IN THE
INDIANA SUPREME COURT

CAUSE NO. 20A04-1310-CR-518

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

OPPOSITION TO BLAKE LAYMAN'S PETITION TO TRANSFER

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QUESTION PRESENTED ON TRANSFER

A jury convicted Layman of felony murder on sufficient evidence. On appeal, Layman raised new claims that his conduct did not constitute felony-murder because Indiana's 130 years of felony-murder jurisprudence should be overruled or because juveniles' alleged moral and cognitive defects require exceptions to the felony murder statute; that he has a constitutional entitlement to disposition of his case in the juvenile court; and that the Eighth Amendment prohibits minimum limits on advisory sentencing. The Court of Appeals correctly held these claims were waived. Should this Court hold that

any challenge to the outcome of a trial may be raised at any time, provided only that the challenge be presented as a constitutional issue?

BACKGROUND AND PRIOR TREATMENT OF THE ISSUE

Layman, Quiroz and Sparks scouted out homes to burglarize in Elkhart (Tr. 875, 921-23, 924). Quiroz later explained that burglarizing an occupied home is more dangerous because of the risk of injuries and more severe legal consequences (Tr. 875). The group targeted Rodney Scott's house and summoned Sharp and Johnson to help (Tr. 925-27). Quiroz, Layman, Johnson and Sharp entered Scott's home by kicking out a steel door leading to Scott's kitchen at the rear (Tr. 644-45, 822, 845, 926-27, 1034, 1052-54; Exhibits 17 & 18). Sparks remained outside with a cell phone in the event that police or other individuals might arrive (Tr. 573-74, 934; Exhibit 14A). Quiroz also had a cell phone (Tr. 935). The group began looking for things to steal (Tr. 926-27). They took a watch and wallet from the kitchen counter (Tr. 669-71, 673, 1000). Sharp took a knife from a block on the counter (Tr. 593-95, 606, 613, 594-94, 640, 644, 646-48, 1079-81).

The forced entry woke Scott, who had been upstairs sleeping (Tr. 1058-59). Recalling that a burglary had occurred in the neighborhood earlier that week, Scott retrieved a handgun and opened the bedroom door (Tr. 1063). After seeing that no one was outside Scott, who weighed approximately 270 pounds, decided to go loudly down the wood stairs (Tr. 1063). Scott went down the stairs and strode through the living room, carrying his handgun at his side, looking to see if anyone was on the first floor (Tr. 1065). When Scott walked to the dining room, he saw Sharp turn and flee out the back door (Tr. 593-95, 606, 613, 594-94, 640, 644, 646-48, 1064-66, 1079-81). Scott saw two other burglars standing in the area of the door to an adjacent bedroom and was afraid they would hurt or kill him (Tr.

1065, 1066, 1095). Scott decided to frighten them before they could attack him and before the man who had fled could return (Tr. 1066, 1068). Scott fired his handgun, aiming low toward the floor (Tr. 1058, 1100). The two burglars fled into the bedroom's closet, closing the door behind them, and Scott called 911 (Tr. 1070).

While Scott was speaking to the 911 dispatcher, the closet door opened (Tr. 1071). Scott shouted, "Keep the door closed" and "Don't open up that door" (Tr. 1071). The door opened again and Scott saw one burglar go to the floor (Tr. 1071). Quiroz told Scott that the burglar who had fallen to the floor had been shot (Tr. 1071). Scott relayed this fact to the dispatcher and requested an ambulance (Tr. 1071). A third man, Layman, who Scott had not seen before, emerged from the closet and asked if he could sit on the bed (Tr. 1073). Scott told Layman to stay in the closet (Tr. 1073). Quiroz looked out of the closet and Scott told him to remain inside (Tr. 1075).

When a police officer entered the house Scott put his handgun down and said, "They're right there in the bedroom by the closet" (Tr. 1076). Quiroz burst from the closet and fled, and the officer left the house in pursuit (Tr. 527, 949-50, 1076, 1078). Scott followed police instructions and was recovered safely (Tr. 562-63, 1078-79). Officers entered the house and arrested Layman, who was treated for a gunshot wound to his leg (Tr. 568-69, 1029). Johnson died at the scene (Tr. 656, 661-62, 822, 927, 1083).

Layman and Sparks were charged with felony murder (App. 2, 4-5). They were tried to a jury and found guilty (Tr. 1274). The trial court sentenced Layman to fifty-five years in the Department of Correction (App. 127, 146). Layman appealed, raising new constitutional objections and arguing that the felony-murder statute's settled interpretation should be

abandoned (Layman-Brief, 8-9).[1] Layman's and Sparks' cases were consolidated and, in a published opinion, the Court of Appeals correctly held that Layman's new challenges were waived; affirmed Layman's conviction under settled Indiana law, and revised his sentence to fifty-five years with ten years suspended to probation. *Layman, et al. v. State*, 17 N.E.3d 957, 964 (Ind. Ct. App. 2014).[2] Although Judge May believed Layman's new claims were not waived, she concurred because Layman had failed to demonstrate error. *Id.* at 970 (May, J., concurring). Judge Kirsch dissented, opining that felony-murder liability should not attach to defendants who subjectively intend to commit the predicate felonies in a "non violent" manner. *Id.* at 970-71 (Kirsch, J., dissenting).

ARGUMENT

I.
The Court of Appeals Correctly Declined to Address Layman's waived claims.

"Error can only be predicated on questions presented to and ruled upon by the trial court." *Wells v. State*, 441 N.E.2d 458, 463 (Ind. 1982). The Court of Appeals correctly held that Layman waived his present challenges by failing to allow the trial court to consider and rule on them. *Layman*, 17 N.E.3d at 961 & 957; *Bigger v. State*, 5 N.E.3d 516, 517 (Ind. Ct. App. 2014) (citing *Norton v. State*, 273 Ind. 635, 668-69, 408 N.E.2d 514, 536 (1980)); Ind. Code §§ 35-34-1-4(b) & 35-34-1-6(a)(3). While *amici* do not contest the Court of Appeals' correct waiver holding, Layman incorrectly attempts to avoid waiver by relying on distinguishable decisions such as *Morse v. State*, 593 N.E.2d 194 (Ind. 1992),

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[1] Sparks' and Layman's petitions and briefs below will be cited with their names, *e.g.*, "Sparks-Petition," and "Layman-Brief." The State's brief below will be cited as "State-Brief." The transfer briefs of *amici* Indiana Public Defender and Juvenile Law Center will be similarly cited as "IPD," and "JLC" respectively.

[2] Sharp's conviction was affirmed in *Sharp v. State*, 16 N.E.3d 470, 478-79, 480-81 (Ind. Ct. App. 2014). Sharp has sought transfer.

which have addressed waived constitutional challenges based on clearly-defined rights and properly-developed records. *Id.* at 197. (Layman-Petition, 10; IPD, 1-2; JLC, 3). These occasional decisions have not been allowed to stand for a general rule relieving parties of the need to present significant legal and constitutional challenges to trial courts. *See Endres v. Ind. State Police*, 809 N.E.2d 320, 321-22 (Ind. 2004) *and Chidester v. Hobart*, 631 N.E.2d 908, 913 (Ind. 1994) (holding constitutional claims to be waived). *Morse*, *Endres*, and *Chidester* were summarized in *Plank v. Community Hosp.*, 981 N.E.2d 49 (Ind. 2013), when this Court unanimously held that presentation of an involved constitutional claim at trial is essential to due process and the administration of justice. *Id.* at 53 (citing *Freytag v. Comm'r.*, 501 U.S. 868, 895 (1991) (Scalia, J., concurring)). *Plank* clarified that *Morse* simply recognized discretion to accept waived constitutional claims in appropriate cases. *Id.* at 54.

Layman waited until his direct appeal to raise his challenges, and his delay in asserting a clearly-available constitutional claim is one factor weighing against review. *Id.* at 53. A second factor weighing heavily against review is the claim's complexity and the need for a record to join the dispute and provide facts relevant to the claim. *Id.* Layman's arguments depends on his sweeping and unsupported assertions about "what has now been proven about juveniles' inability to foresee potential consequences" (Layman-Petition, 8, 9, 11, 14, 15, 17; JLC, 2-3). As the State's brief below noted, Layman omits to mention research contrary to his claims (Layman-Brief, 16-18 & nn. 12-15, 33-34). Indeed, the group's ability to foresee consequences appears in Layman's admission that "I'm a thinker and patient," together with the group's anticipating the risks of burglary resulting in injury and their extensive planning -- which included scouting victims, using electronic

communications, and recruiting others to increase the chance of success (Tr. 573-74, 875, 925-27, 934, 1325).

Even the authorities Layman has relied on refute his attempt to make sweeping scientific and social-policy assertions about what is, and what is not, the constitutional scope of criminal-court jurisdiction and sentencing. *See Graham v. Florida*, 560 U.S. 48, 82 (2010) (affirming juvenile's adult conviction for burglary and robbery, holding the Eighth Amendment does not forbid the imposition of a life sentences for such offenders provided that parole remains an option). Indeed, *J.D.B. v. North Carolina*, -- U.S. –, 131 S.Ct. 2394 (2011), upon which *amicus* JLC and Layman rely, notes that policy decisions in this area depend, not on "citation to social science and cognitive science authorities," but on "commonsense propositions" involving "what 'any parent knows' -- indeed, what any person knows -- about children generally." *Id.* at 2403 & n.5 (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (Layman-Brief, 12; JLC, 3, 6, 7-9). The State's brief below provided ample demonstration from case law and history that Layman's and JLC's stereotype of mentally-deficient juveniles who cannot live basic moral imperatives or reason for themselves is unfounded (State-Brief, 16-17).

J.D.B.'s observation highlights another factor weighing against review, more fully explained elsewhere in this response. Layman's new claims demand wholesale revision of Indiana's criminal and juvenile laws with consequences which Layman has not considered. The power to make such changes to liability for criminal offenses belongs exclusively to the Legislature. Ind. Code § 1-1-2-2; *Higdon v. State*, 241 Ind. 501, 505, 173 N.E.2d 58, 60 (Ind. 1961). "Courts should be very careful not to invade the authority of the legislature." *Berry v. Crawford*, 990 N.E.2d 410, 415 (Ind. 2013) (quotation omitted). "[A]nxiety to

maintain the constitution, laudable as that must ever be esteemed," should not "lessen [this] caution . . . for if [courts] overstep the authority which belongs to them, and assume that which pertains to the legislature, they violate the very constitution which they thereby seek to preserve and maintain." *Id.* (quotation omitted). Responsibly addressing the complex issue of criminal responsibility and penalties for older adolescents requires significant and lengthy arguments, grounded in public values, knowledge and review of an extensive body of disputed research from half a dozen specialized disciplines. That opportunity does not exist in this case, nor could it, because the Legislature is the only appropriate forum for such a debate.

Layman also attempts to avoid the consequences of waiver by citing *Gingerich v. State*, 979 N.E.2d 694 (Ind. Ct. App. 2012), *trans. denied*, and claiming that his arguments challenge subject-matter jurisdiction (Layman-Petition, 9). *Gingerich* applied this Court's holding that "subject matter jurisdiction entails a determination of whether a court has jurisdiction over the general class of actions to which a particular case belongs," *K.S. v. State*, 849 N.E.2d 538, 542 (Ind. 2006) (quoting *Troxel v. Troxel*, 737 N.E.2d 745, 749 (Ind. 2000)), to a dispute about whether required steps had been taken under existing law to bring the case onto the criminal court's docket. *Gingerich*, 979 N.E.3d at 703-04. *Gingerich's* holding, namely that proper procedural steps are required to 'create' subject-matter jurisdiction over a particular case, resurrects the concept of 'jurisdiction of the case' which this Court has rejected. *Packard v. Shoopman*, 852 N.E.2d 927, 932 (Ind. 2006); *K.S. v. State*, 849 N.E.2d 538, 542 (Ind. 2006). But be that as it may, Layman's argument has always conceded that proper steps to put his case on the criminal court's docket *were* taken, and that his case belongs to the class statutorily committed to the criminal court. Layman

Dickson's discussion of foreseeability in *Palmer* was not an outlier; it was another, consistent application of Indiana's felony-murder doctrine. *Palmer*, 704 N.E.2d at 126-27.

Layman's attempt to conjure a contrary Legislative intent underscores the Legislature's approval of this Court's interpretation (Layman-Petition, 7-8). Layman suggests that accomplice liability suffices to impose liability for felony-murder (Layman-Petition, 7). *Amicus* IPD also suggests this result (IPD, 5-6). But if accomplice liability met the Legislature's aims, the Legislature would not have enacted felony-murder liability in the first place. Layman's argument violates the "rule of statutory interpretation that 'courts will not presume the legislature intended to do a useless thing.'" *State v. Brunner*, 947 N.E.2d 411, 416 (Ind. 2011) (quotation omitted). Layman's argument that the Legislature could only have intended Indiana's felony-murder jurisprudence by requiring that a defendant 'contribute' to a death is misplaced (Layman-Petition, 8). "Contributing" to a death would impose even broader liability for murder than foreseeability (or, for that matter, Layman's incorrect appeal to accomplice liability). As the State argued below, this Court's application of felony-murder liability is consistent with the Legislature's intent to punish more severely those "who . . . kill[ ]" by committing felonies which are sufficiently attended by the opportunity for death that the perpetrators should be liable for murder-range sentencing whether or not they subjectively intended that result (State-Brief, 19-21). Ind. Code § 35-42-1-1 (2012).

III.
Layman has not shown that exemptions from felony-murder liability should be created for 'immature' offenders.

As Layman and *amicus* JLC concede, the impact of age on a given offender's punishment is a matter for sentencing, and is distinct from liability for the underlying

Layman's attempts to claim an equal-protection violation also fail (Layman-Petition, 12-14). Without pausing to consider that his purported equal-protection violation could just as easily be remedied by the Legislature abolishing the juvenile-justice system altogether and consigning particularized concerns about the diminished capacity of each person to case-by-case adjudication under the Eighth Amendment or Article 1, Section 16, Layman's argument holds that even this result would be preferable to the present statutory scheme because age-based distinctions have "no rational basis" (Layman-Petition, 13). These arguments do not make a "clear showing of arbitrariness and irrationality," *Gary Cmty., Etc. v. Ind. Dep't. of Pub. Welfare*, 507 N.E.2d 1019, 1023 (Ind. Ct. App. 1987), "negat[ing] every conceivable basis that might support it, whether or not the basis has a foundation in the record." *Beauchamp v. State*, 788 N.E.2d 881, 886 (Ind. Ct. App. 2003).

Section 31-30-1-4 is rationally related to the State's interest in deterring offenders, preserving the security of society, and achieving the State's interests in rehabilitation -- all of which may well require longer periods of supervision and correction than are available under the juvenile code. That the Legislature has limited the offenses which qualify for criminal-court proceedings to severe crimes against the person does not invalidate the classification. The classification is a rational response to what "any parent knows' -- indeed, what any person knows -- about children generally," *Roper*, 543 U.S. at 569, which is that older adolescents are capable of understanding, and refraining from, the listed offenses, so that decisions to commit those offenses is more appropriately dealt with in criminal court. *See, e.g.*, 10 U.S.C. § 311 (providing the militia "consists of all able-bodied males at least 17 years of age") *and United States v. Stephens*, 245 F. 956, 960 (1917), *aff'd.*, 247 U.S. 504 (1918) (militia members can be conscripted to serve in foreign wars);

CONCLUSION

For the foregoing reasons, transfer should be denied.

Respectfully submitted:

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I verify that this brief contains no more than 4,200 words. The word count was conducted by selecting all portions of the brief not excluded by Indiana Appellate Rule 44(C) and selecting Review/Word Count in Microsoft Word, the word-processing program used to prepare this brief.

Ian McLean

CERTIFICATE OF SERVICE

I swear under the penalties for perjury that on November 6, 2014, I caused to be served upon the opposing counsel in the above-entitled cause two copies of the foregoing by depositing the same in the United States mail first-class postage prepaid, addressed as follows:

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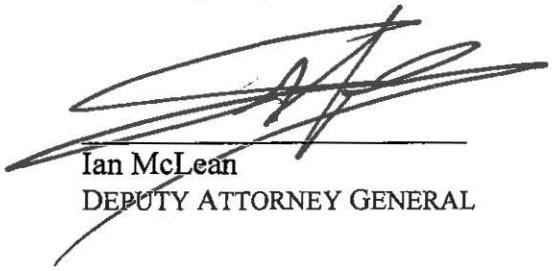

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