IN THE
SUPREME COURT OF INDIANA

COURT OF APPEALS CASE NO. 20-A-04-1310-CR-518

Blake Layman, Appellant, v. State of Indiana, Appellee.	)	Appeal from the Elkhart Circuit Court Case No. 20C01-1210-MR-7 Hon. Terry C. Shewmaker, Judge
Levi Sparks, Appellant, v. State of Indiana, Appellee.	)	Appeal from the Elkhart Circuit Court Case No. 20C01-1210-MR-5 Hon. Terry C. Shewmaker, Judge.

BRIEF OF *AMICI CURIAE* JUVENILE LAW CENTER *ET AL.*,
IN SUPPORT OF PETITION TO TRANSFER

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. INTEREST OF *AMICI CURIAE* 1

II. ARGUMENT 3

A. The Rationale Underlying Indiana's Felony Murder Statute Is Inconsistent With U.S. Supreme Court Jurisprudence Related To Juvenile Offenders 4

1. Adolescents' Decision-Making And Risk-Assessment Are Less Developed Than That Of Adults 5

2. Adolescents Are Particularly Vulnerable To Negative Influences And Outside Pressures 7

3. Adolescents Are Likely To Outgrow Their Reckless, Criminal Behaviors 8

B. This Court Should Either Ban Or Adopt A Presumption Against Holding Adolescents Responsible For Felony Murder 9

C. Courts Must Have Discretion To Impose Individualized Sentences On Children Convicted of Felony Murder That Account For Their Reduced Culpability 10

1. U.S. Supreme Court Precedent Recognizes The Need For Individualized Sentencing In Certain *Adult* Felony Murder Cases 11

2. Because Of Adolescents' Reduced Culpability, Imposing Adult Mandatory Minimum Sentences On Adolescents Convicted Of Felony Murder Is Constitutionally Suspect 12

III. CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

Cases

Conner v. State,
626 N.E.2d 803 (Ind. 1993) 10

Enmund v. Florida, 458 U.S. 782 (1982) 11, 12

Graham v. Florida,
560 U.S. 48 (2010)..... *passim*

Head v. State,
443 N.E.2d 44 (Ind. 1982) 5

J.D.B. v. North Carolina,
131 S. Ct. 2394 (2011).....3, 6, 7, 9

May v. Anderson, 345 U.S. 528 (1953).....14

Miller v. Alabama,
132 S. Ct. 2455 (2013)..... *passim*

Palmer v. State,
704 N.E. 2d 124 (Ind. 1999) 4

Roper v. Simmons,
543 U.S. 551 (2005)..... *passim*

State v. Lyle,
No. 11-1339, 2014 WL 3537026 (Iowa July 18, 2014).....12, 13

Statutes

Ind. Code § 35-50-2-3.....10

Constitutional Provisions

U.S. Const. amend. VIII 10

Ind. Const. art. I, § 16 10

Other Authorities

Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 THE FUTURE OF CHILDREN 15 (2008).....6

Emily C. 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 (2012).....5

Leonard Birdsong, *Felony Murder: A Historical Perspective by Which to Understand Today's Modern Felony Murder Rule Statutes*, 32 T. Marshall L. Rev. 1 (2006) 4

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 (2012).....7, 8

Martin Guggenheim, *Graham v. Florida and A Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457 (2012) 12

I. INTEREST OF *AMICI CURIAE*

Juvenile Law Center, founded in 1975, is the oldest public interest law firm for children in the U.S.. Juvenile Law Center advocates on behalf of youth in the child welfare and 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 these 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 court proceedings, and works to align 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 U.S. 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 U.S. dedicated to uncovering and rectifying wrongful convictions of children and adolescents. The CWCY promotes public awareness and support for nationwide initiatives aimed at preventing future wrongful convictions in the justice systems. Much of the CWCY's 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. The CWCY has written *amicus* briefs on these issues in state and federal courts around the country. The U.S. Supreme Court in *J.D.B. v. North Carolina*, 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. 2394, 2401 (2011). The same developmental

issues that make children more vulnerable to police pressure also make them less culpable for the crimes they do commit. The CWCY therefore participates in *amicus* briefs that oppose theories of liability that automatically hold juveniles as culpable as adults and mandatory sentencing schemes that prevent judges from using a juvenile's youthfulness to mitigate punishment.

Children's Law Center, Inc. (CLC) is a non-profit legal service center established in 1989 to protect the rights of youth, and help them overcome barriers to transition into adulthood, better advocate for their needs, and successfully contribute to society. It provides individual legal advocacy to youth, and through policy work, training and education, impact litigation, and juvenile defender support services, seeks to improve the systems that serve them. CLC offers services in Kentucky and Ohio, and collaborates with organizations within the region and nationally. CLC is dedicated to ensuring that youth in the justice systems receive fair and equitable treatment with due process rights afforded to them at every stage, access to quality representation, and individualized services provided in the least restrictive environment. CLC strives to eliminate the unnecessary incarceration of children through the creation of more effective alternatives in local communities, and promotes access to effective legal representation throughout the youth's case.

II. ARGUMENT

Over the past decade, the U.S. Supreme Court has held that children accused of committing crimes are different than adults in fundamental and constitutionally relevant ways. The Court has found that children who commit crimes, even violent crimes, are categorically less culpable than adults who commit similar crimes and may be deserving of lesser punishments. *See Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that juveniles cannot receive the death penalty), *Graham v. Florida*, 560 U.S. 48, 82 (2010) (holding that juveniles non-homicide offensers cannot receive life without parole), and *Miller v. Alabama*, 132 S. Ct. 2455 (2013) (holding that juvenile homicide offenders cannot receive mandatory life without parole). Similarly, the Court has found that what is "reasonable" for an adult to foresee or perceive may not be "reasonable" for a juvenile in the same circumstances. *See J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2399 (2011) (holding that determinations of "custody" for *Miranda* purposes, i.e., whether or not a "reasonable person" in the suspect's position would feel free to leave, must take into account the age of the suspect). In reaching these conclusions, the Court has relied upon an increasingly settled body of research confirming the distinct emotional, psychological, and neurological attributes of youth. *See Miller,* 132 S. Ct. at 2464-65; *J.D.B.*, 131 S. Ct. at 2403 n. 5; *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569-70.

This Court now has the opportunity to consider how this recent U.S. Supreme Court "children are different" jurisprudence impacts Indiana's application of its felony murder doctrine to juveniles. *Amici* submit that broad application of Indiana's felony murder statute to juvenile offenders fails to consider established research on adolescent development and brain science and conflicts with U.S. Supreme Court jurisprudence. This Court should grant the Petition to Transfer.

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

Petitioners, who as unarmed teenagers took part in a home break-in during which one of their accomplices was killed by the homeowner, were convicted of that accomplice's murder under Indiana's felony murder statute. Indiana's felony murder doctrine requires simply 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 killing, a participant in the felony is held criminally responsible for the homicide where the death is *reasonably foreseeable*. As this 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.[1] As this Court explained:

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[1] Other commentators liken the felony murder rule to a "strict liability" crime and see state efforts to craft "reasonable foreseeability" limitations as efforts to mitigate the harshness of the rule. *See, e.g.,* Leonard Birdsong, *Felony Murder: A Historical Perspective by Which to Understand Today's Modern Felony Murder Rule Statutes*, 32 T. Marshall L. Rev. 1, 2 (2006). To the extent that courts hold felons liable for *any* consequences that flow from their felonies or

> [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 U.S. Supreme Court's recent cases involving juveniles. As Justice Breyer noted in his concurrence in *Miller*, and as detailed in Sections II.A.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 (Breyer, J., concurring) (internal citations omitted). *Roper*, *Graham*, 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.

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*

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do not distinguish between the culpability of youthful offenders and adults, the "reasonable foreseeability" limitation is no limitation at all – it is just another form of strict liability. Strict liability purposefully allows for no individualized determinations, including considerations of a child's age, development, or intent – precisely the sort of 'one size fits all' approach that so directly contravenes the Court's reasoning in *Graham*, *Roper*, and *Miller*.

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). 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.*, 131 S. Ct. at 2403 (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"] ("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, "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, 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 surprising that "adolescents are overrepresented statistically in virtually every category of reckless behavior." *Roper*, 543 U.S. at 569 (internal citation omitted).

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, 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 11-12, *Graham v. Florida*, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621).

These differences often cause adolescent offenders to make different calculations than adults when they participate in felonies. Children cannot be held to the same "reasonable person" standard as adults since what is "reasonably foreseeable" to an adult may not be "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 adolescents who participate in felonies are 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. 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 also 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, at 20-21. Juveniles are much more likely than adults to commit their crimes in groups. *Id*. at 21

The influence of peers may be especially significant in felony murder cases, in which the youth engages in the felony with accomplices. A youth's decision to participate in a felony 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 participating in a felony are driven more by pressures, impulses and emotion than careful assessment of the risks to themselves or others.

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*. 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." *Id.* at 573. Because adolescents convicted of felony murder are likely to outgrow the impulses that led

to their involvement in the felony, the justifications for applying the felony murder doctrine and its accompanying harsh sentences to juveniles are inconsistent with the key characteristics that distinguish adolescents from adults.

B. This Court Should Either Ban Or Adopt A Presumption Against Holding Adolescents Responsible For Felony Murder

Because Indiana's felony murder statute is inconsistent with both U.S. Supreme Court precedent and adolescent development research, this Court should adopt a separate juvenile standard when an adolescent is charged with 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, neither the transferred intent nor the strict liability theories which undergird the felony murder doctrine can be squared with the settled behavioral and scientific research regarding children. Just as this research has led the U.S. 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 for felony murder that accounts for youths' fundamental differences. Because children who engage in felonies are categorically 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").

Neither approach would absolve children of the consequences of their criminal behaviors; they could still be charged and convicted of the underlying felony. Barring the application of the felony murder doctrine to children, or adopting a presumption against convicting children of felony murder, would however 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.

C. Courts Must Have Discretion To Impose Individualized Sentences On Children Convicted of Felony Murder That Account For Their Reduced Culpability

Even if this Court holds that children remain criminally liable for felony murder offenses, the U.S. Supreme Court's adult felony murder cases and juvenile sentencing cases together require individualized, non-mandatory sentencing schemes for juveniles convicted of felony murder.[2] A sentencer should not be required to impose a mandatory sentence intended for adult offenders, but should instead be required to take into account the particular facts of the case and a juvenile offender's reduced culpability.[3] As Chief Justice Roberts remarked, concurring in *Graham*, "[o]ur system depends upon sentencing judges applying their reasoned judgment to each case that comes before them." 560 U.S. at 96 (Roberts, C.J., concurring).

[2] Significantly, the Indiana Constitution requires that "[a]ll penalties shall be proportioned to the nature of the offense." Ind. Const. art. I, § 16. As this Court has noted, "[t]his provision goes beyond the protection against cruel and unusual punishment contained in the Eighth Amendment to the U.S. Constitution." *Conner v. State*, 626 N.E.2d 803, 806 (Ind. 1993).

[3] In Indiana, the mandatory-minimum sentence for felony murder is 45 years in prison. Ind. Code § 35-50-2-3(a). The trial court found that he was required to impose these adult mandatory-minimum sentences on Petitioners. *See* Layman Trial Tr. vol. 6, 1313:4-9.

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 U.S. Supreme Court has recognized the importance of individualized sentencing determinations based upon differences in individual blameworthiness. In *Enmund v. Florida*, the 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, the getaway driver, could not be sentenced to death for 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.

Id. 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.

In support of an individualized sentencing approach for adults convicted of felony murder, the dissent in *Enmund* further 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). Here Petitioners, 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.

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 youth's reduced culpability and individual characteristics is constitutionally infirm. 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). *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."). When sentencing a child, a sentencer must take into account the child's "diminished culpability and greater prospects for reform." *Id*. at 2464. *See also State v. Lyle*, No. 11-1339, 2014 WL 3537026 at *20

(Iowa July 18, 2014) (holding, under Iowa's constitution, "all mandatory minimum sentences of imprisonment for youthful offenders are unconstitutional)."[4]

A judge sentencing a juvenile convicted of felony murder therefore 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 Supreme Court struck down mandatory life without parole for juveniles precisely 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*.

[4] In striking adult mandatory minimums for juveniles, the Iowa Supreme Court noted that "[t]here is no other area of the law in which our laws write off children based only on a category of conduct without considering all background facts and circumstances." *Lyle*, 2014 WL 3537026 at *20.

III. CONCLUSION

As Justice Frankfurter wrote in *May v. Anderson*, "[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." 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). When trying and sentencing children in the adult criminal justice system, courts must take account of the unique developmental characteristics of adolescents and their lesser culpability. 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 urge the Court to give judges the discretion to consider a child's youth in determining the child's criminal responsibility and culpability. For the foregoing reasons, *Amici* respectfully request that this Court grant the Petition to Transfer.

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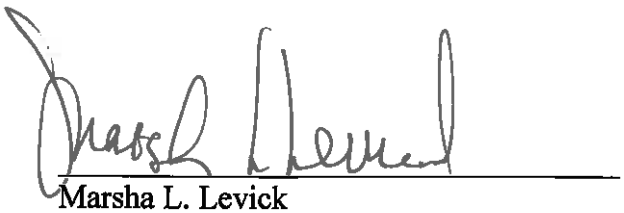
CERTIFICATE OF COMPLIANCE WITH WORD COUNT

Pursuant to Indiana Rule of Appellate Procedure 44(E), I certify that this brief contains 4,200 words.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies this 10th day of October, 2014 that a true and correct copy of the foregoing 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:

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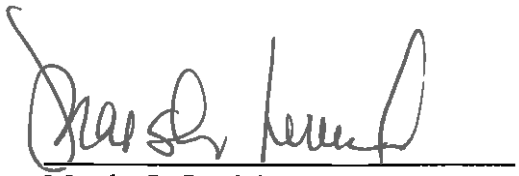

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