IN THE
COURT OF APPEALS OF INDIANA

CASE NO. 20A04-1310-CR-518

BLAKE LAYMAN Appellant/Defendant	))	Appeal from the Elkhart County Circuit Court
	)	
v.	)	Cause No. 20C01-1210-MR-7
	)	
STATE OF INDIANA Appellee	))	The Honorable Terry C. Shewmaker, Judge

LEVI SPARKS Appellant/Defendant	))	Appeal from the Elkhart County Circuit Court
	)	
v.	)	Cause No. 20C01-1210-MR-5
	)	
STATE OF INDIANA Appellee	))	The Honorable Terry C. Shewmaker, Judge

REPLY BRIEF OF THE APPELLANT BLAKE LAYMAN

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SUMMARY OF ARGUMENT

The State's primary focus of its brief is that this Court should reject or ignore well-established U.S. Supreme Court precedent. *Roper*, *Graham*, *Miller*, and *J.D.B.* cannot be considered just in isolation of one another. When the U.S. Supreme Court, who issues writs of certiorari in only a minute number of criminal cases each year, takes several cases dealing with one

small subset of criminal law, it does so because it wants to send a message. The message that these cases collectively send is that neuroscientific research on adolescent brain development proves that our previous beliefs about the treatment of juvenile offenders as adults is unjust.

Contrary to the State's contention, Layman has not cherry-picked "position-friendly research" on this topic. Rather, he has repeatedly cited to U.S. Supreme Court precedent regarding what is now commonly understood about adolescents. The State several times lifts the phrase "what any person knows" about juveniles from these decisions, but then states an assumption directly opposite to the High Court's holdings and findings. [*See, e.g.*, Br. of Appellee, 16-17, 34, 41]. This type of thinking by our State has long been the basis for our system treating a class of our juveniles as miniature adults. But sound scientific research now proves that this thinking was misguided—"developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010).

The State misunderstands the implications of the High Court accepting and relying upon this groundbreaking research. No one is suggesting that juveniles do not foresee the clear and obvious possible consequences of an action. But juveniles are less able to understand attenuated consequences due to less life experience and when weighing the relative benefits and risks of a proposed action, adolescents minimize the

any time, as it involves a question of subject matter jurisdiction.") "When courts lack subject matter jurisdiction, their actions are void *ab initio* and may be attacked at any time." *Kondamuri v. Kondamuri*, 799 N.E.2d 1153, 1156 (Ind. Ct. App. 2003), *trans. denied.*

Admittedly, Blake's situation is somewhat different than *Gingerich*'s because it was the prosecutor's discretionary decision that placed Blake in adult court, not a judge's. Specifically, the prosecutor here chose to charge Blake with felony murder based on his intent to commit burglary. And, pursuant to Indiana Code section 31-30-1-4, the prosecutor's discretionary act permitted the State to file Blake's case directly in adult court. This act was discretionary because the prosecutor could have chosen to charge Blake differently; *e.g.* the prosecutor could have charged Blake with burglary and argued at sentencing that the death of his friend was an aggravating factor, or he could have charged Blake with reckless homicide for Danzele's death. Both of these options would have required the prosecutor to file the case in juvenile court initially and seek waiver to adult court if appropriate. However, it is this prosecutor's discretionary act and Indiana Code section 31-30-1-4 which Blake contends violated his constitutional rights to due process, due course of law, and equal protection. Therefore, Blake is challenging the subject matter jurisdiction of the trial court, a claim which can be raised at any time.

The State relatedly contends that this discretionary act by a prosecutor

can deprive Blake of the protections of a judicial waiver hearing and leave him with no recourse because the charging decisions of a prosecutor cannot be challenged. [Br. of Appellee, 43 (*citing Coy v. State*, 999 N.E.2d 937, 945-46 (Ind. Ct. App. 2013)]. However, the State fails to disclose that such discretion is only unchallengeable "so long as it does not discriminate against any class of defendants." *Coy*, 999 N.E.2d at 945-46 (*quoting Skinner v. State*, 732 N.E.2d 235, 238 (Ind. Ct. App. 2000), *aff'd*, 736 N.E.2d 1222 (Ind. 2000)). Blake's claim is just that: he belongs to a class of defendants who are deprived of critically important procedures by the prosecutor's discretionary act. More importantly, Blake is challenging the statute, which allows the effect of no judicial waiver upon the prosecutor's discretionary charging decision.

B. Even Though Blake's Remaining Claims Could Have Been Raised Below, Our Appellate Courts Have a Strong Preference for Deciding Claims on Their Merits, Particularly Where The Facts are Not in Dispute and the Claims are Purely Legal Issues

Blake acknowledges that his claims could have been raised below. However, constitutional challenges to statutes may be raised at any stage of the proceeding, including *sua sponte* by appellate courts. *Morse v. State*, 593 N.E.2d 194, 197 (Ind. 1992). This Court recently observed that there is discretion on the part of our appellate courts to address constitutional claims on their merits where they were not raised below. *Hucker v. State,* 4 N.E.3d 797, 799 n.1 (Ind. Ct. App. 2014). That being said, the *Hucker* Court

expressed, "[w]e believe it is best practice to decide a case on the merits where possible." *Id. See also Collins v. State*, 639 N.E.2d 653, 655 n.3 (Ind. Ct. App. 1994), *trans. denied* (noting this Court's "strong preference to decide issues on their merits"); *Perry v. State*, 956 N.E.2d 41, 51 (Ind. Ct. App. 2011), *reh'g denied* ("[G]iven our preference for resolving issues on their merits and the potential existence of fundamental error, we choose to address Perry's confrontation claim as raised on appeal.").[1]

With respect to Blake's claim regarding the inapplicability of the felony murder doctrine, Blake acknowledges the issue could have been presented in a pretrial motion to dismiss, but doing so would have been futile. The trial court was bound to follow *Palmer* and would have had no choice but to deny the motion. Moreover, deciding this claim on its merit will provide necessary guidance to trial courts in the future.[2]

[1] The State also claims Layman may have a remedy in the post-conviction process if this claim is deemed waived. However, this issue is a pure question of law; the facts are not in dispute. There is no record that needs to be further developed to present the claim. If Layman had chosen not to raise the claim now, the State will later argue that it was not available on post-conviction because it was known and available on direct appeal. By suggesting that Layman will need to wait until the post-conviction process to raise this issue, the State merely wants to kick the can down the proverbial road.

[2] Two other criminal cases have been filed recently that deal with the same issue. In South Bend, Mario McGrew has been charged with felony murder where a homeowner shot and killed his accomplice during a residential burglary. A motion to dismiss on this issue was just denied by the trial court. *See* Madeline Buckley, *Motion to Dismiss Murder Charge Denied*, South Bend Tribune, Apr. 15, 2014, found at www.southbendtribune.com/news/crime/motion-to-dismiss-murder-charge-denied/article_8a9ebaf8-c4e2-11e3-b4e6-0017a43b2370.html (last checked Apr. 22, 2014). Last year in Fort Wayne, Omar Ruffin, a juvenile, was charged in adult court

II. Regarding Blake's Claims That Statutory Waiver Violated His Rights to Due Process and Due Course of Law, the State's Contention That Blake Has No Protectable Interest in Being Treated as a Juvenile is in Error

The State contends, "[t]here is no common-law or federal constitutional right to adjudication and disposition within the juvenile justice system."[3] [Br. of Appellee, 38]. The State argues, instead, that only the "relevant statute, and not the defendant's age, creates the liberty interest entitling minors to such a hearing." [Br. of Appellee, 39]. In an attempt to support this assertion, the State cites to a string of cases that are not binding on this court; and pre-date the High Court's opinions in *Roper*, *Graham*, and *Miller*. Further, the State cites to this Court's *Gingerich* decision, which contains no language supporting the State's position.

The State also refers to *Kent v. U.S.*, 383 U.S. 541 (1966), the seminal case on juvenile waiver hearings that was decided on a reading of the applicable statute. Admittedly, *Kent* is written from the perspective of protecting statutorily created rights: "It is true beyond dispute that the

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for felony murder after his accomplice was shot and killed by the victim during an attempted robbery. *See* Jeff Neumeyer, *Indiana Felony Murder Statute Amounts to Rude Awakening for Suspects in Some Criminal Cases*, INC Now, Jun. 21, 2013, found at www. indiananewscenter.com/news/local/Indiana-Felony-Murder-Statute-Amounts-to-Rude-Awakening-For-Suspects-In-Some-Criminal-Cases 212540771. html (last checked Apr. 22, 2014).

[3] Apparently the State believes that our legislature could do away with all juvenile court provisions, and five-year-olds, for example, could be tried in adult courts for any and all offenses, and subject to adult sanctions. Without a statute, such abhorrent treatment would be unchallengeable by the State's logic, because children have no constitutional or inherent right to be treated as children by our courts.

waiver of jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile . . . . The statutory scheme makes this plain." *Id. at* 556. However, *Kent* did not reject the existence of constitutionally protectable interests. To the contrary, *Kent* repeatedly spoke of how important the right to a proper waiver hearing was to the juvenile:

> We do not consider whether, on the merits, Kent should have been transferred [to adult court]; but there is no place in our system of law for reaching a result of such tremendous consequences without ceremony – without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue would proceed in this manner.
>
> . . .
>
> In these circumstances, considering particularly that decision as to waivers of jurisdiction and transfer of the matter to the [adult court] was potentially as important to the petitioner as the difference between five years' confinement and a death sentence, we conclude that, as a condition to a valid waiver order, petitioner was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision.
>
> . . .
>
> We hold that it is, indeed, a "critically important" proceeding. The Juvenile Court Act confers upon the child a right to avail himself of that court's "exclusive" jurisdiction. As the Court of Appeals has said, "It is implicit in [the Juvenile Court] scheme that non-criminal treatment is to be the rule—and the adult criminal treatment, the exception which must be governed by the particular factors of individual cases."

Id. at 554, 557, 560. These statements of "critical importance" demonstrate the propriety of giving constitutional protection to the interests of juveniles.

Moreover, the Supreme Court's recent decisions in *Roper*, *Graham*, and

Miller evince a fundamental shift from the concept furthered by Indiana Code section 31-30-1-4—that certain juveniles charged with serious offenses should be treated as miniature adults. These cases did not address directly the issue of transfer to adult court, but the High Court made clear: "criminal procedural laws that fail to take a defendants' youthfulness into account at all would be flawed." *Graham v. Florida*, 130 S. Ct. at 2031. The propriety of Indiana Code section 31-30-1-4 should be reevaluated in the context of this recent shift. In our firmly established hierarchy of laws, there is but one check on our statutes, and that is by constitutional challenge.

III. With Respect to Blake's Equal Protection and Privileges and Immunities Claims, the State Has Failed to Identify a Legitimate State Interest Furthered by Indiana Code Section 31-30-1-4

In response to Blake's contention that Indiana Code section 31-30-1-4 violates his right to equal protection pursuant to the Fourteenth Amendment and Article 1, Section 23 of the Indiana Constitution, the State contends that Indiana Code section 31-30-1-4 is "rationally related to the State's interest in deterring such offenders, preserve [sic.] the security of society, and achieve [sic] the State's interests in rehabilitating such violators." [Br. of Appellee, 40]. Considering that Blake is asking for a chance at a juvenile waiver hearing conducted by a judicial officer, not a prohibition on being prosecuted as an adult, the State's argument completely misses the mark.

First, with respect to deterrence, it is unlikely that many 16- or 17-year-olds know and understand the difference between direct filing and

judicial waiver, especially prior to having been charged with an offense that requires such treatment. At that point, deterrence is moot. Further, the High Court directly refuted the notion that deterrence serves a legitimate goal in certain sanctions for juvenile offenders: "Nor can deterrence do the work in this context, because 'the same characteristics that render juveniles less culpable than adults' – their immaturity, recklessness, and impetuosity – make them less likely to consider potential punishment." *Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012) (*quoting Graham v. Florida*, 560 U.S. 48, 52 (2010)). Moreover, a judicial hearing will result in those offenders who deserve the deterrence of adult court being transferred to that forum. For these reasons, deterrence is not a legitimate state interest which supports sending juveniles to adult court without the protections of a judicial hearing.

Second, "preserving the security of society" is not a legitimate state interest furthered in any way by Indiana Code section 31-30-1-4. As explained above, at an appropriate judicial waiver hearing those children who are beyond the reach of the juvenile justice system will be transferred to adult court. Moreover, in juvenile proceedings, those juveniles who pose a danger to the community may be detained by the court pending adjudication, or may be subject to significant conditions upon the child's liberty designed to protect the community. *See* Ind. Code § 31-37-6-5.

Finally, the State proposes that the state's interest in "rehabilitating such violators" is furthered by denying access to juvenile waiver hearings.

Again, Blake is asking for a waiver hearing, not for a prohibition on being sent to adult court. It is inconceivable how denial of a judicial waiver hearing furthers the concept of rehabilitation. Additionally, it is inconceivable how treatment of youths as adults furthers rehabilitation. A primary objective of the juvenile court system is to provide a "measure of guidance and rehabilitation for the child and protection for society." *Kent*, 383 U.S. at 554. Moreover, our Legislature has expressed that a focus of transferring juveniles to adult court in judicial waiver proceedings is finding that the juvenile is "beyond rehabilitation." Ind. Code § 31-30-3-2. For the State to now contend that a legitimate State interest in skipping the step of a judicial waiver hearing is to provide "rehabilitation for such violators" is perplexing.

Altogether, the State has failed to present any legitimate State interest furthered by the denial of a judicial waiver hearing to a subset of juvenile offenders. The State also failed to address what seems to be the only potential legitimate purpose, which was identified by Blake in his Appellant's Brief: judicial economy. Assumedly, this is because the State agrees with Blake's analysis that judicial economy is an insufficient basis to justify the deprivation of a judicial waiver hearing.

IV. The Felony Murder Statute was Inapplicable in This Case

Blake and the Indiana Public Defender Council have already fully addressed why the plain language of the felony murder statute reflects that our Legislature intended for Indiana to be an "agency" state, not a "mediate

proximate cause" ("MPC") state.[4] In its response brief, the State does not squarely address this part of Blake's claim.

Rather, the State, in discussing *Palmer*'s "deep roots" in Indiana law, made the same mistake that the *Palmer* majority did: it relied upon case law that was not applicable. The cases relied upon by the *Palmer* court and cited by the State here do not address the "MPC versus agency relationship" issue. In fact, in each of the cases cited the defendant either directly took some affirmative act that caused the victim's injuries, or he was in an agency relationship with the person who took such act. *See, e.g., Watson v. State*, 658 N.E.2d 579 (Ind. 1995) (defendant repeatedly hit and kicked victim); *Reaves v. State*, 586 N.E.2d 847 (Ind. 1992) (defendant threw female victim on top of physically incapacitated male victim's legs, causing blood clots to form in male victim's legs, which led to his death); *Pittman v. State*, 528 N.E.2d 67 (Ind. 1988) (defendant stabbed morbidly obese man, who later died from complications during exploratory surgery); *Sims v. State*, 466 N.E.2d 24 (Ind. 1984) (victim died after surgery to repair injuries caused by defendant's beating of victim with a brick); *Booker v. State*, 270 Ind. 498, 386 N.E.2d 1198 (1979) (defendant wrestled with victim during robbery, knocking him to the

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[4] It should be noted that the State attempts to differentiate the MPC theory of liability for felony murder from the concept of foreseeability. But the MPC theory is based on the concept of foreseeability. Or, stated differently, if the death was not reasonably foreseeable, then the defendant's actions were not a mediate proximate cause of the death.

ground, and victim died within minutes of robbery); *Moten v. State*, 269 Ind. 479, 381 N.E.2d 481 (1978) (defendant shot victim, killing him); *White v. State*, 269 Ind. 479, 381 N.E.2d 481 (1978) (defendant set fire to home, killing all six people inside); *Jones v. State*, 244 Ind. 682, 195 N.E.2d 460 (1964) (defendant's co-felon shot victim twice in head, killing him); *Bissot v. State*, 53 Ind. 408, 1876 Ind. LEXIS 195 (1876) (defendant and his co-felon exchanged in gunfire battle with victim, and victim was killed).

The State posits that these cases all show that "foreseeability, and not fine calculations of causal responsibility, has always been Indiana's basis of liability for felony murder." [Br. of Appellee, 26]. But these cases dealt with Indiana's basis of liability for one's acts *in furtherance of the felony*. This is an important distinction with respect to the felony murder doctrine; this is the point at which the three-justice *Palmer* majority parted ways with the dissent.

To understand the distinction, one must understand the history of the felony murder doctrine in Indiana. Indiana's felony murder statute

> embodies the general principles which prompted the common law inception of the doctrine; recognition of the doctrine was predicated on the proposition that inherent to the commission of felonies which were dangerous to life or *malum in se* was the likelihood that death would occur. Consequently, when 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 [or transferred] from the commission or attempted commission of the dangerous felony.

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

The felony murder doctrine has been the subject of much criticism, however, due to the doctrine's transfer of the *mens rea* to commit an inherently dangerous felony to the *mens rea* to commit murder. *Id.* In essence, this has eliminated the State's burden to prove this element of murder. *See id.* ("[I]t is this aspect of the doctrine – the elimination of the prosecutor's burden to prove an essential element of the crime of murder – which has prompted widespread disfavor toward the rule.") Thus, Indiana has limited the scope of the doctrine to only certain felonies that it believes carry the inherent, or reasonably foreseeable, risk of bodily harm. *Id.* at 50.

It has also limited the scope of the doctrine to only those killings *in perpetration of* an enumerated felony. In other words, the *mens rea* of the dangerous felony will only be transferred to those acts committed in furtherance of that felony; namely, the killing.

Additionally, our Legislature, through passage of the accomplice liability statute, allows the State to impute a felon's affirmative acts onto each and every person acting in an agency relationship with that felon. *See* Ind. Code § 35-41-2-4. This is due to the fact that the co-felons are acting together in furtherance of the felony. Thus, one act committed in furtherance of the felony is imputed to all those intending to commit the felony.

Consider an example. Two felons decide to rob a bank. One felon goes inside the bank, while the other felon drives the getaway car. The felon inside

shoots and kills the teller. The co-felon acting as the driver of the getaway car can be convicted of murder as follows: the *mens rea* element of murder is met by transferring the co-felon's intent to commit the robbery to the murder; the *actus reus* element of murder is met by showing that the co-felon assisted the felon with the robbery (this also could be used to prove the *mens rea* element of the underlying robbery), so the felon's act of killing the teller is imputed to the co-felon.

None of the cases relied upon by the *Palmer* majority or cited here by the State allow for an expansion of the accomplice liability statute to all persons within the "zone of danger" inherent in the commission of a dangerous felony. In other words, these cases do not stand for the proposition that the acts taken by *anyone* who is present during the commission of a felony may be imputed to the felon and his co-felons. If this were the case, the State would be relieved of the burden not only to prove the *mens rea* element of murder but the *actus reus* element of murder as well.

Proximate causation and foreseeability have already been incorporated in our felony murder doctrine through our Legislature's selection of what felonies it deems as inherently dangerous. The problem with applying the theory of proximate causation to the felony murder doctrine with respect to the *actus reus* element of murder, as the *Palmer* majority did, is that it relieves the State of proving the *actus reus* element as well. Inherently dangerous felonies are just that: inherently dangerous. The risk of bodily

injury or death is always present. By allowing the overexpansion of the doctrine in this manner, the State will be allowed to impose punishment for our most serious offense on people who neither intended to kill, nor actually killed anyone.

The State argues that limiting Indiana's felony murder doctrine to only those acting in an agency relationship with one another will encourage "felons to commit inherently-dangerous crimes even where death is easily foreseeable . . . ." [Br. of Appellee, 29]. Again, the enumerated felonies in Indiana's felony murder statute were chosen because of their inherent dangerousness. The risk of death was so foreseeable that our Legislature relieved the State of its burden to prove malicious intent. But it has never relieved the State of its burden to prove an *actus reus* ("guilty act"). The "guilty act" is an act taken in furtherance of the felony. The only guilty act taken in this case was the burglary itself; neither Blake nor his co-felons committed any other guilty act. Rather, Danzele was killed by an innocent man in a justified killing; there was no murder.

Assuming for the sake of argument, however, that *Palmer* and its progeny were correctly decided, the agency approach should nevertheless apply to juveniles. As discussed above, the felony murder doctrine obviates the State's burden of proving the *mens rea* element for murder because it transfers the malicious intent to commit the inherently dangerous felony to the killing.

But as Justice Breyer aptly explained in his concurring opinion in *Miller*,

> the theory of transferring a defendant's intent is premised on the idea that one engaged in a dangerous felony should understand 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.

Miller v. Alabama, 132 S. Ct. 2455, 2476 (2012) (Breyer, J., concurring).

Justice Breyer's comments should be amplified even louder here where none of Blake's confederates killed Danzele; Danzele was killed by an innocent person. "Adherence to precedent cannot justify the perpetuation of a policy ill-conceived in theory and unfair in practice." *Thing v. LaChusa*, 771 P.2d 814, 835 (Cal. 1989) (Kaufman, J., concurring).

V. Blake's Advisory Sentence Wholly Ignores The Impact of Blake's Youthful Age on His Culpability

It is difficult to comprehend how the State can argue that a 55-year sentence is appropriate in this case, given that Blake did not injure or kill anyone, was just a juvenile when he committed burglary, and did not display a pattern of violent tendencies. Yet the defendant in *Evans* was an adult with a violent past when he viciously attacked two men with a cement block, brutally killing one of them, and received a sentence less than Blake.

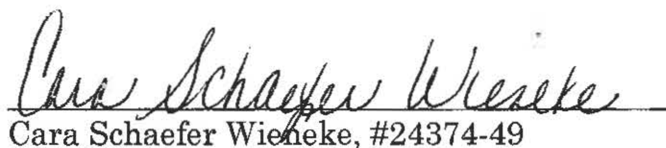
The specific circumstances that the State cited to when discussing the nature of Blake's offense were all related to the commission of the burglary

itself and were no different than other residential burglaries. Notably, however, the State failed to address the significant mitigating weight that should have been given to Blake's young age. *Roper*, *Graham*, and the large body of research upon which they rely "establish that children are . . . different from adults for purposes of sentencing." *Miller*, 132 S. Ct. at 2464. Yet Blake received the advisory sentence that would be appropriate for an adult who committed an intentional killing.

CONCLUSION

Layman does not intend to waive or concede any issue raised in this Appeal but not argued in this Reply Brief. Layman believes that he adequately addressed such issues in his Appellant's Brief. For the reasons stated herein and in his Appellant's Brief, Layman again respectfully requests that this Court reverse his conviction and vacate his resulting sentence. In the alternative, Layman respectfully requests that this Court reduce his 55-year executed sentence.

Respectfully submitted,



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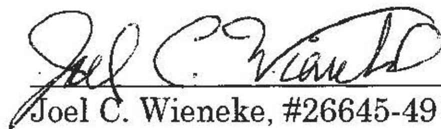

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WORD COUNT CERTIFICATE

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon the following, via U.S. Mail, postage prepaid, this 22nd day of April, 2014.

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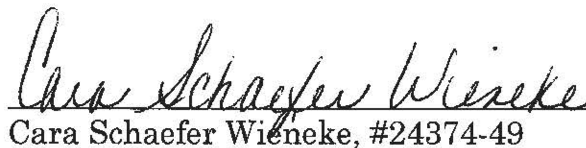

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