



IN THE
INDIANA COURT OF APPEALS

Case No. 20-A-04-1310-CR-518

Blake Layman,)	Appeal from the Elkhart Circuit Court
)	
Appellant,)	
)	
v.)	Case No. 20001-1210-MR-7
)	
State of Indiana,)	
)	
Appellee.)	Hon. Terry C. Shewmaker, Judge

Levi Sparks,)	Appeal from the Elkhart Circuit Court
)	
Appellant,)	
)	
v.)	Case No. 20001-1210-MR-5
)	
State of Indiana,)	
)	
Appellee.)	Hon. Terry C. Shewmaker, Judge.

**AMENDED BRIEF OF AMICI CURIAE JUVENILE LAW CENTER ET AL.,
IN SUPPORT OF APPELLANTS, BLAKE LAYMAN AND LEVI SPARKS**

Scott F. Bieniek
Attorney No. 30221-84
Jeffrey A. Boggess, P.C.
15 North Indiana Street, Suite B
Greencastle, Indiana 46135
P: 765-653-0477
F: 765-653-0466
scott@boggesslaw.com

Marsha L. Levick
Attorney No. 3057-95-TA
Juvenile Law Center
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107
P: 215-625-0551
F: 215-625-2808
mlevick@jlc.org

Local counsel for *Amici Curiae*

Counsel for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. STATEMENTS OF INTEREST	1
II. SUMMARY OF ARGUMENT.....	3
III. ARGUMENT	5
A. The U.S. Supreme Court Recognizes That Children Who Commit Crimes Are Fundamentally Different From Adult Offenders	5
B. The Rationale Underlying Indiana's Felony Murder Statute Is Inconsistent With U.S. Supreme Court Jurisprudence Related To Juvenile Offenders	7
1. Adolescents' Decision-Making And Risk-Assessment Are Less Developed Than That Of Adults	8
2. Adolescents Are Particularly Vulnerable To Negative Influences And Outside Pressures.....	11
3. Adolescents Are Likely To Outgrow Their Reckless, Criminal Behaviors.....	12
C. Indiana Should Adopt A Separate Juvenile Standard When An Adolescent Is Charged With Felony Murder	12
1. Indiana Should Adopt Juvenile-Specific Standards When Adolescents Face Felony Murder Charges And Adopt A Presumption Against Holding Adolescents Responsible For Felony Murder	13
2. At A Minimum, Indiana Should Adopt The "Agency" Theory Of Felony Murder For Juvenile Offenders When A Third Party Commits The Killing.....	14
D. When Children Are Charged And Convicted Of Felony Murder, Courts Must Have Discretion To Impose Individualized Sentences That Account For Their Reduced Culpability.....	16
1. U.S. Supreme Court Precedent Recognizes The Need For Individualized Sentencing In Certain <i>Adult</i> Felony Murder Cases	17
2. Because Of Adolescents' Reduced Culpability, Imposing Adult Mandatory Minimum Sentences On Adolescents Convicted Of Felony Murder Is Constitutionally Suspect	18
IV. CONCLUSION	22

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Campbell v. State</i> , 444 A.2d 1034 (Md. 1982)	15
<i>Commonwealth v. Legg</i> , 491 Pa. 78 (1980)	7
<i>Davis v. Fox</i> , 735 S.E.2d 259 (W. Va. 2012)	15
<i>Graham v. Florida</i> , 560 U.S. 48 (2010)	<i>passim</i>
<i>Head v. State</i> , 443 N.E.2d 44 (Ind. 1982)	8
<i>J.D.B. v. North Carolina</i> , 131 S. Ct. 2394 (2011)	<i>passim</i>
<i>May v. Anderson</i> , 345 U.S. 528 (1953)	22
<i>Miller v. Alabama</i> , 132 S. Ct. 2455 (2013)	<i>passim</i>
<i>Palmer v. State</i> , 704 N.E. 2d 124 (Ind. 1999)	7
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005)	<i>passim</i>
<i>Sheriff Clark Cnty. v. Hicks</i> , 506 P.2d 766 (Nev. 1973)	15
<i>State v. Pina</i> , 233 P.3d 71 (Idaho 2010)	14, 15
<i>State v. Sophophone</i> , 19 P.3d 70 (Kan. 2001)	14, 15
<i>Tison v. Arizona</i> , 481 U.S. 137 (1987)	11, 17

<i>Vlandis v. Kline</i> , 412 U.S. 441 (1973)	20
Statutes	
Ind. Code § 31-30-1-4	19
Ind. Code § 31-30-3-5	20
Ind. Code § 31-30-4	16
Ind. Code § 35-43-2-1	16, 20
Ind. Code § 35-50-2-3	16
Ind. Code § 35-50-2-5	18
Other Authorities	
Sarah-Jayne Blakemore, TED Talk, The Mysterious Workings of the Adolescent Brain, <i>available at</i> http://www.ted.com/talks/sarah_jayne_blakemore_the_mysterious_workings_of_the_adolescent_brain.html	8
Martin Guggenheim, <i>Graham v. Florida and A Juvenile's Right to Age-Appropriate Sentencing</i> , 47 HARV. C.R.-C.L. L. REV. 457 (2012)	19
Marsha L. Levick, Elizabeth-Ann Tierney, <i>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?</i> , 47 HARV. C.R.-C.L. L. Rev. 501 (2012)	10
Elizabeth S. Scott & Laurence Steinberg, <i>Adolescent Development and the Regulation of Youth Crime</i> , 18 <i>The Future of Children</i> 15 (2008)	<i>passim</i>
Emily C. Keller, <i>Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of Roper, Graham & ID.B.</i> , 11 CONN. PUB. INT. L.J. 297 (2012)	8

I. STATEMENTS OF INTEREST

Juvenile Law Center, founded in 1975, is the oldest multi-issue 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. Recognizing the critical developmental differences between youth and adults, Juvenile Law Center works to ensure that the child welfare, juvenile justice, criminal justice, and other public systems provide vulnerable children with the protection and services they need to become healthy and productive adults. Juvenile Law Center advocates for the protection of children's due process rights at all stages of juvenile and adult criminal court proceedings. Juvenile Law Center, works to align juvenile and criminal justice policy and practice with modern understandings of adolescent development and time-honored constitutional principles of fundamental fairness. Juvenile Law Center participates as *amicus curiae* in state and federal courts throughout the country, including the United States Supreme Court, in cases addressing the rights and interests of children.

Center on Wrongful Convictions of Youth, founded in 2008, is the only organization in the United States dedicated to uncovering and rectifying wrongful convictions of children and adolescents. The CWCY also promotes public awareness and support for nationwide initiatives aimed at preventing future wrongful convictions in the juvenile and criminal justice systems. Much of the CWCY's research and work focuses on how young people react to police interrogation, specifically how adolescents' immaturity, vulnerability to external pressure, and diminished ability to weigh risks and long-term consequences renders them uniquely susceptible to making false confessions or unreliable statements when interrogated in a custodial setting. The CWCY has written *amicus* briefs on these issues in state and federal courts around

the United States. The United States Supreme Court in *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2401 (2011) specifically cited the CWCY's *amicus* brief in explaining that the risk of false confession is "all the more acute" when a young person is interrogated. 131 S. Ct. at 2401 (citing Brief for Center on Wrongful Convictions of Youth et al. as *Amici Curiae* at 21-22). The very same developmental issues that make children more vulnerable to police pressure also make them less culpable for the crimes they do commit. For this reason, the CWCY has also signed and written *amicus* briefs that oppose theories of liability that automatically hold juveniles as culpable as adults (e.g. felony murder rules) and mandatory or automatic sentencing schemes that prevent judges from using youthfulness to mitigate punishment for youthful offenders.

The **Children's Law Center, Inc.** in Covington, Kentucky has been a legal service center for children's rights since 1989, protecting the rights of youth through direct representation, research and policy development and training and education. The Center provides services in Kentucky and Ohio, and has been a leading force on issues such as access to and quality of representation for children, conditions of confinement, special education and zero tolerance issues within schools, and child protection issues. It has produced several major publications on children's rights, and utilizes these to train attorneys, judges and other professionals working with children.

II. SUMMARY OF ARGUMENT

On October 3, 2012, 16-year-old Appellant Blake Layman, 17-year-old Appellant Levi Sparks, 21-year-old Danzele Johnson, and two other teens decided to break into a house in Elkhart, Indiana. The five were not armed and thought the house was vacant. Tragically, not only was the home occupied, but the homeowner shot and killed Mr. Johnson. Though not the shooter, Appellants were convicted of murder under Indiana's felony murder statute. Ind. Code. §135-42-1-1(2). Appellant Layman, who suffered a gunshot wound himself, was sentenced to 55 years in prison, and Appellant Sparks, who never even entered the home, received a 50-year sentence.

The trial court's broad application of Indiana's felony murder statute to juvenile offenders conflicts with U.S. Supreme Court precedent, as well as established research on adolescent development and brain science. Compared with adults, children and teenagers are less able to perceive and assess risks. They are less capable decision-makers than adults as they are more impulsive, less risk-averse, and have difficulty assessing the consequences of their actions, often prioritizing short-term rewards over any potential long-term negative consequences.

This Court should bar the application of Indiana's felony murder statute to juveniles in light of the prevailing and uncontroverted scientific research about adolescent offending. In the alternative, the court should adopt a presumption against imposing Indiana's felony murder statute on juvenile offenders who do not kill the victim, intend to kill the victim, or actually foresee that the victim might be killed in the course of the felony. At a minimum, Indiana should adopt an "agency" approach for juvenile offenders and hold that the felony murder doctrine does not apply if the person who causes the death is not the juvenile or one of his accomplices. Finally, if convicted of felony murder, juvenile offenders' sentences must be based on their own

actions and culpability rather than consequences of their actions that they, as adolescents with poor risk-assessment skills, are unlikely to foresee.

III. ARGUMENT

A. The U.S. Supreme Court Recognizes That Children Who Commit Crimes Are Fundamentally Different From Adult Offenders

In *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455 (2013), the U.S. Supreme Court has found that children who commit crimes — even violent crimes — are fundamentally different than adults who commit similar crimes.¹ Relying on *Roper*, the U.S. Supreme Court in *Graham* cited three essential characteristics which distinguish youth from adults for culpability purposes:

As compared to adults, juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed."

560 U.S. at 68 (citing *Roper*, 543 U.S. at 569-70). *Graham* found that "[a]ccordingly, 'juvenile offenders cannot with reliability be classified among the worst offenders.' *Id.* (quoting *Roper*, 543 U.S. at 569, 573). The Court concluded that "[a] juvenile is not absolved of responsibility for his actions, but 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)).

In reaching these conclusions about a juvenile's reduced culpability, the U.S. Supreme Court has relied upon an increasingly settled body of research confirming the distinct emotional, psychological, and neurological attributes of youth. The Court clarified in *Graham* that, since

¹ *Roper* held that imposing the death penalty on juvenile offenders violates the Eighth Amendment, 543 U.S. at 578; *Graham* held that life without parole sentences for juveniles convicted of non-homicide offenses violate the Eighth Amendment, 560 U.S. at 82; and *Miller* held that mandatory life without parole sentences imposed on juveniles convicted of homicide offenses violate the Eighth Amendment, 132 S. Ct. at 2469.

Roper, "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.

The U.S. Supreme Court in *Miller* expanded its juvenile sentencing jurisprudence, banning mandatory life without parole sentences for children convicted of homicide offenses. Reiterating that children are fundamentally different from adults, the Court held that, prior to imposing such a sentence on a juvenile offender, the sentencer must take into account the juvenile's reduced blameworthiness. *Miller*, 132 S. Ct. at 2460. The Court grounded its holding "not only on common sense . . . but on science and social science as well," *id.* at 2464, which demonstrate fundamental differences between juveniles and adults. The Court noted "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 2464-65 (quoting *Graham*, 560 U.S. at 68-69; *Roper*, 543 U.S. at 570).

In *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2406 (2011), a case involving police interrogation of juvenile suspects and holding that the *Miranda* analysis must include consideration of a juvenile suspect's age, the Court similarly recognized the distinct attributes of children. The Court found that "[t]he law has historically reflected the . . . assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them." *Id.* at 2403. The Court acknowledged that the common law "reasonable person" standard does not apply to children and noted that, in the justice system, "children cannot be viewed simply as miniature adults." *Id.* at 2404.

B. The Rationale Underlying Indiana's Felony Murder Statute Is Inconsistent With U.S. Supreme Court Jurisprudence Related To Juvenile Offenders

Appellants, who as unarmed teenagers took part in a home break-in during which the homeowner shot and killed one of their accomplices, were convicted of that accomplice's murder under Indiana's felony murder statute. As defined by the Indiana Supreme Court, the felony murder doctrine generally requires only that an offender participated in a felony and that someone was killed in the course of the felony; the offender need not have actually committed the murder or intended that anyone would die. *See Palmer v. State*, 704 N.E. 2d 124, 127 (Ind. 1999) ("The State need not prove intent to kill in a felony murder charge, only the intent to commit the underlying felony."). When a *non participant* commits the actual killing, a participant in the felony is held criminally responsible for the homicide where the death is *reasonably foreseeable*. As the Indiana Supreme Court explained:

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

Id. at 126 (quoting *Sheckles v. State*, 684 N.E.2d 201, 205 (Ind.Ct.App.1997)).

Felony murder is often justified by a "transferred intent" theory, where the intent to kill may be inferred from an individual's intent to commit the underlying felony since a "reasonable person" would know that death is a possible result of felonious activities. *See Commonwealth v. Legg*, 491 Pa. 78, 82 (1980). As the Indiana Supreme Court has explained:

[W]hen a death did occur in the course of the commission of an inherently dangerous felony, the common law deemed that the malice or intent necessary to support a conviction for murder could be inferred from the commission or attempted commission of the dangerous felony.

Head v. State, 443 N.E.2d 44, 48 (Ind. 1982).

As applied to children, Indiana's felony murder doctrine is inconsistent with the recent quartet² of U.S. Supreme Court cases involving juveniles. As Justice Breyer noted in his concurrence in *Miller*, and as detailed in Sections III.B.1-3, *infra*:

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.

132 S. Ct. at 2476-77 (2012) (Breyer, J., concurring) (internal citations omitted). Indiana's requirement of a foreseeability finding, such as when a non-participant commits the killing, cannot be squared with this reasoning as applied to juvenile offenders. *Roper*, *Graham*, *J.D.B.*, and *Miller* all preclude ascribing the same level of anticipation or foreseeability to a juvenile who takes part in a felony as the law ascribes to an adult. Felony murder statutes that rely on assumptions about what a "reasonable person" would foresee must therefore provide separate juvenile standards that account for the children's distinct developmental characteristics. *See J.D.B.*, 131 S. Ct. at 2404.

1. Adolescents' Decision-Making And Risk-Assessment Are Less Developed Than That Of Adults

Adolescents' risk assessment and decision-making capacities differ from those of adults in ways that are particularly relevant to felony murder cases. *See* Emily C. Keller, *Constitutional*

² For an overview of how brain development influences adolescent decision-making, *see* Sarah-Jayne Blakemore's TED Talk, *The Mysterious Workings of the Adolescent Brain*, available at http://www.ted.com/talks/sarah_jayne_blakemore_the_mysterious_workings_of_the_adolescent_brain.html.

Sentences for Juveniles Convicted of Felony Murder in the Wake of Roper, Graham & J.D.B., 11 CONN. PUB. INT. L.J. 297, 312-16 (2012).³ The U.S. 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. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011) (internal quotation omitted). See also Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 *The Future of Children* 15, 20 (2008) [hereinafter Scott & Steinberg, *Adolescent Development*] ("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, compared to younger children, adolescents have the capacity to reason logically, "adolescents 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." Scott and Steinberg, *Adolescent Development*, at 20.

Adolescents are also less likely to perceive risks and are less risk-averse than adults. *Id.* at 21. The U.S. Supreme Court has recognized that adolescents "have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking." *Miller*, 132 S. Ct. at 2464 (quoting *Roper*, 543 U.S. at 569). As a result, it is not

³ While these U.S. Supreme Court cases apply to juveniles who were under 18 at the time of their offenses, much of the research upon which these cases rely is equally applicable to individuals who were 18 at the time of the offense, including Appellants' co-defendant, Anthony Sharp. See *Roper v. Simmons*, 543 U.S. 551 at 574 (2005) ("Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18.") See also Brief for the American Psychological Association *et al.* as *Amici Curiae* Supporting Respondent at 7, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633) (noting that the "the most dramatic change in behavior occurred *between 16 and 19 years of age*, especially with respect to 'perspective' (i.e., the consideration of different viewpoints and broader contexts of decisions), and 'temperance' (i.e., the ability to limit impulsivity and evaluate decision before acting).") (emphasis added)

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'L REV. 339, 339 (1992)).

Finally, adolescents lack future orientation — they are less likely to think about long-term consequences and are likely to assign less weight to long-term consequences, especially when faced with the prospect of short-term rewards. Scott and Steinberg, *Adolescent Development*, at 20; *Graham*, 560 U.S. at 78. They 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 3-13, *Graham v. Florida*, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621).

Because of these differences, adolescent offenders are not making the same calculations as adults when they participate in felonies. This is particularly true when, as with Appellants, none of the participants in the felony were armed. As *J.D.B.* makes clear, children cannot be held to the same "reasonable person" standard as adults since what is "reasonably foreseeable" to an adult is not "reasonably foreseeable" to a child. *See J.D.B.*, 131 S. Ct. at 2404 ("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.").

Because an adolescent who participates in a felony is less likely to foresee or account for the possibility of death in the course of that felony, holding them liable for murder based on their

participation in an underlying felony or what an adult might "reasonably foresee" makes little sense. Accordingly, their risk-taking should not be equated with malicious intent, nor should their recklessness be equated with indifference to human life. *Cf. Tison v. Arizona*, 481 U.S. 137, 158 (1987) (finding the death penalty may be justified for adult felony murder defendants when they are major participants in the felony and display a "reckless indifference to human life"). Instead, their behavior is a reflection of their impulsiveness and inability to accurately assess risks and exercise good judgment in the face of those risks — characteristics they will outgrow as they mature.

2. Adolescents Are Particularly Vulnerable To Negative Influences And Outside Pressures

The U.S. Supreme Court has recognized that "juveniles are more vulnerable or susceptible to negative influences and outside pressures" than adults. *Roper*, 543 U.S. at 569. They "have less control, or less experience with control, over their own environment." *Id.* Because certain criminal behaviors can heighten status among adolescent peers, youth may face peer pressure to engage in criminal activities that they would otherwise avoid. Scott and Steinberg, *Adolescent Development*, at 20-21.

The influence of peers may be especially significant in felony murder cases, in which they engage in the felony with accomplices. In such cases, the youth may make a spur-of-the-moment decision to participate in the felony, perhaps out of fear of social rejection or loss in social status if he refuses. *Id.* at 22. A youth's decision to participate in a felony therefore is often not a rational, calculated choice:

[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.

Id. Adolescents, such as Appellants, participating in a felony are driven more by pressures, impulses and emotion than careful assessment of the risks to themselves or others. Children who engage in felonies are therefore making different cost-benefit analyses than a reasonable adult.

3. Adolescents Are Likely To Outgrow Their Reckless, Criminal Behaviors

Finally, adolescents who engage in reckless and criminal activity are different from adults in that their personality traits are "more transitory, less fixed." *Roper*, 543 U.S. at 570. Most juveniles who engage in criminal activity are not destined to become life-long criminals. *Id.* See also Brief for American Psychological Association, *supra* note 3, at 8 (finding that involvement in violent crimes peak at age seventeen and then drops precipitously). As the U.S. Supreme Court has noted, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper*, 543 U.S. at 573. Because adolescents convicted of felony murder are likely to naturally outgrow the impulses that led to their involvement in the felony, the justifications for the felony murder doctrine and the harsh sentences imposed on juveniles convicted of felony murder are inconsistent with the key characteristics that distinguish adolescents from adults.

C. Indiana Should Adopt A Separate Juvenile Standard When An Adolescent Is Charged With Felony Murder

Because Indiana's felony murder statute is inconsistent with U.S. Supreme Court precedent and adolescent development, this Court should adopt a separate juvenile standard

when an adolescent is charged with felony murder. *Amici* suggest several ways in which this court can conform the application of Indiana's felony murder statute to these recent Supreme Court rulings.

1. Indiana Should Adopt Juvenile-Specific Standards When Adolescents Face Felony Murder Charges And Adopt A Presumption Against Holding Adolescents Responsible For Felony Murder

Given the demonstrated error of applying the felony murder doctrine to children and adolescents based on prevailing research, Indiana should bar the application of the statute to juveniles. As discussed above, the transferred intent theory which undergirds the modern felony murder doctrine cannot be squared with the settled behavioral and scientific research regarding children which has led the United States Supreme Court to abandon decades-old sentencing and police interrogation tactics where juveniles are involved. This court should likewise abandon application of the felony murder doctrine to juveniles.

In the alternative, this court should adopt a presumption against convicting children of felony murder. Similar to the youth-specific standard adopted by the U.S. Supreme Court in *J.D.B.*, 131 S. Ct. at 2406, this Court should adopt a youth-specific standard that accounts for their fundamental differences. Because, as explained above, children who engage in felonies are unlikely to foresee or appreciate the risk that someone could be killed in the course of the felony, Indiana's felony murder statute should be applied to children only when the child (1) killed the victim; (2) intended to kill the victim; or (3) actually foresaw that the victim might be killed in the course of the felony. *See, e.g., Graham*, 560 U.S. at 69 (drawing a distinction between "defendants who do not kill, intend to kill, or foresee that life will be taken" and "murderers").⁴

⁴ As discussed in Section III.B.1., *supra*, adolescents' ability to foresee the consequences of their actions is limited as compared to adults.

Such an approach would not absolve children of the consequences of their criminal behaviors; they could still be charged and convicted of the underlying felony. However, applying this standard to children who may be charged with felony murder will ensure that children are held accountable for the crimes they actually commit, not the unforeseen actions taken by an accomplice, law enforcement officer, or, as here, the homeowner/victim of the felony.

2. At A Minimum, Indiana Should Adopt The "Agency" Theory Of Felony Murder For Juvenile Offenders When A Third Party Commits The Killing

Even if this Court does not adopt a presumption against charging and convicting *any* child of felony murder, this Court should, at a minimum, adopt the "agency" theory of felony murder for juvenile offenders when the perpetrator of the murder is not the juvenile or an accomplice, but a third party.

In felony murder cases where the killing was committed by neither the defendant nor an accomplice, jurisdictions typically adopt either a "proximate cause" approach or an "agency" approach. *See, e.g., Tyson v. People*, S. Ct. Crim. No. 2011-0055, 2013 WL 3817333, at *6 (V.I. July 18, 2013); *State v. Sophophone*, 19 P.3d 70, 74 (Kan. 2001). Under the proximate cause approach "each actor is held responsible for the death of a person caused during the perpetration of a felony if it was reasonably foreseeable that the acts committed might reasonably be expected to result in death." *State v. Pina*, 233 P.3d 71, 75 (Idaho 2010) *abrogated on other grounds by Verska v. Saint Alphonsus Reg? Med. Ctr.*, 265 P.3d 502 (Idaho 2011). Under this approach, "a person involved in the perpetration of a felony can be held liable for a death even though the death was actually caused by a third person having nothing to do with the perpetration of the felony." *Id.* at 76.

Under the agency approach, conversely, 'the felony-murder doctrine does not apply if the person who directly causes the death is a non-felon.'" *Sophophone*, 19 P.3d at 74 (quoting

Dressler, *Understanding Criminal Law*, § 31.07[4] Killing by a Non Felon, 471-72 (1987)).

Instead, "the felony-murder rule is only applied to actors who are acting in concert in furtherance of a common plan or scheme to commit the underlying felony and one of them causes the death during the perpetration of the felony, regardless of who actually fired the fatal shot." *Pina*, 233 P.3d at 75. Jurisdictions adopting the agency approach recognize "when the robbery victim is the person pulling the trigger there is no malice underlying that act which can be imputed to the co-perpetrator." *Davis v. Fox*, 735 S.E.2d 259, 262 (W. Va. 2012). Under this approach, courts find that the felony murder doctrine cannot be imposed because "[t]he killing is done, not in the perpetration of, or an attempt to perpetrate, a crime, but rather in an attempt to thwart the felony." *Sheriff Clark Cnty. v. Hicks*, 506 P.2d 766, 768 (Nev. 1973).

Even for *adult* defendants, the agency approach is the majority view. *See Pina*, 233 P.3d at 75 n.3; *Tyson*, 2013 WL 3817333, at *6; *Sophophone*, 19 P.3d at 74; *Campbell v. State*, 444 A.2d 1034, 1037 (Md. 1982); *Davis*, 735 S.E.2d at 262. This Court should, at a minimum, adopt the agency approach for juvenile offenders charged with felony murder. In justifying the agency approach, courts have found that "[b]ecause of the extreme penalty attaching to a conviction of felony murder, a closer and more direct causal connection between the felony and the killing is required than the causal connection ordinarily required under the tort concept of proximate cause." *Campbell*, 444 A.2d at 1041. Requiring a direct causal connection for juvenile offenders is consistent with the U.S. Supreme Court's jurisprudence recognizing the distinct characteristics of children and adolescents and their lesser culpability. As discussed in Section III.B.1., *supra*, because juveniles are less able than adults to foresee potential unintended consequences of their actions, particularly the possibility that the victim of their felony may kill them or one of their accomplices, they should not be held liable when a non-accomplice kills one of the accomplices

to the underlying felony.⁵ *See, e.g., Miller*, 132 S. Ct. at 2465 (recognizing children's "transient rashness, proclivity for risk, and inability to assess consequences").

D. When Children Are Charged And Convicted Of Felony Murder, Courts Must Have Discretion To Impose Individualized Sentences That Account For Their Reduced Culpability

No matter what approach this Court adopts with regard to juveniles facing felony murder charges, once a child is convicted of felony murder, a sentencer must be able to fashion an appropriate sentence and should not be required to impose a mandatory sentence designed for adults convicted of the offense.⁶ The U.S. Supreme Court's adult felony murder cases and juvenile sentencing cases both require individualized, non-mandatory sentencing schemes for juveniles convicted of felony murder that take into account the particular facts of the case and the juvenile's reduced culpability. As Chief Justice Roberts remarked, concurring in *Graham*, "[o]ur system depends upon sentencing judges applying their reasoned judgment to each case that becomes before them." 560 U.S. at 96 (Roberts, C.J., concurring).

⁵ Relatedly, in other criminal contexts, Indiana differentiates between victims who are accomplices and victims who are non-accomplices, and treats defendants more leniently if the victim is an accomplice. For example, a burglary is considered a Class A felony if it results in bodily injury "to any person other than a defendant." *See* Ind. Code § 35-43-2-1(2). Otherwise, it is a Class B felony. *See* Ind. Code § 35-43-2-1(1). In the burglary context, Indiana therefore recognizes that a person is less culpable when the person injured in the course of a crime is a defendant.

⁶ In Indiana, the mandatory-minimum sentence for felony murder is 45 years in prison. Ind. Code §§ 35-50-2-3(a); 35-50-2-2(4)(A). The trial court found that he was required to impose this adult mandatory-minimum sentences on Appellants. *See* Layman Trial Tr. vol. 6, 1313:4-9 (noting that the court could not impose a sentence of less than a minimum 45 years). As of July 1, 2013, juveniles subject to criminal court jurisdiction may be sentenced pursuant to Ind. Code § 31-30-4, but those statutes were not utilized in this case, and would not have changed the mandatory minimum sentence at the time of sentencing. Ind. Code § 31-30-4-2(b)(2).

1. U.S. Supreme Court Precedent Recognizes The Need For Individualized Sentencing In Certain *Adult* Felony Murder Cases

In death penalty cases involving *adults* convicted of felony murder, the United States Supreme Court has recognized the importance of individualized sentencing determinations. In *Enmund v. Florida*, the U.S. Supreme Court held that the death penalty cannot be imposed upon a person "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." 458 U.S. 782, 797 (1982). *Enmund* emphasized that the culpability of a defendant must be based on his personal actions, not the actions of other participants in the felony. The Court found that Enmund — who was the getaway driver in the robbery — could not be sentenced to death based on the murders committed by his accomplices:

For the purposes of imposing the death penalty, Enmund's criminal culpability *must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt.* Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts.

458 U.S. at 801 (emphasis added). Similarly, the criminal culpability of a juvenile convicted of felony murder should be limited to the juvenile's personal participation in the underlying felony, not the actions of their accomplices or non-accomplices.⁷

⁷ In other contexts, however, the U.S. Supreme Court has found that adults convicted of felony murder were sufficiently involved and culpable such that the imposition of the death penalty was constitutional. See *Tison v. Arizona*, 481 U.S. 137, 152 (1987) (upholding the death penalty in a felony murder case in which the defendant's "participation [was] major and whose mental state [was] one of reckless indifference."). *Graham* cited *Tison* for the proposition that "[t]he heart of the retribution rationale is that a criminal sentence *must be directly related to the personal culpability of the criminal offender.*" *Graham*, 560 U.S. at 71 (quoting *Tison*, 481 U.S. at 149) (emphasis added).

Enmund stands for the proposition that individualized sentencing that accounts for a defendant's personal role in a felony is required when adults convicted of felony murder face capital punishment. In support of an individualized approach to adults convicted of felony murder, the dissent in *Enmund* noted:

[T]he intent-to-kill requirement is crudely crafted; it fails to take into account the complex picture of the defendant's knowledge of his accomplice's intent and whether he was armed, the defendant's contribution to the planning and success of the crime, and the defendant's actual participation during the commission of the crime. Under the circumstances, the determination of the degree of blameworthiness is best left to the sentencer.

Enmund, 458 U.S. at 825 (O'Connor, J., dissenting). According to the dissent, a sentence in a capital felony murder case "must consider any relevant evidence or arguments that the death penalty is inappropriate for a particular defendant because of his relative lack of *mens rea* and his peripheral participation in the murder." *Id.* at 828 (O'Connor, J., dissenting).

Here Appellants, who were unarmed, whose accomplices were unarmed, and who neither killed nor intended to kill the victim, are no more culpable than a juvenile convicted of a non-homicide felony and should be sentenced accordingly.⁸

2. Because Of Adolescents' Reduced Culpability, Imposing Adult Mandatory Minimum Sentences On Adolescents Convicted Of Felony Murder Is Constitutionally Suspect

Because the U.S. Supreme Court in *Roper*, *Graham* and *Miller* held that juveniles are categorically less culpable than adults, a mandatory adult sentence that does not account for the

⁸ A useful guideline for sentencing for juveniles, such as Appellants, convicted of felony murder who neither killed nor intended to kill would be the sentencing range for the underlying felony, here the Class **B** Burglary, which would carry a sentence of six to twenty years. Ind. Code § 35-50-2-5. However, as discussed below, even this mandatory adult sentencing range may be inappropriate for juvenile offenders such as Appellants since it fails to account for their reduced culpability as juveniles.

youth's reduced culpability and individual characteristics is constitutionally infirm⁹ As

Professor Martin Guggenheim has observed,

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

Martin Guggenheim, *Graham v. Florida and A Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 490-91 (2012) (citing *Graham*, 560 U.S. at 88 (Roberts, C.J., concurring) ("[J]uvenile offenders are generally — though not necessarily in every case — less morally culpable than adults who commit the same crimes."). *See also Miller*, 132 S. Ct. at 2468 ("*Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult.")).¹⁰

⁹ The prospect of a harsh, mandatory minimum for felony murder is unlikely to deter juveniles from engaging in dangerous felonies. Because the death in felony murder cases is not intended, being held liable for murder is not part of the calculus even when adults decide to engage in felonies. *See Enmund*, 458 U.S. at 799 (finding that "competent observers have concluded that there is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself."). Children are even less likely to be susceptible to deterrence. In *Roper*, the Court found that "the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." 543 U.S. at 571. *See also Graham*, 560 U.S. at 72 (finding that "juveniles . . . are less likely to take a possible punishment into consideration when making decisions.").

¹⁰ Because of Indiana's juvenile court jurisdiction law, Appellants were automatically treated as if they were adults facing mandatory-minimum sentences from the time they were charged with felony murder because they were 16 years of age or older. Ind. Code § 31-30-1-4(a)(2). This is sometimes referred to as an automatic transfer law or a "direct file" case. Essentially, Indiana's statutory scheme creates "a non-rebuttable presumption that the juvenile who committed the crime is equally morally culpable as an adult who committed the same act." Guggenheim, *Graham v. Florida and A Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L.

When sentencing a child, a sentencer must take into account the child's "diminished culpability and greater prospects for reform." *Id.* at 2464.

A judge sentencing a juvenile convicted of felony murder therefore must have the opportunity to assess the juvenile's individual level of culpability, considering not only the juvenile's level of involvement in the crime, but also how the juvenile's age and development may have impacted his actions or involvement. As previously discussed, the recklessness and impulsiveness of juveniles, their inability to perceive and weigh risks, their vulnerability to outside pressure, and the transient nature of these characteristics makes the rationale for imposing mandatory adult sentences for felony murder questionable when applied to a juvenile. The assumption that a juvenile knew and considered, or should have known or foreseen, the potentially deadly consequences of participating in a felony — even a dangerous felony — is inconsistent with the realities of adolescent development.

A court must have the discretion to craft a sentence that accounts for the age of the juvenile, his or her level of involvement in the offense, the circumstances of the offense, and the juvenile's individual level of culpability in light of his or her development. In *Miller*, the

L. REV. at 491. However, such irrebuttable presumptions "have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Vlandis v. Kline*, 412 U.S. 441, 446 (1973). The automatic transfer law ignores the key attributes of youth which the United States Supreme Court instructs must inform all criminal laws, *i.e.*, that youth individually possess different levels of maturity, decision-making ability, culpability and capacity for change and growth. Appellants should have had the opportunity to show that, based on their young age, "it would be in the best interests of the child and of the safety and welfare of the community for the child to remain within the juvenile justice system." Ind. Code § 31-30-3-5(3). Had Appellants been charged simply with the underlying burglary (and not the murder), they would have had this opportunity to stay in juvenile court. *See* Ind. Code §§ 31-30-3-5(3) & 35-43-2-1(1)(B)(i). Since Appellants' actual criminal conduct was limited to the burglary, Appellants should not have lost their opportunity to remain in the juvenile justice system solely because of the tragic and unforeseeable misfortune that a non-accomplice shot and killed one of their accomplices during the burglary.

Supreme Court struck down mandatory life without parole for juveniles because those sentences precluded consideration of the juvenile's "chronological age and its hallmark features — among them, immaturity, impetuosity, and failure to appreciate risks and consequences;" "the family and home environment that surrounds him;" "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;" the "incompetencies associated with youth" in dealing with the adult criminal justice system; and "the possibility of rehabilitation even when the circumstances most suggest it." 132 S. Ct. at 2468. These factors should also be considered in determining an appropriate and constitutional sentence for a juvenile convicted of felony murder.

A mandatory sentence that does not allow the sentencer to account for the juvenile's individual level of culpability — including his actions, intent and expectations — is counter to the Court's reasoning in *Enmund*, *Roper*, *Graham*, and *Miller*.

IV. CONCLUSION

As Justice Frankfurter wrote over fifty years ago in *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring), "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." When trying and sentencing children in the adult criminal justice system, courts must take additional considerations and precautions to ensure that the charges and sentences account for the unique developmental characteristics of adolescents and their lesser culpability, as the Supreme Court has acknowledged that a child's age is far "more than a chronological fact." *J.D.B.*, 131 S. Ct. at 2403. In the context of felony murder, the law must take into account adolescents' deficiencies in decision-making and risk-assessment and hold juvenile offenders to a separate standard.

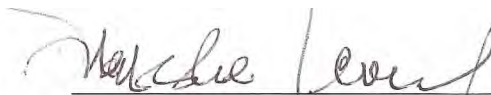
The "common sense" fact that juveniles are less culpable than adults, *see Miller*, 132 S. Ct. at 2464, is at odds with Indiana's felony murder doctrine and mandatory-minimum sentencing laws. The combined effect of these legal regimes is to create a system in which a judge has no choice but to sentence a juvenile over the age of 15 who intends to commit a burglary, but whose burglary results in the unforeseeable death of an accomplice, to a mandatory minimum adult sentence of 45 years in prison. *Amici* submit that such a result contravenes current law and research, and we urge the Court to give judges the discretion to consider a child's youth in determining both the child's culpability and in fashioning a proportionate punishment that fits the child's crime. *Amici* have proposed several ways in which this Court can not only conform Indiana law to settled research but also ensure that the law passes constitutional muster. For the foregoing reasons, *Amici Curiae* respectfully request that this Court vacate Appellants' convictions and sentences.

Respectfully submitted,



Scott F. Bieniek
Attorney No. 30221-84
Jeffrey A. Boggess, P.C.
15 North Indiana Street, Suite B
Greencastle, Indiana 46135
P: 765-653-0477
F: 765-653-0466
scott@boggesslaw.com

Local counsel for *Amici Curiae*



Marsha L. Levick
Attorney No. 3057-95-TA
Juvenile Law Center
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107
P: 215-625-0551
F: 215-625-2808
mlevick@jlc.org

Counsel for *Amici Curiae*

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT

Pursuant to Indiana Rule of Appellate Procedure 44(E), I certify that this brief contains
6,818 words.



Marsha L. Levick

DATED: March 27, 2014

CERTIFICATE OF SERVICE

The undersigned hereby certifies this 27th day of March, 2014 that a true and correct copy of the foregoing Amended Brief of *Amici Curiae* Juvenile Law Center, *et al.* was served upon the following persons by depositing the same in the United States mail, first-class postage prepaid, addressed as follows:

Vincent Michael Campiti, Esq.
Nemeth, Feeney, Masters & Campiti, P.C.
211 West Washington Street, Suite 1800
South Bend, Indiana 46601

Cara Schaefer Wieneke, Esq.
Weineke Law Office, LLC
P.O. Box 188
Plainfield, IN 46168

Joel Craig Wieneke, Esq.
Weineke Law Office, LLC
P.O. Box 188
Plainfield, IN 46168

Gregory Francis Zoeller, Esq.
Indiana Attorney General
Indiana Government Center South
302 West Washington Street, 5th Floor
Indianapolis, IN 46204

Ian Alexander Thomas McLean, Esq.
315 South Water Street
Crawfordsville, IN 47933



Marsha L. Levick