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 LEVI SPARKS' PETITION TO TRANSFER

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QUESTION PRESENTED ON TRANSFER

A jury convicted Sparks of felony murder on sufficient evidence. On appeal, Sparks 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 Sparks to fifty years, to be served in the Department of Correction (App. 127, 146). Sparks appealed, raising new constitutional objections and arguing that the felony-murder statute's settled interpretation

should be abandoned (Sparks-Brief, 1).[1] Layman's and Sparks' cases were consolidated and, in a published opinion, the Court of Appeals correctly held that Sparks' new challenges were waived; affirmed Sparks' conviction under settled Indiana law, and revised his sentence to fifty years with five years suspended to probation. *Layman, et al. v. State*, 17 N.E.3d 957, 964 (Ind. Ct. App. 2014).[2] Although Judge May believed Sparks' 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 Sparks' 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 Sparks 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, Sparks incorrectly attempts to avoid waiver by relying on distinguishable decisions such as *Morse v. State*, 593 N.E.2d 194 (Ind. 1992),

[1] Sparks' and Layman's petitions and briefs will be cited with their names, *e.g.*, "Sparks-Petition" and "Layman-Petition". 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* recognized discretion to accept waived constitutional claims in appropriate cases. *Id.* at 54.

Sparks waited until his direct appeal to raise his clearly-available constitutional claims and this fact weighs against review. *Id.* at 53. A second factor weighing heavily against review is the claim's complexity and the need for a record that clarifies the dispute and establishes relevant facts. *Id.* Sparks' arguments depends on his sweeping assertions about "what has now been proven about juveniles' inability to foresee potential consequences" (Sparks-Petition, 3, 8, 9; JLC, 2-3). As the State's brief below noted, Sparks omits to mention research contrary to his claims (Sparks-Brief, 16-18 & nn. 12-15, 33-34). Indeed, the group's ability to foresee consequences appears in 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 Sparks 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 Sparks 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 (quotation omitted) (Sparks-Brief, 12; JLC, 3, 6, 7-9). The State's brief below provided ample demonstration from case law and history that Sparks' and JLC's stereotype of mentally-deficient juveniles who supposedly cannot obey basic moral imperatives or think rationally is unfounded (State-Brief, 16-17).

J.D.B.'s observation highlights another factor weighing against review, more fully explained elsewhere in this response. Sparks' new claims demand wholesale revision of Indiana's criminal and juvenile laws with consequences which Sparks has not considered. The power to make such changes to liability for criminal offenses belongs exclusively to the Legislature. I.C. § 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.

Sparks also attempts to avoid 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 (Sparks-Petition, 10). *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). Nonetheless, Sparks' 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 a class statutorily committed to the criminal court. Sparks argues that existing law should be changed or is unconstitutional. Claims that a trial court's decisions are contrary to law are not attacks on the court's subject matter decision. *State ex rel. Essex Wire Corp. v. Grant Circuit Court*, 248 Ind. 625, 628, 230 N.E.2d 436, 437 (1967). Sparks' arguments no more

challenge subject-matter jurisdiction than the petitioner in *Graham* challenged the 'subject matter jurisdiction' of the Circuit Court of Duval County, Florida. The merits of these waived arguments are alternatively addressed below.

II.
Sparks' challenge to Indiana's felony-murder jurisprudence is without merit.

Sparks and *amicus* IPD inaccurately portray *Palmer v.State*, 704 N.E.2d 124 (Ind. 1999) as an unpredecented case that introduced foreseeability as the test for felony-murder liability (Sparks-Petition, 6; IPD, 5-6). The State's brief below addresses this mischaracterization by showing that this Court has applied foreseeability under the present and prior versions of Indiana's felony-murder statutes for well over 130 years (State-Brief, 22-26).[3] The Legislature has not inserted any amendment that contradicts this consistent interpretation, thereby approving this Court's jurisprudence on the subject. *Fraley v. Minger*, 829 N.E.2d 476, 492 (Ind. 2005). Legislative acceptance of this Court's felony-murder holdings was explicitly recognized by the Court of Appeals in *Exum v. State*, 812 N.E.2d 204 (Ind. Ct. App. 2004). *Exum* affirmed a conviction for murder when, after the defendant had fled from a robbery scene, the victim fired a handgun and killed a co-participant. *Id.* at 206, 208 n. 4. Justice 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.

Sparks' attempt to conjure a contrary Legislative intent fails (Sparks-Petition, 3, 7). He suggests that accomplice liability suffices to impose liability for felony-murder (Sparks-

[3] As the State's brief below also demonstrated, *amicus* IPD's dichotomy between a majority of 'agency' states and minority of 'foreseeability' states is far more porous than IPD's analysis suggests (IPD 7-9; State-Brief, 27-30).

Petition, 3; Layman-Petition, 8). *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. Sparks' 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). Sparks' adopted argument that the Legislature could only have intended Indiana's felony-murder jurisprudence by requiring that a defendant 'contribute' to a death is misplaced (Sparks-Petition, 3; Layman-Petition, 8). "Contributing" to a death would impose even broader liability for murder than foreseeability (or, for that matter, Sparks' incorrect appeal to accomplice liability).[4] 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). I.C. § 35-42-1-1 (2012).

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

Sparks and *amicus* JLC concede that the a given offender's age is relevant as a matter for sentencing, and is distinct from liability for the underlying offense or the court system handling that offense (Sparks-Petition, 8; JLC, 12-13). *Brown v. State*, 10 N.E.3d 1,

[4] Sparks also insists that absent felony-murder liability he could only be convicted of class C felony burglary, ignoring the fact that he burglarized a dwelling (Sparks-Petition, 7-8). Sparks also insists that if Johnson had only been injured Sparks could not be prosecuted for burglary as a class A felony (Sparks-Petition, 8). Sparks provides no authority for his claim that "a defendant" under I.C. § 35-43-2-1(2) includes anyone else who might be, or is actually, charged with the burglary (Sparks-Petition, 7-8). Passing that issue, Sparks does not explain why it is unconstitutional for the Legislature to distinguish between offenses which actually result in death and offenses which do not.

7-9 (Ind. 2014); *Fuller v. State*, 9 N.E.3d 653, 656-57 (Ind. 2014).[5] Sparks' insistence that "what we now know" about the alleged moral and cognitive defects of less-mature individuals requires a more lenient category of felony-murder liability is not supported by the record (Sparks-Petition, 9; JLC, 9). It is supported by misuse of academic journal articles cited in the decisions of other issues, which is fully rebutted in the State's brief below (State-Brief, 16-18, 40-41; Sparks-Petition, 3, 9, 12-13). Sparks' reliance on conclusory assertions and position-friendly samples of a large, disputed body of psychological, medical, and sociological literature in lieu of a record underscores the magnitude of his waiver (Sparks-Petition, 3, 9). *Plank*, 981 N.E.2d at 53-54.

IV.
Offenders are not constitutionally entitled to adjudication within the juvenile-justice system

As the State argued below, Sparks' claim that he and other 'immature' offenders are constitutionally entitled to the procedures and sanctions available in Indiana's juvenile court system is unsupported by the decisions he cites (Sparks-Petition, 10-11; State-Brief, 35-40). *Roper v. Simmons*, 543 U.S. 551 (2005) held that special concerns involving the death penalty prevented it in the case of youthful offenders under the Eighth Amendment. *Id.* at 568. *Graham* applied the Eighth Amendment to the automatic imposition of life without the possibility of parole on juveniles guilty of non-homicide offenses. *Graham*, 560 U.S. at 62. *Miller v. Alabama*, -- U.S. --, 132 S.Ct. 2455 (2012), extended *Graham* to older juveniles guilty of homicide. *Id.* at 2472-74. This cases did not alter the longstanding principle that there is no common-law or federal constitutional right to require the adjudication of liability for a criminal act in the juvenile justice system. *United States v. Juvenile*, 228 F.3d 987, 990

[5] Sparks does not seek revision of his sentence on transfer (Sparks-Petition, 3).

(9th Cir. 2000); *Woodard v. Wainwright*, 556 F.2d 781, 785 (5th Cir. 1977); *C.B. v. State*, 2012 Ark. 220, 406 S.W.3d 796, 801 (2012); *State v. Skakel*, 276 Conn. 633, 657-58, 888 A.2d 985, 1007 (2006); *In re M.I.*, 370 Ill. Dec. 795, 803, 989 N.E.2d 173, 190 (2013); *Brownlow v. State*, 484 N.E.2d 560, 563 (Ind. 1985); *Gingerich*, 979 N.E.2d at 703.

Sparks' contrary arguments are unpersuasive. He offers his own view of criminal- and juvenile-justice policy and asserts that his views make Indiana Code Section 31-30-1-4 'unconstitutional as applied' because the Legislature should have held different opinions about felony-murder liability and the alleged diminished capacity of offenders such as himself (Sparks-Petition, 10). He agrees with Layman's claim that thinking a criminal-court sentencing order can begin rehabilitating an offender's character and lessening his or her potential for recidivism is a "fallacy" (Sparks-Petition, 3, Layman-Petition, 11, 14). He complains the Legislature irrationally set fifteen years as the minimum age for criminal-court proceedings, thereby acknowledging that his own argument -- namely, that age restrictions on criminal-court proceedings are constitutionally invalid -- logically concludes that a person of any age should be sent to criminal court for any act after a judicial finding that the person meets some undefined, minimum criteria of moral and cognitive awareness (Sparks-Petition, 11-12). These faulty arguments do not support a constitutional entitlement to juvenile-court disposition.

Sparks' attempts to claim an equal-protection violation also fail (Sparks-Petition, 11-12). 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, Sparks' argument

holds that even this result would be preferable to the present statutory scheme because age-based distinctions have "no rational basis" (Sparks-Petition, 12). 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 offenses qualifying for criminal-court proceedings 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); *Lambert v. Wicklund*, 520 U.S. 292, 295-96 (1997) (upholding rights of minors to petition a court for leave to terminate a pregnancy without parental notification); I.C. § 31-11-2-3 (providing right of minors to petition a court for exemption from the age limits on marriage); I.C. § 9-24-3-2.5 (recognizing minors' ability to operate a motor vehicle); I.C. § 31-16-6-6 (recognizing that minors may, in fact, live independently of parental or court supervision). The same facts serve to overcome

Defendants' challenge under Article 1, Section 23 of the Indiana Constitution. *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994).

V.
The Eighth Amendment does not forbid advisory sentencing.

Sparks and *amicus* JLC also misuse *Graham* and *Miller*, which prohibited the mandatory imposition of life without parole, to argue that any 'mandatory' penalties, including minimum advisory ranges, are unconstitutional (Sparks-Petition, 13-14; JLC, 10). *Graham* and *Miller* specifically limited their holdings to statutes which required life without parole. *Miller*, 132 S.Ct. at 2472-74; *Graham*, 560 U.S. at 62. Sparks also ignores the fact that Indiana allows for fact-sensitive sentencing of offenders and a substantial range of correctional alternatives, including parole. I.C. § 35-38-1-7.1(b) (2012); I.C. § 11-13-3-2 (2012); I.C. § 35-50-2-2(b)(4)(A) (2012). As numerous courts have held, *Graham* and *Miller* do not make minimum sentence floors, or advisory sentencing schemes, unconstitutional. *James v. United States*, 59 A.3d 1233, 1236-37 (D.C. 2013); *Starks v. State*, 128 So.3d 91, 92 (Fla. App. 2013); *People v. Pacheco*, 372 Ill.Dec. 406, 417, 991 N.E.2d 896, 907, (Ill. App. 2013), *appeal allowed*, 996 N.E.2d 20 (2013); *Com. v. Batts*, 66 A.3d 286, 295 (Pa. 2013); *cf. United States v. Shill*, 740 F.3d 1347 (9th Cir. 2014) (holding that ten-year mandatory term for adult offender is not barred by *Graham* and *Miller*).[6]

[6] *Amicus* JLC incorrectly claims *Enmund v. Florida*, 458 U.S. 782 (1982), which held that imposing death for felony murder is unconstitutional unless the defendant intended to kill or physically inflicted death, invalidates minimum advisory sentences (JLC, 11). The State does not argue with *Enmund*'s actual ruling, but notes *Edmund* affirms that felony-murder liability may be imposed on someone who did not subjectively intend or physically inflict death. *See State v. Enmund*, 476 So.2d 165, 164, 168 (Fla. 1985) (on remand, affirming consecutive life sentences for felony murder).

VI.
Sparks has no right to pick his conviction and sentence.

Sparks adopts Layman's claim that even though he is guilty of felony murder this Court should convict and sentence him for class C felony reckless homicide or involuntary manslaughter under the proportionality guarantee of Article 1, Section 16 (Sparks-Petition, 3; Layman-Petition, 17). Sparks fails to cite authority that allows reviewing courts to impose convictions and sentences for uncharged crimes not tried to a trial court. *See Burns v. State*, 722 N.E.2d 1243, 1246 n. 2 (Ind. 2000) *and McFarland v. State*, 579 N.E.2d 610, 611 (Ind. 1991) (holding there are no lesser-included homicides to felony murder). Article 1, Section 16, does not entitle defendants to pick their convictions. It only requires proportionality between sentencing ranges and offenses. *State v. Moss-Dwyer*, 686 N.E.2d 109, 112 (Ind. 1997). Courts will not "'set aside the legislative determination as to the appropriate penalty merely because it seems too severe.'" *Laugner v. State*, 769 N.E.2d 1147, 1156 (Ind. Ct. App. 2002) (quoting *Moss-Dwyer*, 686 N.E.2d at 112). Sparks' argument merely invites this Court to reweigh the evidence, which it will not do. *Kiplinger v. State*, 922 N.E.2d 1261, 1266 (Ind. 2010).

CONCLUSION

For the foregoing reasons, transfer should be denied.

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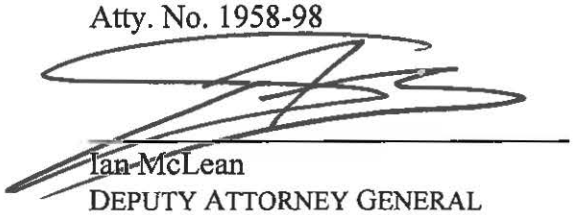

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Ian McLean

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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