, Defendants also suggest a new paradigm for separation of powers under which significant rewriting of Indiana's criminal and juvenile laws can should be undertaken for policy reasons without consulting Hoosiers or our Legislature.

While Defendants and *amici* claim their arguments are universally and completely supported by well-established facts, the record Defendants summon consists mainly of blithe references to law journals coupled with sweeping claims that "neuroscientific research" proves that it is unconstitutional to subject less-mature offenders to criminal liability (Layman, 14, 18, 21; Sparks, 8-9, 11-12, 20; JLC, 8, 10, 19).[12] Defendants and *amici* omit references to equally-scholarly research which is contrary to their positions, such as conclusions that a scientifically-

[12] Defendant Layman also presents a fourteen-minute video found on TED Talks by Sarah-Jayne Blakemore which discusses her hypotheses about adolescent behavior in view of brain development (Layman n.8; Juvenile Law Center Brief, 8) TED is a nonprofit "global community, welcoming people from every discipline and culture who seek a deeper understanding of the world." Our Organization, http://www. ted.com/ about/our- organization (viewed March 21, 2014). A TED Conference is biannual meeting intended as "'the ultimate brain spa' and 'a journey into the future, in the company of those creating it' . . . a winning formula of brilliant and curious minds and a mix of curated ideas worth spreading." Conferences, http://www.ted.com/about/conferences (viewed March 21, 2014).

proved correlation between brain activity and personal responsibility, on which Defendants rely, "is a fantasy based on present knowledge and probably always will be when we are considering complex human actions."[13] Defendants also omit scholarship showing that neuroscience is incapable of determining "whether any given individual has a 'mature brain' in any respect, though imaging might reveal gross pathology."[14] Citing *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2403 n.5 (2011), Defendants nonetheless contend that the United States Supreme Court has absolved them of the need to fully prove their contentions by anything more than citations to scholarship (Layman, 12; Sparks, 6-7). Defendants' citation to *J.D.B.*, is to a footnote in which the United States Supreme Court says that "citation to social science and cognitive science authorities is unnecessary to establish" the "commonsense propositions" that a "juvenile subject of police interrogation 'cannot be compared' to an adult subject,'" and the differences lie in "what 'any parent knows' -- indeed, what any person knows -- about children generally." *Id.* at 2403 & n.5 (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (quotation omitted). The footnote in *J.D.B.*, *supra*, does not support Defendants' arguments that they are relieved of the need to make a record in the trial court.

Indeed, "what any person knows" about young persons is that they are capable of significant moral reasoning and self-control, at least to the extent required for them to hold them to full responsibility for felony offenses which have significant sentencing consequences. *Id.*;

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[13] Stephen J. Morse, "The Mind of a Child: The Relationship between Brain Development, Cognitive Functioning, and Accountability under the Law," 3 Ohio St. J. Crim. L. 397, 406 (Spring, 2006)

[14] Terry A. Maroney, "The False Promise of Adolescent Brain Science in Juvenile Justice," 85 Notre Dame L. Rev. 89, 146 (2009). Professor Maroney goes on to conclude, "Neuroscience may provide *marginal support* for categorically limiting the sanctions that may be imposed on juveniles [with respect to the death penalty], but it has little to offer in assessing the mental state, capacity for rehabilitation, or other law-relevant attributes of any given juvenile." *Id.* at 148 (emphasis supplied).

see also Graham v. Florida, 560 U.S. 48, 82 (2010) (affirming juvenile's adult conviction for burglary and robbery, holding that the Eighth Amendment does not forbid the imposition of a life sentences for such offenders provided that parole remains an option). Any person knows that juveniles may act like Heinrich Guter or Helmuth Hubener, who non-violently resisted the Nazis at ages of seventeen and sixteen, respectively, and whose ability to make complex moral judgments while resisting social and peer pressure places them in sharp contrast to 'neuroscientifically mature' adults who were unwilling make such judgments.[15] Any person also knows that juveniles are also capable of less noteworthy, but equally moral and responsible, powers of self-control and decision-making. *Cf. Berry v. State*, 561 N.E.2d 832, 836 (Ind. Ct. App. 1990) (analyzing nineteen-year-old's defense of abandonment to charge of dealing in marijuana on school grounds); *Lewis v. State*, 249 Ga.App. 812, 816, 549 S.E.2d 732, 737 (2001), *overruled on other grounds*, *Miller v. State*, 285 Ga. 285, 287 n.1, 676 S.E.2d 173, 187 n.1 (2009) (discussing defense of abandonment raised by juvenile tried as an adult for aggravated assault); *Commonwealth v. Hogan*, 426 Mass. 424, 434, 688 N.E.2d 977, 986 (1998) (discussing defense of abandonment raised by juvenile tried as adult for felony murder). If Defendants believe these common sense judgments are an insufficient framework for their arguments, they have the option to provide courts with fats that have been verified by skilled witnesses with personal knowledge.

The complex issue of criminal responsibility and penalties for older adolescents is not answered -- or even fully addressed -- by Defendants' categorical assertions and sketchy list of position-friendly research. Defendants's policy claims are in any event properly within the

[15] George J. Wittenstein, "Memories of the White Rose," http://www. historyplace.com/ pointsofview/white-rose4.htm (viewed March 27, 2014); Daniel Jonah Goldhagen, "Ordinary

purview of the Legislature, not the courts. More to the point, however, is that Defendants chose not to allow a jury or the trial court to evaluate their claims, preferring to wait until they could make dubious constitutional assertions on disputable claims of fact in this Court. Defendants might just as well have chosen to forego even this opportunity, and wait until an unfavorable decision before raising their new arguments in a petition to transfer jurisdiction. Waiver deprives the judicial system of one of its great strengths, which is the ability to fully test arguments and evidence through repeated consideration by skilled evaluators. This Court has warned defendants not to raise challenges to the viability of a charge for the first time on appeal -- when the times to amend the information and offer additional evidence, or seek pretrial clarification via an interlocutory appeal -- have already passed. *See Sewell*, 973 N.E.2d at 101 ("We reiterate our warning to defendants that cases in which we have addressed the merits of the challenge notwithstanding the waiver, should not be viewed as an 'invitation to neglect to file a motion to dismiss and then argue for the first time on appeal . . ..'") (*quoting Price*, 911 N.E.2d at 719 n.2). On these facts, this Court should exercise its discretion to hold that Defendants' arguments against the application of the felony murder and sentencing statutes are waived and not reviewable on appeal.[16] *Plank*, 981 N.E.2d at 53-54.

I.
Assuming Defendants had preserved the issue, Indiana's felony murder statute and its sentencing range should apply to them.

Assuming that Defendants had preserved their present challenges to the interpretation of the felony murder statute, arguments in favor of a motion to dismiss are ordinarily reviewed for

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Germans and the Holocaust," http://www.history place.com/pointsofview/goldhagen.htm (viewed March 21, 2014).

[16] Defendants would then have the opportunity to litigate their claims and present their arguments on a complete record. Ind. R. P-C 1.

an abuse of discretion. *State v. Davis*, 898 N.E.2d 281, 285 (Ind. 2008). However, matters of statutory interpretation that may underlie a motion to dismiss are questions of law that would be reviewed de novo. *Herron v. State*, 729 N.E.2d 1008, 1010 (Ind. Ct. App. 2000). Defendants have failed to show that the felony-murder statute should be reinterpreted to exclude liability when someone other than a participant in the target felony performs the act causing death (Layman, 28-29, 30-31; Sparks, 20-21, 22-23; IPD, 3-5, 7-9, 10-12).

(A) Background

The power to define criminal offenses belongs exclusively to the Legislature. Ind. Code § 1-1-2-2; *Higdon v. State*, 241 Ind. 501, 505, 173 N.E.2d 58, 60 (Ind. 1961). The primary purpose in statutory interpretation is to ascertain and give effect to the legislature's intent. *B.K.C. v. State*, 781 N.E.2d 1157, 1167 (Ind. Ct. App. 2003). "In Indiana, statutes are passed without recorded legislative history by which we may determine the legislature's intent." *Goldsberry v. State*, 821 N.E.2d 447, 465 (Ind. Ct. App. 2005). Therefore the "best evidence" of Legislative intent "is a statute's text." *Adams v. State*, 960 N.E.2d 793, 798 (Ind. 2012). This Court will examine the statute as a whole, avoiding unduly-literal or selective readings of individual words. *Glotzbach v. State*, 783 N.E.2d 1221, 1227 (Ind. Ct. App. 2003). This Court will also presume that the legislature intended for the statutory language to be applied in a logical manner consistent with the statute's policy and goals. *Green v. State*, 945 N.E.2d 205, 208 (Ind. Ct. App. 2011). The plain meaning of the statute will be upheld, notwithstanding a court's contrary view of appropriate public or legal policy. *Brownsburg Area Patrons, Etc. v. Baldwin*, 714 N.E.2d 135, 139 (Ind. 1999); *cf. Ledbetter v. Hunter*, 842 N.E.2d 810, 814 (Ind. 2006) ("[A] statute is not unconstitutional simply because we might disagree with the legislature about the wisdom of the statute").

The Legislature has consistently preserved felony-murder liability in addition to provisions imposing liability for murder and acting as an accomplice to murder. *See* Ind. Pub. L. 340-1977 §§ 6, 25 (enacting present murder, felony-murder, and accomplice liability provisions); *Sage v. State*, 127 Ind. 15, 26 N.E. 667, 668 (1891) (addressing accomplice liability); *Patterson v. State*, 66 Ind. 185, 1879 WL 5894 *2 (1879) (addressing murder and felony-murder provisions of the Indiana code). "It is a rule of statutory interpretation that 'courts will not presume the legislature intended to do a useless thing.'" *State v. Brunner*, 947 N.E.2d 411, 416 (Ind. 2011) (quoting *Northern Ind. Bank v. State Bd.*, 457 N.E.2d 527, 532 (Ind. 1983)). By constantly maintaining the addition of felony-murder as a basis for liability to murder-range sentencing, the Legislature has rejected any rule that limits murder-range sentencing to persons who directly kill or their accomplices in the killing. *Id.*

In doing so, our Legislature has followed a general trend, initiated by English legal thinkers writing before the Revolution, and continued through enactments by state legislatures, concluding that the commission of some felonies is sufficiently attended by the opportunity for death that the perpetrators should be liable for murder-range sentencing whether or not they had intended to kill. *See, e.g.*, *People v. Patterson*, 49 Cal.3d 615, 617, 778 P.2d 549, 550 (1989) (noting that "inherent dangerousness" of target felony is prerequisite of felony-murder liability); *State v. Oimen*, 184 Wis.2d 423, 444, 516 N.W.2d 399, 408 (1994) ("[T]he legislature chose to limit liability for felony murder only to deaths that occurred as a result of the commission or attempt to commit five inherently dangerous felonies . . . Because of the violent and dangerous nature of the underlying act, a death is deemed to be a natural and probable consequence"); Ala. Code § 13A-6-2(a)(3) (imposing felony murder liability for deaths in the commission of certain felonies and "any other felony clearly dangerous to human life"); Iowa Code Ann. § 707.2.1.a

("A person commits murder" when the "person kills another person while participating in a forcible felony"); Kan. Stat. Ann § 21-5402(a) (defining murder *inter alia* as "the killing of a human being committed . . . in the commission of, attempt to commit, or flight from any inherently dangerous felony"). William Blackstone, *Commentary on the Laws of England*, Book IV, p. 193 (1770)[17]; William Hawkins, *A Treatise of the Pleas of the Crown*, 86-87 (1824 Edition).[18]

Debates have always occurred regarding the wisdom, utility, or fairness in the means by which the circle of this liability should be drawn. *See, e.g.*, *Head v. State*, 443 N.E.2d 44, 48-50 (Ind. 1982) (discussing various approaches to felony-murder liability, remaining with Indiana's rule). Defendants' and IPD's briefs partially employ these debates by contending, *inter alia*, that a clear divide exists between 'minority' states employing foreseeability (which Defendants and IPD call the "proximate cause" and "mediate proximate cause" approach) and an alleged 'majority' of states employing what Defendants call an "'agency' view" restricting murder-range sentencing to cases in which one or more perpetrators of the target felony killed a victim (Layman, 30; Sparks, 21-22; IPD, 6).[19] Defendants and IPD then summon policy arguments for

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[17] "And in general, when an involuntary killing happens in consequence of . . . a felonious intent, or in its consequences naturally tended to bloodshed, it will be murder." *Id.*

[18] "And if a man happen to kill another in the execution of a malicious and deliberate purpose . . . in the wilful commission of any unlawful act, which necessarily tends to raise tumults and quarrels, and consequently cannot but be attended with the danger of personal hurt to some one or other . . . he shall be judged guilty of murder." *Id.* Hawkins' work was first printed in 1716. Edward Hyde East, *Treatise on Pleas of the Crown*, Vol. I, p. v & note (1803).

[19] *Amicus* JLC adds a claim that Indiana follows a "'transferred intent' theory" of felony-murder liability, citing *Head*, *supra* (JLC, 7-8). Layman and Sparks similarly misread *Pittman*, *supra* (Layman, 22; Sparks, 13). Neither case discusses 'transferred intent.' *Pittman*, 885 N.E.2d at 1258; *Head*, 443 N.E.2d at 48-50. Transferred intent applies when a defendant begins a crime against one person but, through mistake or inadvertence, completes the crime against an unintended victim of that crime. *Blanche v. State*, 690 N.E.2d 709, 712 (Ind. 1998);*D.H. v. State*, 932 N.E.2d 236, 238 (Ind. Ct. App. 2010). Transferred intent is inapplicable to felony murder

the superiority of the "'agency' view" ranging from a nose-count of states which supposedly employ it, to Defendants' and IPD's various moral and policy judgments about the proper scope of criminal liability (Layman, 30; Sparks, 21-22; IPD, 6). The status of Indiana's felony-murder law does not confirm Defendants' and IPD's categorizations and conclusions.

(B) Indiana's Foreseeability Test for Felony-Murder Liability

The felony murder statute provides: "A person who ... [k]ills another human being while committing or attempting to commit . . . burglary . . . commits murder, a felony." Ind. Code § 35-42-1-1(2). As Defendants and *amici* concede, our Supreme Court has held that this language was not intended to restrict felony murder liability only to instances in which felons kill, but also applies when any of them foreseeably causes the death of any person. *Palmer v. State*, 704 N.E.2d 124, 126 (Ind. 1999). Our Supreme Court has repeatedly reaffirmed this interpretation. *Pittman v. State*, 885 N.E.2d 1246, 1258 (Ind. 2008); 885 N.E.2d 1246, 1258 (Ind. 2008); *Lacey v. State*, 755 N.E.2d 576, 578 n.1 (Ind. 2001); *Jenkins v. State*, 726 N.E.2d 268, 270 (Ind. 2000).

In *Palmer*, *supra*, our Supreme Court approved this Court's holding in an earlier case that under the felony murder statute:

> [A] person who commits or attempts to commit one of the offenses designated . . . is criminally responsible for a homicide which results from the act of one who was not a participant in the original criminal activity. 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

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because the guilty killing does not have to be accompanied by *mens rea* for anything other than the target crime. *See Pittman*, 885 N.E.2d at 1258 (felony murder "requires no proof of *mens rea* other than that required for the underlying crime, in this case burglary"). *Head*'s and *Pittman*'s relevance is only in the repetition of the rationale for felony-murder liability, namely that culpability required to justify murder-range sentencing is deemed to exist when a defendant engages in "a dangerous felony." *Pittman*, 885 N.E.2d at 1258; *Head*, 443 N.E.2d at 48.

> the death of the victim. There, the situation is a mediate contribution to the victim's killing.

Palmer, 704 N.E.2d at 126 (quoting *Sheckles v. State*, 684 N.E.2d 201, 205 (Ind. Ct. App. 1997)). Our Supreme Court's choice of "foreseeability" to describe the scope of felony-murder liability is significant for several reasons. First, as the Supreme Court has held, 'foreseeability' not *mens rea* and a felony-murder defendant need not have acted with the intent, or even while aware of a high degree of probability, that death would result from the commission of the target felony. *Pittman*, 885 N.E.2d at 1258. Earlier cases had already established that the culpability sufficient to justify murder-range sentencing is provided by the Legislature's decision that the target felony is inherently dangerous and proof that the felony "raised the foreseeable possibility" of death. *Palmer*, 704 N.E.2d at 126; *Head*, 443 N.E.2d at 48.

Similarly, our Supreme Court carefully endorsed *Sheckles*' reference to 'mediate' causality. *Palmer*, 704 N.E.2d at 126. That endorsement stemmed from the history of Indiana felony-murder cases, which showed that: "In deciding whether a person may be convicted of felony murder for an allegedly indirect or remote death, we have applied the felony murder statute when the designated felony was 'the mediate or immediate cause' of the death." *Id.* (summarizing cases). "Immediate" and "mediate" causation are terms of art arising from attempts to distinguish between direct, primary causation, and remote, or contributory, causation. *See Pittsburg C.C. & St. L. Ry. Co. v. Klitch*, 37 N.E. 560, 561 (Ind. Ct. App. 1894) (distinguishing, in suit over injuries from exposure, between "immediate" cause of walking in cold weather and 'mediate' cause of negligently putting passengers off a train); *Jeffers v. Olexo*, 43 Ohio St.3d 140, 143, 539 N.E.2d 614, 617 (Ohio 1989) (discussing attempts to limit liability on whether a cause is 'immediate' or 'mediate'). By re-emphasizing the exclusion of these concepts from felony-murder liability, the *Palmer* Court also re-emphasized that defendants may

be guilty of felony-murder even if others are 'more causally responsible' for a death. *Palmer*, 704 N.E.2d at 126; *see also Gibson v. State*, 515 N.E.2d 492 (Ind. 1987) (affirming murder conviction where defendant beat child, necessitating hospitalization and surgery, which then caused a fatal staph infection). *Palmer* reaffirmed that foreseeability, not factual causation, is the test for felony-murder liability.

(C) *Palmer*'s Deep Indiana Roots

Defendants and *amici* err by suggesting that *Palmer*'s endorsement of *Sheckles* was a new development, and that Indiana had previously followed their conception of the 'agency' rule (Layman, 31-32; Sparks, 19, 21-23 IPD, 3-4; JLC, 7). *Palmer* merely summarized a consistent interpretation of the felony-murder statute, demonstrated through cases spanning decades. For example, in *Reaves v. State*, 586 N.E.2d 847 (Ind. 1992), the Court had affirmed a felony-murder conviction where a bed-ridden robbery victim died of a pulmonary embolism three weeks after a robbery. *Id.* at 854-55. In *Pittman v. State*, 528 N.E.2d 67 (Ind. 1988), the victim, who weighed 400-500 pounds, suffered several non-fatal stab wounds during a robbery sought medical attention, during which exploratory surgery and attendant complications caused his death. *Id.* at 69. Our Supreme Court affirmed Pittman's felony-murder conviction because the victim's "physical condition put him at much higher risk than one without the physical disabilities to withstand the trauma of the injuries inflicted by Pittman." *Id.* at 70. In *Sims v. State*, 466 N.E.2d 24 (Ind. 1984) our Supreme Court affirmed a conviction where the victim died of congestive heart failure following surgery for a broken jaw suffered during a burglary. *Id.* at 25-26. A similar result was reached in 1982, when our Supreme Court affirmed a felony-murder conviction where the victim died of heart attack following robbery: "'It is a familiar principle of criminal law that it is not necessary that death should be the proximate result of the felonious

act.'" *Thomas v. State*, 436 N.E.2d 1109, 1111-12 (Ind. 1982) (quoting *Sage v. State*, 127 Ind. 15, 30, 26 N.E. 667, 672 (1891)).

In 1979, our Supreme Court affirmed a felony-murder conviction where Booker and his accomplice accosted and manhandled an elderly couple while robbing them; one of the victims later died of "'arrhythmia,' which the pathologist believed had been brought on by the physical and emotional stress occasioned by the robbery." *Booker v. State*, 270 Ind. 498, 502, 386 N.E.2d 1198, 1200-01 (1979). Our Supreme Court held that Booker was rightly found guilty of felony murder because the victim's "death was a result of the circumstances of the attack." *Id.* Ind. at 504, N.E.2d at 1202. In *Moten v. State*, 269 Ind. 309, 380 N.E.2d 544 (Ind. 1978), our Supreme Court affirmed a felony-murder conviction on evidence that defendants used a shotgun to perpetrate robbery, which was unintentionally fired when the victim rose to his feet. *Id.* Ind. at 313, N.E.2d at 547. In *White v. State*, 269 Ind. 479, 381 N.E.2d 481 (Ind. 1978), our Supreme Court affirmed a felony-murder conviction because the victims died as the result of smoke inhalation and carbon monoxide poisoning, holding, "a showing that lives have been lost as a result of the arson is all that is additionally necessary to support the murder convictions." *Id.* 269 Ind. at 481, 487, N.E.2d at 483, 486. Similar results obtained under the felony-murder statutes predecessors. In *Jones v. State*, 244 Ind. 682, 195 N.E.2d 460 (Ind. 1964), our Supreme Court affirmed a conviction for murder during the commission of a robbery, where one robber took the victim away from the defendant and into a field; the other robber later returned and answering the Defendants' worry about the victim reporting the crime by saying that the victim would not report anything for a long time. *Id.* Ind. at 685, N.E.2d at 460-61. In *Bissot v. State*, 53 Ind. 408, 1876 WL 6509 (1876), our Supreme Court affirmed a murder conviction under statute

criminalizing killing of any human being during the commission of burglary, where shopkeeper fired gun at burglars, who then returned fire. *Id.* at *2.

These convictions show that foreseeability, and not fine calculations of causal responsibility, has always been Indiana's basis of liability for felony murder. Consequently, in *Jenkins*, *supra*, the victim of a robbery, expecting to be killed, seized one robber's gun used it to shoot and kill the other robber. *Jenkins*, 726 N.E.2d at 271. Following long-settled Indiana precedent, our Supreme Court held that the surviving robber was guilty of felony murder because: "The evidence and reasonable inferences establish that the defendant and his co-perpetrator engaged in dangerously violent and threatening conduct and that their conduct created a situation that exposed persons present to the danger of death at the hands of a non-participant who might resist or respond to the conduct." *Id.* In *Palmer*, *supra*, the defendant accompanied Williams to meeting with Williams' parole officer. *Id.* 704 N.E.2d at 125. When officers attempted to arrest Williams, Palmer produced a handgun and eventually fired it, injuring a police officer. *Id.* Another officer responded by firing his own handgun, killing Williams. *Id.* Again, our Supreme Court affirmed Palmer's conviction due to the foreseeability of the resulting death, noting that Palmer's pointing and firing the gun at the first officer "clearly raised the foreseeable possibility that the intended victim might resist or that [other] law enforcement [officers] would respond, and thereby created a risk of death to persons present" and that this conduct was "the mediate or immediate cause" of Williams' death. *Id.*

Likewise, in *Exum v. State*, 812 N.E.2d 204 (Ind. Ct. App. 2004), after the defendant had fled from the scene of a robbery, the robbery victim fired a handgun at defendant's confederates, who were also fleeing, killing one of them. *Id.* at 206. This Court affirmed Exum's conviction, finding that, "A victim of a forcible felony or unlawful entry of or attack on his dwelling fighting

back with deadly force is such a natural consequence [of either act] that it has been justified by our State's legislature." *Id.* at 208 (citing I.C. § 35-41-2-4). Consequently, "Exum should have reasonably foreseen that the crime of attempted robbery with deadly force was likely to create a situation where the death of one of his co-perpetrators from the victim's act of self-defense or defense of his dwelling would occur." *Id.*

(D) *Palmer* Represents a Correct Understanding of Felony Murder

Indiana's foreseeability reasoning is not unique. Several states whose laws are relied on by Defendants and *amici* for an 'agency *versus* foreseeability' test explicitly use foreseeability in imposing or defining liability for felony murder (IPD, 10 n.3). *See* Del. Code Ann. tit. 11, §§ 261-263 (providing, "causation is not established if the actual result is outside the intention or the contemplation of the defendant"); Me. Rev. Stat. tit 17-A § 202 ("A person is guilty of felony murder if . . . the death is a reasonably foreseeable consequence"); 18 Pa. Cons. Stat. §303(b), (c) (providing that an element is not established unless it is foreseeable); *State v. Bennett*, 307 Conn. 758, 764 59 A.3d 221, 225 (2013); *State v. Gleason*, 277 Kan. 624, 636, 88 P.3d 218, 229 (2004); *Kinchion v. State*, 81 P.3d 681, 684 (Okla. Crim. App. 2004). Alabama permits felony-murder liability where the victim's foreseeable resistance kills a perpetrator. *See Mills v. State*, --- So.3d ----, 2013 WL 3589293, slip op. at 5 (Ala. Crim. App. 2013) (victim's resistance to kidnapping and resulting struggle for gun, during which co-felon was killed, was foreseeable and therefore defendant was guilty of felony murder); *accord*, *Witherspoon v. State*, 33 So.3d 625, 629-29 (Ala. Crim. App. 2009) (store clerk's decision to produce his own handgun to resist an armed robbery, and subsequent shooting of co-felon, was foreseeable and therefore surviving robber was guilty of felony murder). Other states make exceptions or have laws imposing results which are not formally felony murder, but are analogous to it. Although California restricts

felony-murder liability to deaths inflicted by perpetrators of the target offense, she permits criminal liability for murder when deaths are caused by foreseeable reactions of victims or police to criminal conduct. *See People v. Gonzalez*, 54 Cal.4th 643, 654, 278 P.3d 1242, 1252, 142 Cal.Rptr.3d 893, 903-04 (Cal. 2012) ("Under the provocative act doctrine, when the perpetrator of a crime maliciously commits an act that is likely to result in death, and the victim kills in reasonable response to that act, the perpetrator is guilty of murder"). Maryland does not apply an 'agency' limitation when perpetrators use innocent persons as shields against pursuit, apprehension or interference by police, and the police cause the deaths of such innocent persons. *Campbell v. State*, 293 Md. 438, 451, 444 A.2d 1034, 1041 (1982).

Consequently, Indiana's reliance on foreseeability is a humane and reasonable basis for imposing felony-murder liability. Without foreseeability -- or as Defendants call it, 'proximate cause'[20] -- there would seem to be no rational basis for any felony murder statute.[21] To that extent, Defendants' characterization of 'foreseeability' or 'proximate cause' as an aberration practiced by a minority of jurisdictions is misplaced (IPD, 7). More to the point, however, is that the distinction between 'agency' and 'foreseeability' rules does not arise from the nature or theory of felony-murder liability. The distinction arises from pure policy decisions about the utility or public legitimacy of imposing felony-murder liability on perpetrators who were not themselves the 'immediate' cause of a death. *See Comer v. State*, 977 A.2d 334, 342 (Del. Supr.

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[20] "Whether or not proximate cause exists is primarily a question of foreseeability. . . . The fact-finder must evaluate whether the injury 'is a natural and probable consequence, which in the light of the circumstances, should have been foreseen or anticipated.'" *Green v. Ford Motor Company*, 942 N.E.2d 791, 795 (Ind. 2011) (quoting *Bader v. Johnson*, 732 N.E.2d 1212, 1218 (Ind. 2000)).

[21] Defendant Layman's argument that the Legislature could only have intended the present felony-murder jurisprudence by requiring that the defendant only 'contribute' to a death is misplaced (Layman, 32-33). Simply "contributing" to a death would impose even broader liability than presently exists under the foreseeability standard.

2009) (preferring agency limit because it makes felons responsible for killings they commit, while foreseeability gives "felons . . . little incentive to refrain from using a gun against an armed victim or a pursuing police officer, since they will be held liable for any deaths that ensue regardless") (quotation and citation omitted); *State v. Canola*, 73 N.J. 206, 225, 374 A.2d 20, 29 (1977) (considering "the public policy implications" of relying on foreseeability and concluding that agency limits encourages "some" defendants to "refuse to assume a homicidal risk in committing other crimes").

Delaware and New Jersey's claims may be rebutted -- as they have in Indiana -- by observing that 'agency limit' encourages felons to commit inherently-dangerous crimes even where death is easily foreseeable, so long as the felons think they will somehow -- and despite any apparent risk -- still manage to 'handle' shopkeepers or homeowners, intimidate children or rape victims, or evade apprehension by police. And there is neither reason or justice in the apathy shown to foreseeable and preventable death by the 'agency limit.' Such policy choices are for the Legislature, not the courts. *See Boehm v. St. John*, 675 N.E.2d 318, 321 (Ind. 1996) ("The legislature has wide latitude in determining public policy, and we do not substitute our belief as to the wisdom of a particular statute for [that] of the legislature") (quoting *State v. Rendleman*, 603 N.E.2d 1333, 1334 (Ind. 1992). Indiana's Legislature has rejected the 'agency limit' proposed by Defendants, and this Court is not free to override that choice merely because it might find that Delaware or New Jersey have 'better' policy. *Id.*

Palmer and its predecessors are correct interpretations of the felony murder statute notwithstanding Justice Sullivan's dissent in *Palmer*. Justice Sullivan's dissent proceeds from his belief that the only way for a defendant to culpably "kill another" is to be the 'immediate' cause of death, and that accomplice liability is the only possible exception to this requirement.

Palmer, 704 N.E.2d at 128 (Sullivan, J., dissenting). Defendants' use of Justice Sullivan's dissent assumes what Defendants set out to prove, that the felony murder statute does not intend to create liability for anyone other than those who 'immediately' cause death or their accomplices. But under Indiana law -- and the law of every felony-murder jurisdiction -- defendants who commit qualifying offenses which carry a significant foreseeable risk of death, *do* "kill another" when that risk is realized. The purpose of the agency limit is not to abandon this understanding of felony murder liability, only to restrict it as a matter of public policy. *Canola*, 73 N.J. at 225, 374 A.2d at 29. The Legislature's insistence on inserting felony-murder liability into Indiana statutory law *in addition* to the liability for murder *already* imposed contradicts adopting that rule in Indiana.

Defendants also overlook the Legislature's constant approval of Indiana's foreseeability interpretation. At no point since the present version of the felony-murder statute was enacted in 1977 has the Legislature inserted any amendment that would contradict the consistent interpretations of this Court and the Court of Appeals. The doctrine of legislative acquiescence holds that when courts have established a judicial interpretation of a statute and the Legislature does not make any changes to the law, the Legislature is deemed to have agreed with the judicial interpretation. *Fraley v. Minger*, 829 N.E.2d 476, 492 (Ind. 2005). In 2004, this Court specifically acknowledged that our Legislature has acquiesced in the interpretation of the felony-murder statute which existed prior to and after *Palmer*. *Exum*, 812 N.E.2d at 208 n. 4. Defendants have not justified their request to rewrite Indiana's felony-murder statute, or rebuke the Supreme Court for its own jurisprudence (Layman 33-34; Sparks 24-25; IPD, 3).

(E). Proportionality Does Not Require a Different Result

Defendants also incorrectly claim that even though they are guilty of felony murder under Indiana law, this Court should nonetheless reduce their convictions to class C felony recklessness, or at least reduce their sentences to the maximum sentence for a class C felony, under the proportionality guarantee of Article 1, Section 16 of the Indiana Constitution that "[a]ll penalties shall be proportioned to the nature of the offense." (Layman, 40-41; Sparks, 28; IPD, 12-14). Indiana courts have consistently held that the nature and extent of penal sanctions are primarily legislative considerations and therefore reviewing courts must take a "highly restrained" approach to proportionality claims and review legislative penalties very deferentially. *State v. Moss-Dwyer*, 686 N.E.2d 109, 112 (Ind. 1997). This Court is "not free 'to set aside the legislative determination as to the appropriate penalty merely because it seems too severe.'" *Laugner v. State*, 769 N.E.2d 1147, 1156 (Ind. Ct. App. 2002) (quoting *Moss-Dwyer*, 686 N.E.2d at 112). Rather, the Legislature's determination of the appropriate penalty except upon a showing of clear constitutional infirmity. *Moss-Dwyer*, 686 N.E.2d at 111-12.

At the outset, it is not entirely clear what Defendants are asking this Court to do. Defendant Layman and *amici* IPD assert that his conduct can only warrant a sentence of eight years, the maximum sentence for a class C felony, which they identify as either involuntary manslaughter or reckless homicide (Layman, 40-41; IPD, 12-14). At the same time, however, Layman and IPD agree that he is guilty of burglary, a class B felony (Layman, Issue Statement 1, pp. 40-41; IPD 14). *Contrast* Ind. Code § 35-43-2-1(1)(B) (defining burglary of a dwelling as a class B felony) *and* Ind. Code § 35-50-2-5 (providing sentencing range of six to twenty years for a class B felony). IPD seeks the same 'recklessness' conviction for Sparks, who claims that he did not commit a crime (Sparks, 19-20; IPD 13-14). But Sparks also admits that his actions were

"possibly reckless" and may warrant a class C felony conviction and sentence (Sparks, 28). The only common denominator in these arguments is that it is somehow disproportionate to subject defendants to the felony-murder sentencing range if they choose to be guilty of different crimes.

Article 1, Section 16, of the Indiana Constitution does not entitle defendants to pick their convictions. It only requires proportionality between sentencing ranges and offenses. *Moss-Dwyer*, 686 N.E.2d at 111-12. It is not unreasonable for the Legislature to determine that commission of an inherently-dangerous felony which causes a foreseeable death is a more serious offense than the target felony alone. And Defendants apparently concede that death was a foreseeable result of the burglary in this case, writing that "the homeowner was justified in using deadly force to protect his home" (Layman, 10) and "[B]lame certainly cannot be placed on the homeowner for defending his home in the manner he did" (Sparks, 29). *See Exum*, 812 N.E.2d at 207 (it is foreseeable that anyone would attempt to repel an attack on his dwelling with deadly force). IPD asserts nonetheless that this 'burglary' "pales in comparison to most murder cases" -- but that is no doubt why a more severe sentence for murder is available in appropriate cases (IPD, 13). Ind. Code § 35-50-2-9(b); *Pittman*, 885 N.E.2d at 1258; *Greer v. State*, 749 N.E.2d 545, 548 (Ind. 2001).

Sparks also argues that a class C felony sentence is required because, "if Mr. Johnson was shot and lived the rest of his life as a quadriplegic or even in a vegetative state . . . Sparks and [Layman] could only be charged with Class C felony burglary with the applicable sentencing range being significantly different" (Sparks, 18). But in that case, Sparks and Layman would be guilty of burglary as a class A felony, which carries a significant, but lower sentencing range than felony murder. *See* Ind. Code § 35-43-2-1(2) (defining burglary as class A felony) *and* Ind. Code § 35-50-2-4 (sentencing range for class A felony); *compare* Ind. Code § 35-50-2-3

(sentencing range for murder). Defendant's sentences are not disproportionate under *Poling v. State*, 938 N.E.2d 1212 (Ind. Ct. App. 2010) (IPD, 13-14). Murder, reckless homicide, involuntary manslaughter, felony murder, burglary as a class C felony, and burglary as a class B felony are not 'one in the same crime' simply because defendants express their willingness to receive a sentence for one after being convicted of another. The distinctions between these offenses and their sentencing ranges provides certain evidence that the Legislature considers them to be separate offenses warranting different ranges of punishment. *Poling*, 938 N.E.2d at 1216. Defendants have failed to show that their sentences are unconstitutional under Article 1, Section 16. *Moss-Dwyer*, 686 N.E.2d at 111-12.

II.

Assuming Defendants had preserved the issue, whether the United States or Indiana Constitutions prevent their prosecution, convictions, and sentences for felony murder.

Defendants claim that they cannot be convicted or sentenced for felony murder because the United States Supreme Court has allegedly held that differences between adolescents and adults prohibit treating persons near the age of eighteen years as "miniature adult[s]," who can be convicted and sentenced for adult offenses without "consideration of "the fundamental impact that" their ages "had on the commission of" a crime (Layman, 10-13; Sparks, 5-7; JLC 5-7 & n.9). Defendants' misuse of United States Supreme Court decisions to support their arguments will be discussed presently. At this point the State notes that defendants are claiming they were prejudiced by being deprived of an opportunity to present evidence and argue these alleged differences in the trial court (Layman, 13; Sparks, 7). As noted in Part I of this Brief, however, any such prejudice was invited by the Defendants. Defendants' suggestions that evidence of 'fundamental differences' exists which is either particular to them or provable through scientific investigation further illustrates the magnitude of their waiver and the need to decline review

(Layman, 13; Sparks, 7). *Plank*, 981 N.E.2d at 53-54; *see also Bennett v. Richmond*, 960 N.E.2d 782, 791-92 (Ind. 2012) (explaining need for a hearing when scientific evidence is introduced at trial).

Defendants' attempts to provide such evidence from the trial record are insufficient to cure this gap (Layman. 34-36; 26-27). Layman cites his statement to the trial court at sentencing that "I just wasn't thinking of the consequences," as proof that he suffers from a neurological deficit that precludes adult responsibility (Layman, 36). Such statements are routinely made by adult offenders. *See, e.g.* , *Hape v. State*, 903 N.E.2d 977, 1003 (Ind. Ct. App. 2009) ("I've just made a lot of mistakes here"). Defendants also claim they acted irrationally and with poor foresight because they chose a home near Quiroz's residence and, although the presence of Scott's wallet alerted them to his presence in the home, the thought of fleeing "never crossed the boys' minds" (Layman, 35; Sparks, 26). Adults choose to commit crimes near their residences. *Hobson v. State*, 957 N.E.2d 1031, 1033 (Ind. Ct. App. 2011). There is no evidence that the thought of fleeing "never crossed the boys' minds"; for all the record shows, Defendants might just as well have thought the homeowner had left his wallet behind or -- more to the point -- did not care if the owner was home after all. (Tr. 668-71, 672-73, 1080-81; Exhibits 37, 38A & 38B). Their conduct in canvassing the neighborhood to find unoccupied homes shows foresight about the risks attendant on their planned crime (Tr. 921-23, 873). It is certainly foreseeable to anyone with minimal life experience that a home's residents do not always answer the door, or answer the door in time, to encounter visitors, and Defendants have failed to show evidence supporting their personal claims of diminished responsibility. As the following subsections will show, Defendants have also failed to justify their claims that they were improperly charged and sentenced under Indiana's the felony-murder laws.

(A) Application of Felony Murder Liability

Defendants argue that because the felony murder statute and its sentencing range do not permit "unique treatment" of individuals who are less mature than 'adults,' those statutes cannot be applied to persons who fit a generic typology of adolescents Defendants glean from a selective reading of *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham*, 560 U.S. at 63; *J.D.B.*, 131 S.Ct. at 2408, and *Miller v. Alabama*, -- U.S. --, 132 S.Ct. 2455 (2012) (Layman, 5, 10). Defendants are not entirely clear about what this 'unique treatment' in a trial for felony-murder might require, other than to insist on application of the 'agency view' of felony murder, juveniles who commit eligible target felonies should be exempted from liability unless one of their number performs the physical act required to cause death (Layman, 34-37; Sparks, 26; JLC, 14-15). Defendants do not suggest any particular age to which this 'unique' treatment should apply, suggesting that they view chronological age as irrelevant provided that the generalized observations about juveniles made in the above Supreme Court cases apply to any defendant charged with felony murder. *Amicus* JLC, however, urges that chronological age should be irrelevant, and that this special status should be available to persons over the age of eighteen (JLC 7 n.9). JLC also suggests that this Court should require a 'juvenile specific' standard that limits felony-murder liability only to juveniles who themselves perform the physical act causing death, and even then only when they kill with specific intent (JLC, 13).

Defendants also complain that the jury asked questions about the felony-murder liability and rhetorically conclude, "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." (Layman, 36-37; Sparks, 26-27). This argument is advanced in support of Defendants' claim that application of the 'agency view' to

their offenses is required to protect their rights to 'unique treatment' (Layman, 36-37; Sparks, 25-27). But if jurors are incapable of determining if a 16-year-old can foresee death resulting from his or her conduct, then jurors are equally incapable of determining whether a sixteen-year-old can culpably participate in a companion's conduct. So are judges, for that matter, because they too are not the 'peers' of adolescents. The jurors asked questions one would expect of concerned adults with significant life experiences who are charged with evaluating Defendants' claims that death was not a foreseeable result of their conduct and the option of convicting Defendants of burglary only (App. 131-32; Tr. 517, 520-24, 1312). Defendants have failed to show any prejudice from their alleged deprivation of 'unique treatment'.

The fatal flaw in Defendants' ideas of 'unique treatment' is that they are unsupported by authority. *Roper* held that special concerns involving the infliction of the death penalty prevented it in the case of youthful offenders. *Roper*, 543 U.S. at 568. *Graham* applied special Eighth Amendment concerns over the automatic imposition of life without the possibility of parole to prevent that penalty from being imposed on older juveniles guilty of nonhomicide offenses. *Graham*, 560 U.S. at 62. *Miller* extended *Graham*'s holding to older juveniles guilty of homicide. *Miller*, 132 S.Ct. at 2472-74. None of these cases required, or even suggested, a constitutional requirement of 'unique' treatment in charging, trying, or sentencing of older juveniles for offenses such as burglary or felony murder. *Miller*, 132 S.Ct. at 2472-74; *Graham*, 560 U.S. at 62; *Roper*, 543 U.S. at 568. Similarly, *J.D.B.* required consideration of a juvenile's age as one factor in determining whether he or she was in custody for purposes of *Miranda*. *J.D.B.*, 131 S.Ct. at 2408. The Court's caution in observing *Miranda* formalities during the interview of a juvenile by police recognizes that juveniles may knowingly, validly and intelligently understand and waive their constitutional rights. *Id.* Neither *J.D.B.* or the cases just

cited require Defendants' conceptions of 'unique' offenses, charges and trials for adolescents charged with crimes. *Id.*

(B) Application of Felony Murder Sentencing

Defendant Layman and the JLC likewise misread the Court's cases as grants of 'unique' sentencing procedures which, generally, boil down to granting trial courts complete discretion to impose any sentence on criminal defendants who can claim to match Layman's and the JLC's conception of an 'immature' juvenile (Layman, 38-39; JLC, 16-21). Layman and the JLC reason that since *Graham* and *Miller* prohibited the mandatory imposition of life without parole, all 'mandatory' penalties, including advisory ranges, are unconstitutional. *Miller*, 132 S.Ct. at 2472-74; *Graham*, 560 U.S. at 62. Defendants' argument overlooks the fact that Indiana law already allows for the fact-sensitive sentencing of offenders. *See, e.g.*, Ind. Code § 35-38-1-7.1(b) (outlining non-exhaustive list of facts in mitigation of a sentence).

Further, on Defendants' own logic neither our Supreme Court or the Legislature could prescribe any mandatory term or condition for sentencing any offender under the age of eighteen. Similarly, courts sentencing such offenders could require sentences in excess of those available to criminal offenders who could not meet Layman's and JLC's conception of a 'juvenile'. Courts addressing similar arguments have held that *Graham* and *Miller* do not require such results. *See James v. United States*, 59 A.3d 1233, 1236-37 (D.C. 2013) (mandatory minimum term of thirty years before parole eligibility does not fall within *Miller*); *Starks v. State*, 128 So.3d 91, 92 (Fla. App. 2013) (*Miller* did not apply because the sentencing statute provided the trial court with a choice of a life sentence or a term of years); *People v. Pacheco*, 372 Ill.Dec. 406, 417, 991 N.E.2d 896, 907, (Ill. App. 2013), (*Roper*, *Graham* and *Miller* do not prohibit juveniles convicted as adults from receiving a mandatory minimum sentences of twenty years),

appeal allowed, 996 N.E.2d 20 (2013);[22] *Com. v. Batts*, 66 A.3d 286, 295 (Pa. 2013) (*Miller* does not prohibit statutory minimum sentences); *cf. United States v. Shill*, 740 F.3d 1347 (9th Cir. 2014) (holding, in context of an adult offender, that ten-year mandatory prison term is not a mandatory sentence within the meaning of *Graham* and *Miller*).

(C) The Trial Court's Jurisdiction Is Not Unconstitutional.

Defendants claim that Indiana Code Section 31-30-1-4, which required criminal-court jurisdiction over their offenses, is unconstitutional. Defendant's claim adds a misreading of *Kent v. United States*, 383 U.S. 541 (1966) to their misapplication of *Roper*, *Graham*, and *Miller*, *supra*, for an assertion that Section 31-30-1-4 is unconstitutional on its face because it violates a freestanding 'liberty interest' either to adjudication within the juvenile justice system, or to a waiver hearing before they can be tried in criminal court (Layman, 16-18, 19 & nn. 6-8; Sparks, 8-10, 11-12).[23] However, *Roper*, *Graham* and *Miller* do not constitutionally limit states' authority to determine criminal liability or the jurisdiction of a juvenile court. *Miller*, 132 S.Ct. at 2472-74; *Graham*, 560 U.S. at 62; *Roper*, 543 U.S. at 568. There is no common-law or federal constitutional right to adjudication and disposition within the juvenile justice system. *United States v. Juvenile*, 228 F.3d 987, 990 (9th Cir. 2000); *Woodard v. Wainwright*, 556 F.2d 781, 785 (5th Cir. 1977); *C.B. v. State*, 2012 Ark. 220, 406 S.W.3d 796, 801 (2012); *State v. Skakel*, 276 Conn. 633, 657-58, 888 A.2d 985, 1007 (2006); *In re M.I.*, 370 Ill. Dec. 795, 803, 989 N.E.2d 173, 190 (2013); *Brownlow v. State*, 484 N.E.2d 560, 563 (Ind. 1985); *Gingerich v. State*, 979

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[22] Illinois courts cite decisions in cases where "appeal [was] allowed" as precedent. *People v. Love*, 2013 IL App (2d) 120, 2 N.E.3d 628, 719 (Ill. App. 2013).

[23] This claim is premised solely on a right to juvenile adjudication under the United States Constitution, not the Indiana Constitution; review under the Indiana Constitution is therefore waived. *Wallace v. State*, 905 N.E.2d 371, 378 (Ind. 2009); *Dye v. State*, 717 N.E.2d 5, 24 (Ind. 1999).

N.E.2d 694, 703 (Ind. Ct. App. 2012), *trans. denied.* If a state provides that minors may be adjudicated within the juvenile justice system or criminal court, it may not require transfer of a case to adult court without the due-process hearing generally described by *Kent*, *supra*. *Kent*, 383 U.S. at 556-57. The relevant statute, and not a defendant's age, creates the liberty interest entitling minors to such a hearing. *Id.; Gingerich*, 979 N.E.2d at 703. Consequently, Section 31-30-1-4, which precludes jurisdiction over felony-murder charges in a juvenile court, does not impinge on Defendant's liberty interests. For the same reason, the statute is not 'unconstitutional as applied' because it was applied according to its terms, which are not subject to revision according to a common-law constitutional theory of 'juvenile justice jurisdiction.' *Juvenile*, 228 F.3d at 990; *Woodard*, 556 F.2d at 785.

Defendants also assert that Section 31-30-1-4 violates their right to equal protection under the Fourteenth Amendment to the United States Constitution and Article I, Section 23 of the Indiana Constitution. The Fourteenth Amendment's equal protection clause guarantees a "right to be free from invidious discrimination in statutory classifications or other governmental activity." *Beauchamp v. State*, 788 N.E.2d 881, 886 (Ind. Ct. App. 2003) (citing *Harris v. McRae*, 448 U.S. 297, 322 (1980)). In other words, the clause guarantees that similar individuals will be dealt with in a similar manner. *Lewis v. State*, 898 N.E.2d 1286, 1290 (Ind. Ct. App. 2009). In addressing an equal protection challenge, a reviewing court must first determine whether the issue is subject to traditional "rational basis" scrutiny or the more stringent "strict scrutiny." *Beauchamp*, 788 N.E.2d at 886. Strict scrutiny applies only if the classification involves a suspect class or impermissibly interferes with a fundamental right, otherwise, a rational basis analysis will be used. *Brown v. State*, 744 N.E.2d 989, 995 (Ind. Ct. App. 2001).

Age is not a suspect classification. *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991); *see also Ortwein v. Schwab*, 410 U.S. 656, 660 (1973) (enumerating "suspect classification[s]" as "race, nationality, or alienage"). As shown above, Defendants have no freestanding fundamental right to juvenile-court adjudication. Their claims are therefore subject to a rational basis analysis. *Beauchamp*, 788 N.E.2d at 886. Under that review, a classification will be upheld if there is a rational relationship between the disparity of the treatment and some legitimate government purpose. *Id.* at 886. Section 31-30-1-4 is presumed to be a rational classification, and Defendants can overturn that presumption only by a "clear showing of arbitrariness and irrationality." *Gary Cmty., Etc. v. Ind. Dep't. of Pub. Welfare*, 507 N.E.2d 1019, 1023 (Ind. Ct. App. 1987). In other words, the statute must be upheld "unless 'the classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective.'" *Harris*, 448 U.S. at 322 (quoting *McGowan v. Maryland*, 366 U.S. 420, 425 (1961)). Further, Defendants can carry this burden only by "negat[ing] every conceivable basis that might support it, whether or not the basis has a foundation in the record." *Beauchamp*, 788 N.E.2d at 886.

Section 31-30-1-4 vests exclusive jurisdiction in the criminal court over defendants who committed specified felonies after their sixteenth birthday. Ind. Code § 31-30-1-4. Those offenses include murder, carjacking, firearms offenses, robbery while armed with a deadly weapon or resulting in injury, criminal deviate conduct, rape, kidnapping, and specified gang crimes. *Id.* This classification is rationally related to the State's interest in deterring such offenders, preserve the security of society, and achieve the State's interests in rehabilitating such violators -- all of which may well require longer periods of supervision and correction than are available under the juvenile code. Likewise, while Defendants claim the statute is unconstitutional because it applies to felony murder committed during a burglary, and not to

burglary, the infliction of is a distinction between those offenses that also comports with these reasonable goals (Layman, 22; Sparks, 2-14).

This classification is also a rational response to what "any parent knows' -- indeed, what any person knows -- about children generally," *Roper*, 543 U.S. at 569, namely that sixteen- and seventeen-year-olds are capable of understanding, and refraining from, conduct that constitutes the listed offenses so that their decisions to commit those offenses is more appropriately dealt with in criminal court. *See, e.g.*, 10 U.S.C. § 311 (providing that the militia of the United States "consists of all able-bodied males at least 17 years of age") *and United States v. Stephens*, 245 F. 956, 960 (1917), *aff'd.*, 247 U.S. 504 (1918) (members of the militia may be conscripted to serve in foreign wars); *Lambert v. Wicklund*, 520 U.S. 292, 295-96 (1997) (upholding rights of minors to petition a court for leave to terminate a pregnancy without parental notification); Ind. Code § 31-11-2-3 (providing right of minors to petition a court for exemption from the age limits on marriage); Ind. Code § 9-24-3-2.5 (recognizing minors' ability to operate a motor vehicle); Ind. Code § 31-16-6-6 (recognizing that minors may, in fact, live independently of their parents or court supervision). Defendants, whose challenge merely offers alternative policy suggestions, have not shown that the statute lacks a rational basis. *Beauchamp*, 788 N.E.2d at 886; *see also Imel v. State*, 158 Ind.App. 374, 388-90, 342 N.E.2d 897, 899-901 (Ind. Ct. App. 1976) (holding that the ability to characterize any age distinction as "arbitrary" is insufficient to prove an equal-protection violation).

The same facts serve to overcome Defendants' challenge under Article 1, Section 23 of the Indiana Constitution. As with its federal counterpart, disparate treatment is permitted if it is "reasonably related to inherent characteristics which distinguish the unequally treated classes." *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994). Second, "the preferential treatment must be

uniformly applicable and equally available to all persons similarly situated." *Id.* Reviewing courts must exercise "substantial deference to legislative discretion." *Id.* "Legislative classification becomes a judicial question only where the lines drawn appear arbitrary or manifestly unreasonable." *Beauchamp*, 788 N.E.2d at 887. "The party challenging the statute based on a purported improper classification must negate every reasonable basis for the classification." *State v. Price*, 724 N.E.2d 670, 675 (Ind. Ct. App. 2000); *see also Dvorak v. Bloomington*, 796 N.E.2d 236, 239 (Ind. 2003) (there is "no burden" on the government to prove that the disparate treatment is reasonably related to the legislative goals; rather, "the burden is entirely upon" the challenger to prove that the statute is unconstitutional). In addition to the rational distinctions discussed in the preceding paragraph, the State would also note that Section 31-30-1-4 permits no distinction among offenders subject to its jurisdictional provisions; *none* of them can obtain juvenile-court adjudications. Again, Defendants' competing visions of appropriate public policy are insufficient to invalidate the statute. *Collins*, 644 N.E.2d at 80.

Defendants also claim that Section 31-30-1-4 violates the "Due Process and Course of Law Clauses contained in the Federal and Indiana Constitutions" either because it gives prosecutors discretion to 'avoid' the jurisdiction of criminal court without a waiver hearing, or because the statute compels prosecutors to invoke criminal jurisdiction without a waiver hearing (Layman, 13-16, 18-21; Sparks, 7-8, 11-12). Defendants have waived review of this claim because they have not supported their arguments with analysis and citation to authority explaining the relevance of either the "Due Process and Course of Law Clauses" to their arguments. Ind. Appellate Rule 46(A)(8)(a). Even if this claim had not been waived, however, Defendants have no constitutional right to a waiver hearing in order to avail themselves of juvenile-court jurisdiction. *Juvenile*, 228 F.3d at 990; *Woodard*, 556 F.2d at 785. Further,

Defendants do not explain how a prosecutor would exercise his or her 'discretion' to avoid or invoke criminal jurisdiction in any particular case, and in any event the existence and exercise of prosecutorial discretion is not a constitutional infirmity. *Id.*; *Coy v. State*, 999 N.E.2d 937, 945-46 (Ind. Ct. App. 2013).

III.
Sufficient evidence supports Sparks' conviction for felony murder.

This Court will not re-weigh evidence or re-evaluate the credibility of witnesses. *Kiplinger v. State*, 922 N.E.2d 1261, 1266 (Ind. 2010); *Dillard v. State*, 755 N.E.2d 1085, 1089 (Ind. 2001). This Court "will consider only the evidence most favorable to the judgment and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment." *Hoover v. State*, 918 N.E.2d 724, 731 (Ind. Ct. App. 2009). The evidence need not be sufficient to overcome reasonable hypotheses of innocence. *Craig v. State*, 730 N.E.2d 1262, 1266 (Ind. 2000). To the contrary, this Court will only overturn a verdict if it finds that, after considering the evidence and inferences supporting the conviction, "no rational fact-finder" could have found the defendant guilty. *Matthews v. State*, 718 N.E.2d 807, 810-11 (Ind. Ct. App. 1999).

The evidence shows that Sparks assisted the group in scouting out burglary targets (Tr. 922-23; Exhibit 40). Sparks, Quiroz, and Layman decided to target Scott's house for the burglary (Tr. 921-23, 925, 1036). The group summoned Sharp and Johnson, to "help . . . get into the house" (Tr. 925). Sparks later explained that he remained outside Scott's residence with a cell phone in the event that the police or a visitor arrived at Scott's house (Tr. 573-574, 934; Exhibit 14A). Quiroz was also equipped with a cell phone (Tr. 933). When their burglary had been detected, Sparks fled, abandoning his cell phone at the scene (Tr. 572-73, 760, 934-35;

Exhibits 2-3, 10). This evidence is sufficient to prove that Sparks was closely involved in planning the burglary and knew that it would be dangerous if the group were surprised by the homeowner. This is sufficient evidence to convict Sparks. *Exum v. State*, 812 N.E.2d at 208.

IV.
Defendant's sentences are not inappropriate to their offenses and character.

This Court will only revise a sentence if, upon "due consideration of the trial court's decision" it nonetheless appears that "the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B); *Anglemyer v. State*, 868 N.E.2d 482, 490-91 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (2007). The "nature of the offense" refers to the defendant's acts in comparison with the elements of his offense, *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008), while the "character of the offender" refers "general sentencing considerations and the relevant aggravating and mitigating circumstances." *Douglas v. State*, 878 N.E.2d 873, 881 (Ind. Ct. App. 2007). "Because reasonable people will differ as to the appropriate sentence in any given case," this Court will "refrain from merely substituting [its] opinions for those of the trial court." *Everroad v. State*, 701 N.E.2d 1284, 1286 (Ind. Ct. App. 1998). "The principal role of such review is to attempt to leaven the outliers," and is not intended to achieve a perceived "correct" sentence. *Chambers v. State*, 989 N.E.2d 1257, 1259 (Ind. 2013); *Cardwell v.* State, 895 N.E.2d 1219, 1225 (Ind. 2008). Layman and Sparks bear the burden of showing that their sentences are inappropriate on both grounds. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). A defendant "bears a particularly heavy burden in persuading [this Court] that his sentence is inappropriate when the trial court imposes the advisory sentence." *Fernbach v. State*, 954 N.E.2d 1080, 1089 (Ind. Ct. App. 2011), *trans. denied.*

A). Layman's Sentence Is Not Inappropriate

The nature of Layman's offense supports the trial court's decision to impose the advisory sentence of fifty-five years (App. 127). Felony murder does not require group participation and may be committed by an individual acting alone. But Layman was one of the initial participants of the group which decided to burglarize a home, scouted various possible targets, and selected Scott's house (Tr. 921-23, 925, 1036; Exhibit 40). Not content with the potential to outnumber a returning or present homeowner by three to one, the group summoned Sharp and Johnson, to "help . . . get into the house" (Tr. 925, 1319). Laymen then entered the house with the others, who remained in the house despite Scott's attempts to notify any burglars of his presence (Tr. 1063, 1065). Once inside the house Sharp, whom Layman and the others had summoned for help, armed himself with a knife taken from Scott's kitchen (Tr. 593-94, 604, 621, 640, 644-47, 1081; Exhibits 11, 21-22). The record does not contain detailed information about the length of time between Scott's appearance to the group and his decision to shoot, but there was enough time for Sharp to turn and flee, making the others' choice to remain even more culpable (Tr. 540-42, 612-13, 648, 760, 984). Layman claims his sentence is inappropriate in comparison with the fifty-year sentence given to a felony-murder defendant in *Evans v. State*, 497 N.E.2d 919 (Ind. 1986), but in that case our Supreme Court merely rejected a claim that the sentence violated the Eighth Amendment. *Id.* at 924. *Evans* does not stand for the proposition that only 'hardened' criminals should receive advisory sentences. *Id.*

Layman's character also does not warrant a revision of his sentence. The trial court considered Layman's youth and expressions of remorse at sentencing as mitigating facts, and declined to rely on Layman's "moderate" risk to reoffend (Tr. 1282, 1318). But the trial court was also entitled to compare Layman's role in organizing the burglary and his decision to enter

the house in light of Layman's statement, "I'm peaceful and I'm a thinker and patient" (Tr. 1325; Layman PSI, 6). Layman admitted to using marijuana on a daily basis for four years prior to the offense, and to abusing xanax and vicodin (Layman PSI, 6). Layman's drug use coincided with his involvement in the juvenile justice system, which began in 2009 when he was placed on informal supervision for theft, and the juvenile allegation that Layman received stolen property, which was pending when Layman decided to commit this offense (Tr. 1303, 1322; PSI, Attachment). The court was also obliged to consider Layman's suspension from school for fighting as well as Layman's having declined to avail himself of the opportunity to continue attending an alternative school (Tr. 1319-20). Layman's character shows a willingness to disregard the authority of the law and the courts and a significant disregard for the rights of others that, in this case, led to death. Layman has not shown that his advisory sentence is inappropriate to his offense or character and the trial court should be affirmed. *Fernbach*, 954 N.E.2d at 1089.

B). Sparks' Sentence Is Not Inappropriate

At the outset, the State notes that Sparks has appeared to waive review of his sentence because a transcript of the sentencing hearing is not included in the record (Tr. 1280). *See Davis v. State*, 935 N.E.2d 1215, 1217 (Ind. Ct. App. 2010), *trans. denied* ("It is a defendant's duty to present an adequate record clearly showing the alleged error," and
failure to provide a transcript of relevant proceeding waives review). Assuming this Court would find that Sparks has not waived review, he received a sentence slightly below the advisory sentence for his offense (App. 145-46). While Sparks insists that he had no connection to the burglary, the evidence, reviewed above, which supports Sparks' conviction shows that he was an initial and constant participant in the decisions and actions leading up to the burglary and

Johnson's death. Like Layman, Sparks chose not to commit this crime alone, but instead operated with the group. In that capacity he served as the lookout, equipped with a cell-phone by which he could communicate with the other burglars inside the house. Although the trial court apparently thought that the group intended Sparks to create a diversion, it still bears repeating that Sparks and the group had little reason for his surveillance except to respond to the unanticipated appearance of police, a visitor, or a homeowner. Sparks' assertion that his sentence should be further reduced because "no innocent lives were lost," merely diminishes the significance of Johnson's death (Brief of Appellant, 29). While Sparks notes that Johnson was the oldest participant, Sparks overlooks the fact that he, Quiroz and Layman invited Johnson to help commit the burglary (Tr. 921-22, 925, 1036) (Brief of Appellant, 29). Sparks' participation in the offense was significant and does not warrant a sentencing revision. Sparks has also failed to show that his character warrants revision. As the trial court noted that Sparks had informal adjustments in two juvenile cases, both of which ended unsuccessfully, within two years of this offense (App. 146; Sparks PSI, "Attachment"). Sparks abused marijuana during this time (App. 145; Sparks PSI, 5). Sparks' identical reliance on *Evans*, *supra*, does little to illustrate why his sentence warrants revision due to his offense or character (Sparks, 30). His sentence should be affirmed.

CONCLUSION

For the foregoing reasons, the State respectfully urges that the trial court be affirmed.

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CERTIFICATE OF WORD COUNT

I verify that this brief, including footnotes, contains no more than 21,000 words according to the word count function of the Microsoft Word word-processing program used to prepare this brief.

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CERTIFICATE OF SERVICE

I swear under the penalties for perjury that on April 4, 2014, I caused to be served upon the opposing counsel in the above-entitled cause two copies of the foregoing by depositing the same in the United States mail first-class postage prepaid, addressed as follows:

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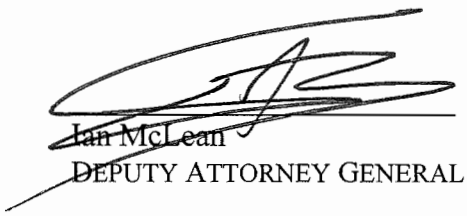

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