IN THE
SUPREME COURT OF IOWA

STATE OF IOWA,

Plaintiff-Appellee No. 16-1998

v.

KEYON HARRISON,

Defendant-Appellant.

BRIEF OF JUVENILE LAW CENTER, CENTER ON WRONGFUL CONVICTIONS OF YOUTH, AND CENTER FOR LAW, BRAIN AND BEHAVIOR AS *AMICI CURIAE* IN SUPPORT OF APPELLANT HARRISON

Appeal from the Iowa District Court for Polk County
No. FECR285476

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST AND IDENTITY OF AMICI CURIAE[1]

Juvenile Law Center, founded in 1975, is the oldest public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Among other things, Juvenile Law Center works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

Juvenile Law Center has worked extensively on the issue of juvenile life without parole, serving as co-counsel for petitioner in the U.S. Supreme Court case *Montgomery v. Louisiana*, __ U.S. __, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016), and filing amicus briefs in the U.S. Supreme Court in both *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), and *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

[1] Pursuant to Iowa R. App. P. 6.906(1) the written consent of counsel for all parties is attached hereto. Pursuant to Rule 6.906(4)(d), no counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

Juvenile Law Center has also participated as either lead counsel, co-counsel or *amicus curiae* in numerous juvenile life without parole cases throughout the nation, including in the Supreme Court of California, Arkansas Supreme Court, Colorado Supreme Court, Florida Supreme Court, Maryland Court of Appeals, Michigan Supreme Court, Supreme Court of Missouri, Ohio Supreme Court, Supreme Court of Pennsylvania, and Supreme Court of Virginia. Additionally, Juvenile Law Center has been a key player in coordinating the effort to obtain and train counsel for the more than 500 juvenile lifers awaiting resentencing in Pennsylvania.

The **Center on Wrongful Convictions of Youth** ("CWCY") operates under the auspices of the Bluhm Legal Clinic at Northwestern University School of Law. A joint project of the Clinic's Center on Wrongful Convictions and Children and Family Justice Center, the CWCY was founded in 2009 with a unique mission: to uncover and remedy wrongful convictions of youth and promote public awareness and support for nationwide initiatives aimed at preventing future wrongful convictions in the juvenile justice system. Since its founding, the CWCY has filed *amicus* briefs in jurisdictions across the country, ranging from state trial courts to the U.S. Supreme Court.

The Center for Law, Brain and Behavior of the Massachusetts General Hospital is a nonprofit organization whose goal is to provide responsible, ethical and scientifically sound translation of neuroscience into law, finance and public policy. Research findings in neurology, psychiatry, psychology, cognitive neuroscience and neuroimaging are rapidly affecting our ability to understand the relationships between brain functioning, brain development and behavior. Those findings, in turn, have substantial implications for the law in general, and criminal law, in particular, affecting concepts of competency, culpability and punishment, along with evidentiary questions about memory, eyewitness identification and even credibility. The Center, located within the MGH Department of Psychiatry, seeks to inform the discussion of these issues by drawing upon the collaborative work of clinicians and researchers, as well as a board of advisors comprising representatives from finance, law, academia, politics, media and biotechnology. It does so through media outreach, educational programs for judges, students and practitioners, publications, a "Law and Neuroscience" course at the Harvard Law School, and *amicus* briefs. A particular focus of CLBB has been the question of what constitutes responsible and legal behavior in children and adolescence.

ARGUMENT

When Keyon Harrison was sixteen-years-old, an adult acquaintance used him as an accomplice in a planned robbery of a neighborhood drug dealer. Harrison's role was to lure the drug dealer to a location where the adult co-defendant would rob the dealer. The robbery went terribly wrong when the victim fought with Harrison's adult co-defendant, the two struggled over the co-defendant's gun, and the gun went off killing the victim. Even though Harrison was not armed, did not participate in the fight that led to the victim's death, and did not expect, intend, or foresee that the victim would be killed, he was charged with first degree murder in the adult justice system, convicted of felony murder, and sentenced to life with the possibility of parole. This case raises fundamental questions about the fairness of applying Iowa's broad felony murder statute to juvenile defendants in light of new developmental and neuroscientific findings about the reduced culpability of juvenile offenders. It also raises concerns about subjecting juvenile defendants to the same mandatory sentencing schemes as those applied to adults convicted of felony murder.

Amici write to urge this court to remand the case because evidence, rooted in law and science, demonstrates that young people must not be held liable under the theory of felony murder.

I. THE RATIONALE UNDERLYING THE FELONY MURDER DOCTRINE CONTRAVENES SUPREME COURT JURISPRUDENCE AS APPLIED TO JUVENILES

Broadly defined, felony murder is the killing of another person during the commission of a felony. Emily Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of Roper, Graham & J.D.B.*, 11 CONN. PUB. INT. L.J. 297, 302 (2012). There need not be an intent to kill: a person can be convicted of felony murder even if the killing was "accidental, unforeseeable, or committed by another participant in the felony." *Id.* at 302-303. Liability for felony murder is justified by a theory of "transferred intent;"–the intent to kill is inferred from an individual's intent to commit the underlying felony because a reasonable person would know that death is a possible result of dangerous felonious activities. *Id.* at 305. As this Court has stated, "certain crimes are so inherently dangerous that proof of participating in these crimes may obviate the need for showing all of the elements normally required for first-degree murder." *State v. Heemstra*, 721 N.W.2d 549, 554 (Iowa 2006). However, as Justice Breyer explained in his

concurring opinion in *Miller v. Alabama*, this rationale fails when applied to juveniles.

> At base, the theory of transferring a defendant's intent is premised on the idea that one engaged in a dangerous felony should understand the risk that the victim of the felony could be killed, even by a confederate. Yet the ability to consider the full consequences of a course of action and to adjust one's conduct accordingly is precisely what we know juveniles lack capacity to do effectively.

567 U.S. 460, 492, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) (Breyer, J., concurring) (citations omitted). Though Justice Breyer was arguing against the imposition of life without parole sentences, his reasoning shows why it would be improper to impose a sentence of life, life without parole, or a lengthy term-of-years sentence on any juvenile convicted under the felony murder rule, given their reduced blameworthiness and moral culpability.

A. Liability For Felony Murder Has Historically Assumed A Defendant's Intent And Foreseeability

The felony murder rule dates back to eighteenth century England, but was not enacted into law in England or the American colonies before the American Revolution. Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 413-415 (2011). Early English courts limited the felony murder doctrine to require (1) that the defendant's conduct in the felony involve an act of violence, or (2) that the death be the natural and probable consequence of the defendant's conduct in committing the felony. WAYNE R.

LAFAVE, SUBSTANTIVE CRIMINAL LAW, *§ 14.5. Felony Murder* (West, 2d ed. 2016). English law around felony murder continued to evolve, and by the end of the nineteenth century, felony murder liability was predicated on a foreseeable dangerous act. Leonard Birdsong, *Felony Murder: A Historical Perspective by Which to Understand Today's Modern Felony Murder Rule Statutes*, 32 T. MARSHALL L. REV. 1, 16 (2006). Even still, the rule was disfavored, and England officially abolished felony murder by statute in 1957. *Id.*

In the United States, felony murder liability emerged in the nineteenth century as murder laws were codified and murder was limited to "'killings' that were intentional or committed in furtherance of particularly heinous crimes." Binder, *supra*, at 415. *See also* Keller, *supra*, at 304. A 1794 Pennsylvania statute defining capital or first-degree murder as killings "that were either intended and premeditated or committed in perpetrating or attempting robbery, rape, arson, or burglary" became a model for states on how to impose felony murder liability. Binder, *supra*, at 415. States began to enact legislation to impose liability for unintended killings under first or second-degree murder laws, including "involuntary killing . . . in the commission of an unlawful act which in its consequence, naturally tends to destroy the life of a human being, or is committed in the prosecution of a

felonious intent." *Id.* Unlike today's felony murder rules, however, these early statutes required that the defendant have the intent to inflict an injury during the felony, even if they did not have the intent to kill. Keller, *supra*, at 304. While some courts emphasized the wickedness of the felonious purpose, others emphasized the dangerousness of certain felonies. This led to what legal scholars classify as the principle of dual culpability: felony murder was wrong not simply because the accused committed a dangerous act, but because this act was coupled with a 'wicked' motive. Binder, *supra*, at 416-17.

In contrast to developments in England, where the doctrine was abandoned due to its questionable roots and impractical application, felony murder expanded in the United States during the twentieth century. When scholars proposed a scheme for grading homicide according to the degree of the actor's expectation of causing death, which would eventually grow into the hierarchy of mental states in the 1962 Model Penal Code, they suggested abolishing felony murder liability. *Id.* at 418-19. "To proponents of the Model Penal Code, felony murder liability was a form of strict liability, which the Code forbade, [as it] required at least extreme indifference to human life for murder but permitted juries to treat participation in an enumerated felony as

prima facie evidence of such indifference." *Id.* at 419. (citing Model Penal Code § 210.2(1)(b) (Proposed Official Draft 1962).

As states enacted new penal codes abandoning the requirement that a participant have intent to wound or injure the victim, the underlying predicate felonies in felony murder statutes were expanded to include less serious and less violent crimes. Keller, *supra*, at 304. Simultaneously, courts began finding liability for felony murder even when the connection between the felonious act and the killing was attenuated. *Id.* Today, a number of states have adopted statutes by which an accomplice to a crime is held accountable to the same extent as the principal. "Collectively, these statues and case law allow felony murder convictions even where the participant's involvement was very minor and the death was unintended or unanticipated." *Id.* at 305.

After a 1979 United States Supreme Court's decision forbidding juries to presume mental elements of offenses, *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), courts have generally avoided explaining felony murder rules as presuming malice or the intent to kill, instead offering different rationales. Binder, *supra*, at 420. Some states have reasoned that the statutorily enumerated felonies that provide for felony murder liability are so 'inherently dangerous' that 'death is deemed to be a natural and probable consequence,' and thus the felony murder rule is required

both to deter and punish those who choose to engage in 'dangerous' or 'reckless' actions that are 'likely to result in death.' *Id.* at 420-421. This is the strict liability standard that the Model Penal Code forbade, as the actual intent of the defendant is irrelevant to the overall analysis in determining culpability, and the accused will be punished for murder even if the person did not foresee, expect, or intend death. Keller, *supra*, at 305. Other states claim that malice can be inferred, or imputed, from the violent and dangerous nature of the enumerated felonies that provide for felony murder liability, as such crimes are evidence of a 'person-endangering' or 'malignantly reckless' state of mind. Binder, *supra*, at 420. Underlying all of these rationales is the assumption that an individual who takes part in a felony should understand, foresee, and thus reasonably assume the risk that someone might get killed during the commission of a felony. Keller, *supra*, at 305.

Iowa's felony murder scheme imposes strict liability: "[t]he combination of sections 707.2(2) and 702.11 constitute what is commonly known as the 'felony murder' rule." *Heemstra*, 721 N.W.2d at 552. In relevant part, the rule states that "[a] person commits murder in the first degree when . . . [t]he person kills another person while participating in a forcible felony." Iowa Code Ann. § 707.2(1)(b) (West 2013). A "forcible felony" is defined by the Iowa Code as "any felonious child endangerment, assault, murder, sexual

abuse, kidnapping, robbery, human trafficking, arson in the first degree, or burglary in the first degree." Iowa Code Ann. § 702.11(1) (West 2015).

To convict under a theory of felony murder, "the State must prove that the defendant was participating in the underlying felony." *Conner v. State*, 362 N.W.2d 449, 455 (Iowa 1985) (citing *State v. Phams,* 342 N.W.2d 792, 795 (Iowa 1983)). If an individual participated in the underlying felony, he is "vicariously liable for [the] acts of the principal," and Iowa courts have long held that "when two or more people combine to accomplish an unlawful purpose, each is responsible for the acts of the other that arise out of the consequences of carrying out the original crime, even though the particular crime committed was not a part of that original design and the injury done was greater than intended by the conspirator." *Id.* (first citing *State v. Kneedy,* 3 N.W.2d 611, 616 (Iowa 1942); then citing *State v. Lyons*, 211 N.W. 702, 703 (Iowa 1927)). *See also* Iowa Code Ann. § 703.2 (West 1978). Though the killing may not have been within the "actual contemplation and intention of one of the parties," as long as the principal had the necessary *mens rea* for the underlying felony, and the killing was a consequence of carrying out an unlawful purpose, criminal responsibility can be imputed to the accessory because of their participation, whether direct or indirect, in the commission of the predicate felony. *Conner*, 362 N.W.2d at 455 In *Conner*, the Iowa

Supreme Court reasoned that this imputing of responsibility was justified because a foreseeable result of crimes that require force is that someone may be killed. *Id*. at 456. While malice aforethought is required for such a killing to be considered murder, this can be implied from the surrounding circumstances, such as the commission of the felony from which the death results. *Id*. (citing *State v. Veverka,* 271 N.W.2d 744, 747 (Iowa 1978)). It was under this scheme that 16-year-old Mr. Harrison, an accomplice to an adult codefendant, was convicted under the theory of felony murder in this case.

B. The Supreme Court Has Established That Children Who Commit Crimes Should Be Treated Differently Than Adults

The United States Supreme Court has repeatedly held that children are fundamentally different from adults, and that as such, "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471. *See also Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). As the Supreme Court explained, "[b]ecause juveniles have diminished culpability and greater prospects for reform . . .'they are [categorically] less deserving of the most severe punishments.'" *Miller*, 567 U.S. at 471 (quoting *Graham*, 560 U.S. at 68.) *Roper* and *Graham* noted three significant differences that distinguish youth from adults for culpability purposes:

> First, children have a "lack of maturity and an underdeveloped sense of responsibility," leading to recklessness, impulsivity, and heedless risk-taking. Second, children "are more vulnerable . . . to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]."

Miller, 567 U.S. at 471 (alterations in original) (citations omitted). The Court found that "those [scientific] findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" *Id*. at 472 (quoting *Graham*, 560 U.S. at 68-69); *Roper*, 543 U.S. at 570.

> Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."

Graham, 560 U.S. at 68 (alteration in original) (citation omitted) (quoting *Roper*, 543 U.S. at 570). Thus, the Court concluded that while "[a] juvenile is not absolved of responsibility for his actions . . . his transgression 'is not as morally reprehensible as that of an adult,'" *Graham*, 560 U.S. at 68 (quoting

Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (plurality opinion)) and that as such, "juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* (quoting *Roper*, 543 U.S. at 569, 573). This reasoning applies with equal—if not greater—force when imposing liability on young people under the theory of felony murder.

C. Imposing Felony Murder Liability On Juveniles Is Inconsistent with the Supreme Court's Juvenile Sentencing Cases

1. Transferring Intent To Juvenile Accomplices Results In A Disproportionate Assignment Of Culpability

Graham forbade the imposition of life without parole sentences on juveniles "who do not kill, intend to kill, or foresee that life will be taken" because they "are categorically less deserving of the most serious forms of punishment than are murderers. 560 U.S. at 69. [W]hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." *Id.* The reasoning in *Graham* builds on the Supreme Court's felony murder jurisprudence, which recognizes that the diminished culpability of non-principals precludes the application of mandatory sentencing schemes to individuals who may have participated in, but did not commit, a murder. *See Tison v. Arizona*, 481 U.S. 137, 158, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) (upholding defendant's death sentence when he acted with "reckless disregard" and participation in the crime was

"major"); *Enmund v. Florida*, 458 U.S. 782, 801, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (limiting culpability to the felony crime because homicide crimes are morally different). The Court held that mandatory life without parole sentences for children convicted of homicide offenses violates the Eighth Amendment because the sentencer must take into account the juvenile's "lessened culpability," "greater 'capacity for change,'" and individual characteristics before imposing such a harsh sentence. *Miller*, 567 U.S. at 465 (quoting *Graham*, 560 U.S. at 68, 74).

Mr. Harrison did not kill or intend to kill; he was convicted under a theory of felony murder. Thus the theory of homicide underlying Mr. Harrison's conviction is not one of direct participation, but one of derivative liability theory, which ignores precedent and scientific findings underscored by the Supreme Court, as well as more recent scientific evidence showing that specific contexts, such as the presence of peers or high arousal settings, actually exacerbate adolescent deficiencies in decision-making, risk appraisal, self-control and impulsivity. *Miller*, 567 U.S. 460; *Graham*, 560 U.S. 48; *Roper*, 543 U.S. 551. *See also* Laurence Steinberg et al., *Peers Increase Adolescent Risk Taking Even When the Probabilities of Negative Outcomes Are Known*, 50 DEVELOPMENTAL PSYCHOL. 1, 2 (2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4305434/pdf/nihms652797.

pdf (Adolescents' risk-taking behavior in the presence of their peers coincides with "increased activation of brain regions specifically associated with the prediction and valuation of rewards, including the ventral striatum and orbitofrontal cortex."). As the Supreme Court held that sentencers must take a juvenile's 'lessened culpability' and individual characteristics into account, theories of liability that preclude individualized consideration of the *setting* in which adolescents make decisions are likewise flawed.

Though Mr. Harrison participated in the commission of a robbery, his adult co-defendant used him as a decoy to lure the victim to the adult co-defendant's location. (Sent'g Hr'g Tr. 4:23-5:7.) Mr. Harrison did not shoot the victim, did not fight with the victim, or touch the victim in any way. (Sent'g Hr'g Tr. 7:2-4; 9:3-8; 11:19-25.) Nor is there any evidence to suggest that he could have foreseen that the victim's death was a possible outcome. (Sent'g Hr'g Tr. 8:25-9:8.) It would be inconsistent with the logic of *Graham* and *Miller*—which mandate proportionality and graduation of sentences based on culpability and the nature of the offense—to give a juvenile accomplice the same sentence as an adult principal who actually killed or intended to kill their victims. *Graham*, 560 U.S. at 59. ("Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the]

offense.'" (alteration in original) (citing *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910))). Individualized consideration of a juvenile's "distinctive (and transitory) mental traits and environmental vulnerabilities," *see Miller*, 567 U.S. at 473, as well as a consideration of the circumstances of the offense and the precise nature of the youth's involvement, are constitutionally required to ensure that the punishment fits both the offense and the offender.

2. Adolescents Lack The Foreseeability Necessary To Be Held Liable Under The Felony Murder Doctrine

a. Adolescents are more likely to engage in risky behaviors and less likely to appreciate potential long-term consequences

What is "reasonably foreseeable" to an adult is likely not "reasonably foreseeable" to a child. *See J.D.B. v. North Carolina*, 564 U.S. 261, 274, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011) ("Indeed, even where a 'reasonable person' standard otherwise applies, the common law has reflected the reality that children are not adults."). *See also* Marsha L. Levick, Elizabeth-Ann Tierney, *The United States Supreme Court Adopts A Reasonable Juvenile Standard in J.D.B. v. North Carolina for Purposes of the Miranda Custody Analysis: Can A More Reasoned Justice System for Juveniles Be Far Behind?*, 47 HARV. C.R.-C.L. L. REV. 501, 506 (2012) ("The qualities that characterize the reasonable person throughout the common law–attention, prudence,

knowledge, intelligence, and judgment–are precisely those that society fails to ascribe to minors."). As adolescents who participate in felonies are less likely to foresee or account for the possibility that someone may get killed in the course of that felony, their participation cannot be presumed to reflect a malicious intent to kill.

Adolescents' risk assessment and decision-making capacities differ from those of adults in ways that are particularly relevant to felony murder cases. *See* Keller, *supra*, at 312-16. The Supreme Court has observed that adolescents "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *J.D.B.*, 564 U.S. at 272 (quoting *Bellotti v. Baird*, 443 U.S. 622, 635, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979). *See also* Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 THE FUTURE OF CHILDREN 15, 20 (2008). ("Considerable evidence supports the conclusion that children and adolescents are less capable decision makers than adults in ways that are relevant to their criminal choices."). Although adolescents have the capacity to reason logically, they "are likely less capable than adults are in *using* these capacities in making real-world choices, partly because of lack of experience and partly because teens are less efficient than adults at

processing information." *Id.* Because adolescents are less likely to perceive potential risks, they are less risk-averse than adults. *Id*. at 21.

Additionally, because adolescents attach different values to rewards than adults do, they often exhibit sensation-seeking characteristics that reflect their need to seek "varied, novel, [and] complex . . . experiences [as well as a] willingness to take physical, social, legal and financial risks for the sake of such experience." MARVIN ZUCKERMAN, BEHAVIORAL EXPRESSIONS AND BIOSOCIAL BASES OF SENSATION SEEKING 27 (1994). The need for this type of stimulation often leads adolescents to engage in risky behaviors, and as they have difficulty suppressing action toward emotional stimulus, they often display a lack of self-control. Scott & Steinberg, *supra*, at 20. The Supreme Court has recognized this, stating that adolescents "have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risktaking." *Miller*, 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 569). As a result, it is not surprising that "adolescents are overrepresented statistically in virtually every category of reckless behavior." *Roper*, 543 U.S. at 569 (quoting Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEV. REV. 339, 339 (1992)).

Finally, and perhaps most relevant in the context of felony murder, adolescents have difficulty thinking realistically about what may occur in the

future. *See* Brief for the American Psychological Association *et al*. as *Amici Curiae* Supporting Petitioners at 11-12, *Graham v. Florida*, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621). This lack of future orientation means that adolescents are both less likely to think about potential long-term consequences, and more likely to assign less weight to those that they *have* identified, especially when faced with the prospect of short-term rewards. Scott & Steinberg, *supra*, at 20; *Graham,* 560 U.S. at 78. These differences often cause adolescents to make different calculations than adults when they participate in criminal conduct.

Adolescents' willingness to act as accomplices in "inherently dangerous" felonies more accurately reflects the impulsiveness, failure to exercise good judgment, and inability to accurately assess risks that the Supreme Court has recognized are common. *See Miller*, 567 U.S. at 471; *see also Roper*, 543 U.S. at 569. Thus, holding an adolescent liable for murder because he or she should have been able to "reasonably foresee" the same risks as an adult is nonsensical, and the theory of "transferred intent" is unjustifiable when juveniles are not found to have killed, intended to kill, or foreseen that life would be taken. *See Graham*, 560 U.S. at 69.

b. Adolescents are more susceptible to negative influences

The Supreme Court has recognized that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure" than adults. *Roper*, 543 U.S. at 569 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)). As "[m]id-adolescence is marked by decreased dependency on parental influence and increased dependency on peer influence," an adolescent's decision to participate in a felony is more often driven by fear of ostracism than rational thinking. Alison Burton, *A Commonsense Conclusion: Creating A Juvenile Carve Out to the Massachusetts Felony Murder Rule*, 52 HARV. C.R.-C.L. L. REV. 169, 186-87 (2017) (citing Laurence Steinberg & Susan B. Silverberg, *The Vicissitudes of Autonomy in Early Adolescence,* 57 CHILD DEV. 841, 848 (1986)). When adolescents are pressured by their peers to participate in a criminal act, they may do so out of a misplaced concern about fitting in, even if they do not condone or want to participate in the criminal activity. *Id.* (citing DAVID MATZA, DELINQUENCY AND DRIFT 57 (1964)); *See* Jacob T.N. Young & Frank Weerman, *Delinquency as a Consequence of Misperception: Overestimation of Friends' Delinquent Behavior and Mechanisms of Social Influence,* 60 SOC. PROBS. 334, 337 (2013) (citing Tamar Breznitz, *Juvenile Delinquents' Perceptions of Own and Others'*

Commitment to Delinquency, 12 J. RES. CRIME & DELINQ. 124 (1975); *See also* M.D. Buffalo & Joseph W. Rodgers, *Behavioral Norms, Moral Norms, and Attachment: Problems of Deviance and Conformity*, 19 SOC. PROBS. 101 (1971); *See also* Mark Warr & Mark Stafford, *The Influence of Delinquent Peers: What They Think or What They Do?*, 29 CRIMINOLOGY 851 (1991)).

> [The youth] may assume that his friends will reject him if he declines to participate—a negative consequence to which he attaches considerable weight in considering alternatives. He does not think of ways to extricate himself, as a more mature person might do. He may fail to consider possible options because he lacks experience, because the choice is made so quickly, or because he has difficulty projecting the course of events into the future. Also, the "adventure" of the [crime] and the possibility of getting some money are exciting. These immediate rewards, together with peer approval, weigh more heavily in his decision than the (remote) possibility of apprehension by the police.

Scott & Steinberg, *supra*, at 22. This concern about 'fitting in' is one of the main reasons why juveniles are far more likely to participate in group crimes than adults are. Burton, *supra*, at 187 (citing FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 29 (1998)). One study found that over half of all violent crimes committed by individuals under the age of 16 involve multiple offenders. *Id.* The study also found that approximately 51% of the homicides committed by juveniles involve multiple offenders, as compared to only 23% of homicides committed by adults. *Id.* These studies confirm that

because juveniles are particularly susceptible to peer pressure and groupthink, they are more likely than adults to be talked into participating in a felony. As adolescents are more likely to act based on impulses and emotions than rational thinking, they often fail to do a careful assessment of the risks to themselves or others, even when engaging in felonious activities.

3. Neuroscientific Research Weighs Against Imposing Liability On Young People For Felony Murder

In its recent juvenile sentencing cases, the Supreme Court has relied on an increasingly settled body of research finding that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Graham*, 560 U.S. at 68. These scientific studies have helped to "explain salient features of adolescent development, and point[] to the conclusion that children do not think and reason like adults because they cannot." Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children From Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights*, 2006 WIS. L. REV. 431, 434-35 (2006).

One such difference is shown in the prefrontal cortex, the brain region implicated in complex cognitive behavior, personality expression, decision-making and moderating social behavior, which undergoes crucial changes

during adolescence. *See* Sara M. Szczepanski & Robert T. Knight, *Insights into Human Behavior from Lesions to the Prefrontal Cortex*, 83 NEURON 1002, 1002 (2014) (stating that the frontal lobes "play an essential role in the organization and control of goal-directed thought and behavior," and that these functions are collectively referred to as cognitive or executive). *See also* Erin H. Flynn, *Dismantling the Felony-Murder Rule: Juvenile Deterrence and Retribution Post-Roper v. Simmons*, 156 U. Pa. L. Rev. 1049, 1070 (2008). As a result of myelination, the process through which nerve fibers become sheathed in myelin (a white fatty substance that facilitates faster, more efficient communication between brain systems), adolescents experience an increase of "white matter" in the prefrontal cortex as they age. Laurence Steinberg, *The Science of Adolescent Brain Development and Its Implication for Adolescent Rights and Responsibilities*, *in* HUMAN RIGHTS AND ADOLESCENCE 59, 64 (Jacqueline Bhabha ed., 2014) [hereinafter Steinberg, *The Science of Adolescent*]. *See also* Terry A. Maroney, *The Once and Future Juvenile Brain*, *in* CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE 189, 194 (Franklin E. Zimring & David S. Tanenhaus eds., 2014). The creation of more efficient neural connections within the prefrontal cortex is critical for the development of "higher-order cognitive functions [that are] regulated by multiple prefrontal areas working in concert—functions such as

planning ahead, weighing risks and rewards, and making complicated decisions." Steinberg, *The Science of Adolescent*, *supra*, at 64. Compared to the brain of a young teenager, the brain of a young adult displays "a much more extensive network of myelinated cables connecting brain regions," *Id.* and evidence shows that adolescents become better at completing tasks that require self-regulation and management of processing as they age. Deanna Kuhn, *Do Cognitive Changes Accompany Developments in the Adolescent Brain?*, 1 PERSPEC. ON PSYCH. SCI. 59, 60-61 (2006) (stating that inhibition comprises two components: "resistance to interfering stimuli and inhibitory control of one's own responses." There is more evidence available on situations when individuals are instructed to inhibit their responses than when individuals make their own choice to self-inhibit).

Neuroscientists have also observed that different parts of the cortex mature at different rates: myelination and pruning start at the back of the brain and spread toward the front, Maroney, *supra,* at 193, which means that areas involved in more basic functions, such as those involved in processing information from the senses and in controlling movement, develop first, while the parts of the brain responsible for more "top-down" control, such as controlling impulses and planning ahead, are among the last to mature. *The Teen Brain: Still Under Construction*, National Institute of Mental Health

(2011), http://www.nimh.nih.gov/health/publications/the-teen-brain-still-under-construction/index.shtml#pub2. *See also* Joseph M. Peraino & Patrick J. Fitz-Gerald, *Psychological Considerations in Direct Filing*, 40 COLO. LAW. 41, 43 (2011). Differences in adolescent and adult perception of the same experiences likely result from the different areas of the brain that each uses to analyze a situation and from the capacity of each to process and reason with information. King, *supra*, at 435. Developmental psychology has shown that though reasoning improves throughout adolescence and into adulthood, it is always tied to and limited by the adolescent's psychosocial immaturity. *See id.* at 436. Even if an adolescent has an "adult-like" capacity to make decisions, the adolescent's sense of time, lack of future orientation, pliable emotions, calculus of risk and gain, and vulnerability to pressure will often drive him or her to make very different decisions than an adult would make in a comparable situation. *Id.*

The structural and biochemical changes that occur in adolescent brains are incredibly relevant in considering the foreseeability component of the felony murder rule. Donna M. Bishop & Hillary B. Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by in Re Gault*, 60 RUTGERS L. REV. 125, 152 (2007). Changes in the prefrontal and parietal cortices, the portions of the brain responsible for

foresight, planning, strategic thinking, and self-regulation, help account for the apparent gap in understanding and adolescent behavior. Antonio R. Damasio & Steven W. Anderson, *The Frontal Lobes, in* CLINICAL NEUROPSYCHOLOGY, 404, 433-34 (Kenneth M. Heilman & Edward Valenstein eds., 4th ed. 2003). While juveniles may be able to understand the same information as adults, research indicates that juveniles lack sound judgment and are less able to account for possible negative outcomes. Burton, *supra*, 183 (citing Elizabeth S. Scott & Laurence Steinberg, Rethinking Juvenile Justice 36-37 (2008)). *See also* Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEV. PSYCH. 193, 204-05 (2010). Accordingly, the Supreme Court has noted that adolescents have "[d]ifficulty in weighing long-term consequences" and "a corresponding impulsiveness." *Graham*, 560 U.S. at 78. *See also* Scott & Steinberg, *supra*, at 20. Thus it has been proven that possessing an "adult-like" capacity is not the same as *actually* possessing an adult capacity—adolescents are not simply miniature adults.

Underlying all rationales for imposing felony murder liability is the assumption that an individual who takes part in a felony should understand, foresee, and thus reasonably assume the risk that someone might get killed

during the commission of a felony. Keller, *supra*, at 305. Adolescents cannot "reasonably foresee" the same consequences that an adult would, therefore it is clear that when applied to juveniles, this assumption is meritless.

CONCLUSION

Wherefore, *Amici* respectfully request that for the foregoing reasons this Honorable Court declare the imposition of felony murder liability inappropriate when applied to juveniles and remand the case forthwith.

Sincerely,

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2017, I electronically filed this document with the Supreme Court Clerk using the EDMS system, which will serve it on the appropriate parties electronically.

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