IN THE SUPREME COURT OF IOWA
Supreme Court No. 16–1998

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEYON DASHAWN HARRISON,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HON. PAUL SCOTT, JUDGE

APPELLEE'S BRIEF

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IV. Was Harrison's Trial Counsel Ineffective for Failing to Argue That *Heemstra* Requires Either Merger or Proof of Independent Assaultive Acts When Robbery Is Used as a Predicate Crime for Felony Murder?

Authorities

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ROUTING STATEMENT

This due process challenge to Iowa Code § 707.2(1)(b) is a candidate for retention because it presents "substantial questions of enunciating or changing legal principles." Iowa R. App. P. 6.1101(2)(f). Establishing the outer boundaries of this Court's juvenile sentencing jurisprudence is just as important as extending novel protections—and this argument will be raised by every juvenile convicted on a felony-murder theory until this Court resolves the issue with finality.

Retention is also appropriate for cases that present issues of broad public importance. *See* Iowa R. App. P. 6.1101(2)(d). Amici have already weighed in, asserting interests in justice for juvenile offenders. Moreover, the public has an interest in swiftly resolving constitutional challenges to statutes defining murder—if section 707.2(1)(b) is truly unconstitutional as applied to juveniles, the legislature must be told immediately so they can enact a statute that remedies the problem without delay. The Iowa Supreme Court should resolve the issue as soon as possible to provide essential guidance and minimize harms and costs. Thus, the State joins in Harrison's request for retention. *See* Def's Br. at 1.

STATEMENT OF THE CASE

Nature of the Case:

On November 7, 2014, defendant Keyon Dashawn Harrison and Keith Collins lured Aaron McHenry into a driveway, purportedly to purchase marijuana from him. One of them shot McHenry to death, and they made off with McHenry's marijuana. Harrison and Collins were tried separately, and Harrison was found guilty of first-degree murder by killing McHenry while participating in a forcible felony, a Class A felony, in violation of Iowa Code § 707.2(1)(b) (2016).

Harrison was 17 years old when he committed this offense, so he was sentenced to life in prison with immediate parole eligibility. *See* Sent.Tr. p.43,ln.17–p.45,ln.24; Iowa Code § 902.1(2)(a)(3).

Harrison now appeals, arguing: (1) it is fundamentally unfair to convict any juvenile for felony murder; (2) his life sentence is cruel and unusual punishment, both categorically and as applied to him; (3) the jury instructions failed to instruct the jury that he could not be found guilty of felony murder based on participation in third-degree robbery, which is an aggravated misdemeanor; (4) robbery cannot qualify as a predicate crime for felony murder under *Heemstra*; and (5) his counsel was ineffective for failing to object to certain evidence.

Course of Proceedings:

The State generally accepts Harrison's recitation of the relevant course of proceedings. *See* Iowa R. App. P. 6.903(3).

Statement of Facts:

On November 7, 2014, Jorge Gutierrez left his house to chase a wayward Chihuahua, who had run across the street. *See* TrialTr.V2 p.6,ln.9–p.8,ln.12. He saw a black male sitting on a retaining wall on Hickman Lane, near 26th Street. *See* TrialTr.V2 p.8,ln.13–p.11,ln.25. Gutierrez also saw "another black male and a white male," walking up 26th Street towards Hickman; they started walking faster, and then "started to, like, push each other." *See* TrialTr.V2 p.9,ln.24–p.10,ln.6; TrialTr.V2 p.12,ln.15–p.14,ln.1; *cf.* TrialTr.V2 p.31,ln.20–p.34,ln.4. Gutierrez was "minding [his] own business," so he went back inside with his dog—but then, he heard a series of gunshots. *See* TrialTr.V2 p.14,ln.2– p.15,ln.4. When he turned back around, Gutierrez saw the white male lying on the ground. *See* TrialTr.V2 p.15,ln.5–22. He also saw the two black males run from the scene together, up 26th Street and away from Hickman Road. *See* TrialTr.V2 p.15,ln.23–p.16,ln.8.

Robin Bowen lived in the neighborhood, and she looked out her window when she heard gunshots. She saw a "young black man" at

that location, and "saw him look at the ground and then he turned around and ran north on 26th." *See* TrialTr.V1 p.24,ln.8–p.28,ln.4.

Patricia DePatten lived nearby, and also heard the gunshots. *See* TrialTr.V1 p.78,ln.10–p.81,ln.1. She looked outside and saw "two teenage boys. One was speed-walking and one was running." *See* TrialTr.V1 p.81,ln.2–7. The runner was a skinnier black male who was wearing "a hoodie and khakis." *See* TrialTr.V1 p.81,ln.8–p.82,ln.14. The speed-walker was a similarly dressed black male who Patricia thought she recognized as someone who went to school with her. *See* TrialTr.V1 p.82,ln.15–p.86,ln.18. Both of them "looked scared"—they both seemed to be running from the same direction but had split up. *See* TrialTr.V1 p.86,ln.19–p.87,ln.2. Patricia's father, Robert DePatten, described similar observations. *See* TrialTr.V1 p.99,ln.7–p.102,ln.22.

Shirley Dick[1] lived on Hickman Lane, *See* Ct.Ex.C p.1,ln.6–p.2,ln.25. Shirley went outside to put her dogs out at 4:23 p.m. *See* Ct.Ex.C p.5,ln.2–21. She saw an individual (later identified as Collins)

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[1] Shirley Dick had testified at Collins' trial, but she passed away before Harrison's trial. *See* TrialTr.V1 p.23,ln.11–25. Both parties agreed to have Shirley's testimony read into the record at Harrison's trial and admitted as Court's Exhibit C. *See* TrialTr.V1 p.193,ln.4–p.194,ln.11; TrialTr.V3 p.52,ln.4–18. The State's citations will treat the first page of Shirley's testimony (page 350 of volume III of the transcript from Collins' trial) as the first page of Court's Exhibit C.

walking up Hickman Lane. *See* Ct.Ex.C p.5,ln.22–p.7,ln.2; *cf.* Ct.Ex.C p.8,ln.2–11; Ct.Ex.C p.372,ln.21–p.374,ln.9. Collins heard Shirley's dog barking and stopped in his tracks, which prompted this conversation:

> I am like, She's not going to bite you, don't worry about it. She's okay. She will not bite you. . . .
>
> I said, Can I help you with anything, sweetie? He said he is waiting for his girlfriend.
>
> I said, Your girlfriend? There is no girl that lives anywhere near here. There is no kids your age that live this way. And as I told him that, he turned away from me to the right and pulled his hoodie up and then I'm like okay. He didn't say anything else to me. He sat on the railroad ties right in front of Ron and Robin's house and I started to walk back with [my dog] after [Gutierrez's] dog across the street got out.

See Ct.Ex.C p.7,ln.3–p.8,ln.1; *see also* Ct.Ex.C p.8,ln.15–p.9,ln.20; Ct.Ex.C p.11,ln.15–p.14,ln.10. Shirley turned around and walked back towards her house—but she turned around when she heard gunshots:

> I turn around. He's running underneath the bushes at Mark and Connie's house which is right across from Ron and Robin's, and as he did so he slid on his stomach, turned back around and went back towards what I . . . didn't know was a body at the time because as I turned around and I seen the kid falling, the kid that got shot, I really did kind of — it was really fast as it happened. . . .
>
> When I turned back around, he was on his belly but he grabbed ahold of his footing and went back towards the body in the alley which would be in front of Ron and Robin's. . . .
>
> I seen him lean down and then he just took off so of course I am going to run back to the house with the dog and grab the phone.

See Ct.Ex.C p.16,ln.6–p.19,ln.25. Collins was "maybe five feet" from McHenry when Shirley turned around; Shirley did not see Harrison or anyone else in the area. *See* Ct.Ex.C p.18,ln.4–10. Shirley called 911 and reported that someone had been shot; she said the shooter was a "black kid" wearing "tan pants" and "a black hoodie," who had been sitting on the retaining wall earlier. *See* State's Ex. 24.

Officers who responded to Shirley's 911 call found McHenry laying on the ground. *See* TrialTr.V1 p.10,ln.23–p.15,ln.13; State's Ex. 7–9; App. 110–12. One bullet had hit him "in the corner of the right eye" and exited near his right ear; that gunshot wound showed "stippling," which is "an indicator of a close-contact wound, gunshot wound." *See* TrialTr.V1 p.132,ln.4–p.133,ln.5; TrialTr.V2 p.118,ln.23–p.121,ln.19; State's Ex. 9; App. 112; State's Ex. 90; App. 140. The gunshot wound to McHenry's upper back also indicated that McHenry was positioned "close to the muzzle" when he was shot. *See* TrialTr.V1 p.168,ln.14–p.169,ln.13; TrialTr.V2 p.121,ln.20–p.124,ln.4; State's Ex. 91–92; App. 141–42. McHenry had been hit in the head and torso by multiple .45 caliber bullets fired from multiple angles. *See* TrialTr.V1 p.170,ln.6–p.173,ln.2; TrialTr.V2 p.121,ln.2–8; TrialTr.V2 p.134,ln.22–p.135,ln.7; State's Ex. 102–03; App. 143–44.

Two nearby homeowners had security camera footage that showed a black male running away from the scene of the crime; they each turned their videos over to the police. *See* TrialTr.V1 p.16,ln.19–p.18,ln.11; TrialTr.V1 p.189,ln.3–21; TrialTr.V2 p.47,ln.17–p.48,ln.22; State's Ex. 56–57; *cf.* State's Ex. 2; App. 109.

Messages between Collins and McHenry indicated that Collins initially wanted McHenry to meet him at an Oasis store. *See* State's Ex. 46; App. 134. Video from security cameras at that Oasis showed Collins and Harrison were there at about 3:36 p.m. *See* TrialTr.V3 p.23,ln.5–23; TrialTr.V3 p.35,ln.6–p.36,ln.13; State's Ex. 54.

McHenry shared a phone with his friend Jonathan Olson. *See* TrialTr.V1 p.44,ln.10–p.47,ln.6. On November 7, McHenry received a text message on that phone from Collins, looking to buy marijuana; they agreed to meet up at 4:20 p.m. at the Family Dollar, which was near Hickman and 26th Street. *See* TrialTr.V1 p.48,ln.18–p.54,ln.2; TrialTr.V1 p.179,ln.15–p.181,ln.2; TrialTr.V2 p.49,ln.23–p.55,ln.1; TrialTr.V3 p.12,ln.20–p.15,ln.17; State's Ex. 20; App. 114; State's Ex. 25–34; App. 115–24. Those phones had exchanged a number of calls and messages around 4:20 p.m.—just before McHenry was killed. *See* TrialTr.V1 p.178,ln.17–p.179,ln.14; State's Ex. 35–37; App. 125–27.

After McHenry was killed, investigators found some loose marijuana in his pocket—he was no longer carrying anything packaged for sale, nor was he carrying any cash. *See* TrialTr.V1 p.133,ln.6–21; TrialTr.V1 p.160,ln.19–p.161,ln.16; TrialTr.V2 p.63,ln.10–p.64,ln.8; TrialTr.V3 p.11,ln.13–p.12,ln.8 State's Ex. 19–20; App. 113–14.

Andrea Jackson was Harrison's girlfriend at the time. *See* TrialTr.V2 p.81,ln.23–p.83,ln.16; TrialTr.V2 p.85,ln.14–20. She said Harrison had a cell phone, but it did not work without wi-fi—so he frequently used Collins' phone. *See* TrialTr.V2 p.84,ln.13–p.85,ln.13. On November 7, Andrea was at home when Harrison contacted her and asked her to "meet up with him at Broadlawns." *See* TrialTr.V2 p.85,ln.21–p.87,ln.22. Andrea and her cousin Aasyeyah Terry walked to Broadlawns and met Harrison, who was with Collins. *See* TrialTr.V2 p.88,ln.12–p.89,ln.10. Collins went inside; "[h]is hand looked like it was messed up," and "[h]e was holding his hand when he was walking in the hospital." *See* TrialTr.V2 p.89,ln.11–20. Andrea, Aasyeyah, and Harrison waited for Collins. *See* TrialTr.V2 p.89,ln.21–p.91,ln.18. They left the hospital together to walk to Andrea's house—but they stopped at a store so that Collins and Harrison could buy blunt wraps for smoking marijuana. *See* TrialTr.V2 p.91,ln.19–p.92,ln.15. Andrea

saw Harrison holding "two bags of marijuana in his hands," and the marijuana inside was "like baseball size." *See* TrialTr.V2 p.92,ln.19–p.93,ln.5; TrialTr.V2 p.110,ln.16–p.112,ln.7. When they arrived at Andrea's house, Collins and Harrison smoked marijuana together, then hung out with Andrea and Aasyeyah. *See* TrialTr.V2 p.93,ln.8–p.95,ln.1. After a while, Collins and Harrison called someone for a ride and left. *See* TrialTr.V2 p.95,ln.2–15. Andrea confirmed that video from Broadlawns showed Collins and Harrison entering the hospital together; the video was time-stamped to show that happened around 5:56 p.m. *See* TrialTr.V2 p.97,ln.20–p.99,ln.25; State's Ex. 58.

Aasyeyah Terry[2] testified to a similar series of events. *See* Ct.Ex.B p.5,ln.18–p.15,ln.10; Ct.Ex.B p.17,ln.5–p.18,ln.2. At about 4:13 p.m. on November 7, Collins had sent her a text message that said he was not going to Andrea's house because he was hanging out with his cousin. *See* Ct.Ex.B p.18,ln.19–p.20,ln.7; State's Ex. 45 at 3; App. 130. She also confirmed that Andrea was known to call Collins to get ahold of Harrison. *See* Ct.Ex.B p.27,ln.24–p.29,ln.4.

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[2] Aasyeyah was in Spain during trial; the parties had originally agreed to play a video recording of Aasyeyah's perpetuated testimony, but there were technical difficulties. Instead, the parties agreed to have her testimony read to the jury and admitted as Court's Exhibit B. *See* TrialTr.V2 p.135,ln.20–p.136,ln.20; TrialTr.V2 p.191,ln.3–14; TrialTr.V3 p.52,ln.4–18; Ct.Ex.B p.4,ln.18–p.5,ln.6.

About 12 hours after the robbery, officers executed a search of Collins' residence pursuant to a warrant. *See* TrialTr.V1 p.120,ln.8–p.121,ln.13; TrialTr.V1 p.138,ln.8–p.140,ln.25. Apart from Collins and his family, the only other person in Collins' residence was Harrison. *See* TrialTr.V1 p.123,ln.3–15; TrialTr.V1 p.141,ln.1–15. Collins had marijuana in his backpack. *See* TrialTr.V2 p.57,ln.6–p.58,ln.20; State's Ex. 73–75; App. 137–39. Harrison was carrying marijuana on his person. *See* TrialTr.V2 p.40,ln.6–p.43,ln.14. Both of them possessed precisely equal amounts of marijuana in identical packages, and a digital scale with marijuana residue was found in the residence as well. *See* TrialTr.V1 p.122,ln.2–17; TrialTr.V1 p.191,ln.11–p.192,ln.14; TrialTr.V2 p.58,ln.21–p.61,ln.10; State's Ex. 79–81; 132–33; App. 145.

Collins also had photographs of a ".45 caliber Hi-Point pistol" on his phone, which was the same type of weapon that fired the shots that killed McHenry. *See* TrialTr.V2 p.180,ln.12–p.181,ln.8; TrialTr.V2 p.188,ln.19–p.189,ln.13; State's Ex. 48–51.

Collins had McHenry's phone number listed in his phone, under the name "Lick." *See* State's Ex. 45–46; App. 128–34; State's Ex. 52; App. 135. A "lick" or "hitting a lick" is a slang term for a robbery. *See* TrialTr.V1 p.131,ln.11–17; TrialTr.V2 p.64,ln.17–23; TrialTr.V2

p.73,ln.10–19. During a recorded interview with Detective Youngblut, after being *Mirandized* and in the presence of his mother, Harrison told a number of lies about his whereabouts during the killing. *See* TrialTr.V3 p.26,ln.21–p.31,ln.23; State's Ex. 147; *see also* TrialTr.V3 p.93,ln.4–17. Later, when Detective Youngblut left the interview room, Harrison's mother asked Harrison to stop lying and tell her the truth—which prompted him to say this:

> Alright mama. Look, look. We was walking, [Collins]'s like, "I got a lick." I'm like, "Bro, no, bro, you're not going to do it." He's like, "Bro, I've got a lick. I need it. I need to go to Chicago." He's like — because he's trying to go to Chicago or whatever with his mom. He's like, "Bro, I need it." So I'm like, "Bro, you can hit that lick but bro, I'm just going to stay on the side." So we walking down, we walking down the street and then he was . . .

See TrialTr.V3 p.31,ln.24–p.33,ln.6; State's Ex. 146. At that point, Harrison's mother told him to stop talking because she knew that everything they said was being recorded. *See* TrialTr.V3 p.33,ln.7–11.

Comparison of the various videos showed that Collins had changed from loose sweatpants to khakis just before the shooting. *See* TrialTr.V3 p.40,ln.25–p.41,ln.21. Detective Youngblut noted that made sense—it would have been "extremely difficult to conceal a .45 caliber handgun in sweatpants." *See* TrialTr.V3 p.41,ln.22–p.42,ln.2.

Additional facts will be discussed when necessary.

ARGUMENT

I. It Is Not Fundamentally Unfair to Convict a Juvenile for Committing Felony Murder.

Preservation of Error

Harrison argues error was preserved when he challenged the inclusion of a felony-murder theory in the jury instructions. *See* Def's Br. at 7; TrialTr.V4 p.11,ln.13–p.30,ln.1. But Harrison's due process argument should have been raised before trial under Rule 2.11(2). "Requiring objections at the earliest possible time gives the district court the opportunity 'to take any necessary corrective action at a time when correction is still possible.'" *See State v. McCright*, 569 N.W.2d 605, 608 (Iowa 1997) (quoting *State v. Johnson*, 476 N.W.2d 330, 334 (Iowa 1991)). Here, this challenge was not raised until *after* the State had presented its entire case on a felony-murder theory. Indeed, when this argument was first raised, the trial court was unsure of how it could rule "in any sort of meaningful way at all," given "the complexity of the issue" and the current stage of the trial. *See* TrialTr.V4 p.24,ln.18–25.

"In order to preserve any alleged error in a ruling on the constitutionality of a statute, the party challenging the statute must do so at the earliest available opportunity in the progress of the case."

State v. Pelelo, 247 N.W.2d 221, 225–26 (Iowa 1976). Here, Harrison could have attacked the constitutionality of charging a juvenile with felony murder as a defect in the information, under Rule 2.11(2)(b). Just like in *State v. Ritchison*, Harrison's failure to do so *before* trial precludes him from ambushing the court with this claim *during* trial.

> The information in the present case was filed October 29, 1970. . . . Trial commenced May 1, 1972. In the months that intervened defendant made no attack on the constitutionality of this statute until motion for directed verdict at the close of all evidence.
>
> It does not seem logical that a party can sit idly by for such a period, permit the State to introduce all its evidence and then for the first time at the conclusion of the evidence challenge the statute as constitutionally defective. It cannot be said that this point was the earliest available opportunity in the progress of the case to make the challenge.
>
> We therefore hold defendant failed to preserve any error for review under this assignment.

State v. Ritchison, 223 N.W.2d 207, 214 (Iowa 1974); *see also* Iowa R. Crim. P. 2.11(3) (noting that "[f]ailure of the defendant to timely raise defenses or objections" that "must be made prior to trial under this rule shall constitute waiver thereof"). Harrison sandbagged this argument from June 10, 2015 until October 10, 2016, planning to ambush the trial court with it for "strategic reasons." *See* TrialTr.V4 p.24,ln.15–25; Trial Information (6/10/15); App. 1. This Court should never reward such tactics; it should hold error was not preserved for this argument.

Standard of Review

Harrison is asserting a due process violation. Review is de novo. *See State v. Nail*, 743 N.W.2d 535, 538–39 (Iowa 2007).

Merits

Harrison's due process argument is flawed on multiple levels.

A. Juvenile defendants must be treated differently when imposing punishment. That does not create any right to trial under different substantive rules defining criminal offenses or burdens of proof.

Harrison and amici both summarize recent developments in juvenile sentencing jurisprudence. *See* Def's Br. at 9–11, 15–16; Amici Br. at 19–35. None of those cases imply that the Eighth Amendment or Article I, Section 17 of the Iowa Constutiton could require Iowa courts to redefine the enumerated elements of an offense in a juvenile's favor.

Harrison's culpability for his participation in this murder *was* diminished by his juvenile status during the offense. Accordingly, he was sentenced to life in prison with immediate parole eligibility—not the harsh LWOP sentence that an adult offender would have received. *See* Sent.Tr. p.43,ln.17–p.45,ln.24. But Harrison's young age does not change the fact that he aided and abetted a killing that occurred while he participated in a forcible felony—and the legislature has decided that qualifies as first-degree murder. *See* Iowa Code § 707.2(1)(b).

The legislature is not required to ignore the obvious gravity of these offenses in defining them. Nor are courts permitted to rewrite the legislature's definitions for these offenses—even for juveniles.

> Clearly the State has a legitimate interest in holding persons responsible for their criminal acts. When those acts are particularly serious, as in the case of forcible felonies, it is logical that the State would assign grave consequences to them. . . . "Having placed certain designated crimes committed by juveniles who have reached the age of sixteen within the criminal court jurisdiction, the legislature presumably thought the need for adult discipline and legal restraint was necessary in these cases."

State v. Mann, 602 N.W.2d 785, 792–93 (Iowa 1999) (quoting *State v. Terry*, 569 N.W.2d 364, 367 (Iowa 1997)); *see also Sen v. State*, 301 P.3d 106, 118–20 (Wyo. 2013) (rejecting argument that juvenile defendant was entitled to present an infancy defense to felony murder because "[w]hen the decision has been made to try a juvenile in criminal court, he is subject to the same legal rules that apply to adult criminal defendants in his position").

None of the arguments presented by Harrison or amici can clear this hurdle—neither brief presents an articulable rationale for moving beyond recognition that juveniles should be *sentenced* differently and into unexplored territory where juveniles could not be *tried* for crimes with certain mens rea requirements. This challenge is nonsensical.

B. Felony murder is not premised on the offender's ability to *foresee* danger. It is premised on the *inherent* dangerousness of forcible felonies.

Both Harrison and amici start from the misconception that felony murder treats killings during participation in forcible felonies as first-degree murder simply because such killings are foreseeable. *See* Def's Br. at 15–16; Amici Br. at 13–19. While such killings may be forseeable as a result of the predicate felony, they also might *not* be—and in those cases, felony-murder liability still attaches normally.

> The fact that killing was not within the actual contemplation and intention of one of the parties to the robbery does not relieve such person of the responsibility as long as the other party to the robbery had the necessary *mens rea* and the act was a consequence of carrying out the unlawful common design.

Conner v. State, 362 N.W.2d 449, 455 (Iowa 1985). Foreseeability would matter if the State charged a vicarious liability theory that involved joint criminal conduct. *See* Iowa Code § 703.2. However, Harrison was only charged as a principal and as an aider and abettor. *See* Jury Instr. 21; App. 73. This theory involves its own mens rea requirements, which will be discussed later; for now, it is sufficient to note that "foreseeability" is immaterial to the felony murder statute and to Harrison's conviction. *See* Jury Instr. 17; App. 69 ("[M]ere knowledge of the crime is not enough to prove 'aiding and abetting'.").

"The rationale of the felony-murder rule is that certain crimes are so inherently dangerous that proof of participating in these crimes may obviate the need for showing all of the elements normally required for first-degree murder." *State v. Heemstra*, 721 N.W.2d 549, 554 (Iowa 2006). It would be incorrect to call this "strict liability," because the State must establish malice aforethought under applicable principal/accomplice liability frameworks *and* the requisite mens rea to prove participation in the predicate felony. *See* Jury Instr. 17, 21–22; App. 69, 73–74; *cf. State v. Ragland*, 420 N.W.2d 791, 794 (Iowa 1988) (citing *State v. Oliver*, 341 N.W.2d 744, 747 (Iowa 1983)), *overruled on other grounds by Heemstra*, 721 N.W.2d 549 ("[N]ot all killings which occur during designated felonies are first-degree murder. Rather, only *murders* which occur during designated felonies are first-degree murder. Under our statute the difference between killing and murder is malice aforethought. If the State does not prove this malice there can be no finding of murder."). Harrison could (and did) contest the State's proof of each of those required elements at trial—but it did not matter what was foreseeable to Harrison or to *anybody* in this situation, because armed robbery is so inherently dangerous that *any* participation entails an obvious risk that someone might die.

Iowa cases on felony murder have adopted this principle. *E.g.*, *State v. Heaivilin*, No. 99–2005, 2002 WL 22297, at *4 (Iowa Ct. App. Jan. 9, 2002) (citing *Conner*, 362 N.W.2d at 455) ("It is immaterial whether the killing was in the *contemplation* or intention of the defendant."). Cases from other jurisdictions generally concur. *See, e.g.*, *People v. Lowery*, 687 N.E.2d 973, 978 (Ill. 1997) ("It is unimportant that defendant did not anticipate the precise sequence of events that followed his robbery attempt."); *People v. Brackett*, 510 N.E.2d 877, 882 (Ill. 1987) ("There are often cases in which the precise manner of death will not be foreseeable to the defendant while he is committing a felony. This does not relieve the defendant of responsibility. . . . We hold here that the defendant did not have to foresee that this victim would die from asphyxiation in order to be guilty of felony murder."); *Eads v. State*, 577 N.E.2d 584, 587 (Ind. 1991) ("The fact that appellant did not shoot the victim and claims that he did not foresee or intend that the shooting would occur does not relieve him of liability under the felony murder doctrine."); *State v. Gleason*, 88 P.3d 218, 229–30 (Kan. 2004) ("[W]here the underlying felony is one inherently dangerous to human life, such as a burglary, the foreseeability requirement is established as a matter of law.").

Harrison and amici maintain that juveniles cannot foresee the clear risks of armed robbery (or can foresee them, but disregard them) and claim this invalidates felony murder as applied to juveniles. *See* Def's Br. at 9–11, 14–16; Amici Br. at 24–35. Even assuming the truth of every claim about juveniles' developmental/psychological capacity, it would not matter here. California's appellate courts would concur:

> Richardson first contends his conviction violates the due process clause of the Fourteenth Amendment because it depended upon the application of the natural and probable consequences doctrine. In Richardson's view, the natural and probable consequences doctrine improperly infers that the intent of a 16–year–old defendant can meet the same objective standard of that of a normal adult, when in fact a minor's neurological capacity is less. . . . He contends that as a minor, he was too young to have been able to foresee that "a robbery is likely to become a killing" and thus was unable to understand the possible consequences of his actions. . . .
>
> Richardson's claimed inability to foresee the natural and probable consequences of his actions also makes no difference, because first degree felony murder encompasses crimes that are "wholly unforeseeable." Where, as in this case, the killing occurred during the course of an independent felony (robbery), Richardson's participation in the commission of that crime made him liable for the murder committed during the course of the robbery, even if the killing was not a natural, reasonable, or probable consequence of that crime.

People v. Richardson, No. A134783, 2013 WL 2432510, at *3, 5 (Cal. Ct. App. June 4, 2013) (quoting *People v. Dillon*, 34 Cal.Rptr.3d 441, 477 (1983)). Foreseeability is simply not relevant to this conviction.

C. The jury found Harrison helped kill McHenry with malice aforethought or with knowledge that Collins acted with malice aforethought, and made similar findings on the specific intent for robbery.

Both Harrison and amici ignore the pivotal factual findings that the jury needed to make before convicting Harrison of felony murder. First and foremost, Harrison could not be convicted unless the jury found that he shot McHenry or aided and abetted someone who did—and to do that, he would have to "knowingly approve and agree to the [killing], either by active participation in it or by knowingly advising or encouraging the act in some way before or when it [was] committed." *See* Jury Instr. 17, 21; App. 69, 73. Then, the jury needed to find he acted with "a fixed purpose or design to do some physical harm," or that he knowingly aided and abetted someone in so acting. *See* Jury Instr. 17, 21–22; App. 69, 73–74. And, to find he participated in the underlying robbery, the jury needed to find that Harrison "either had the specific intent to commit a theft or 'aided and abetted' with the knowledge the other person who directly committed the crime had such specific intent"—along with the separate mens rea required to commit or aid/abet an assault to trigger liability for robbery. *See* Jury Instr. 17, 21, 26, 28; App. 69, 73, 78, 80. Thus, this conviction entailed specific findings of culpable mens rea and criminal actus reus.

Most importantly, the jury was told to focus on Harrison's contemporaneous participation in assessing his criminal liability:

> Conduct following the crime may be considered only as it may tend to prove the defendant's earlier participation. Mere nearness to, or presence at, the scene of the crime, without more evidence, is not "aiding and abetting". Likewise, mere knowledge of the crime is not enough to prove "aiding and abetting".
>
> The guilt of a person who knowingly aids and abets the commission of a crime must be determined only on the facts which show the part he has in it, and does not depend upon the degree of another person's guilt.

Jury Instr. 17; App. 69. Harrison's conviction was his and his alone.

These instructions are worth considering for two reasons. First, this shows Harrison's concern about "conclusive presumptions" is misplaced. *See* Def's Br. at 13–16. The jury found Harrison guilty of participating in and/or aiding and abetting the killing of McHenry, and heightened liability for felony murder only attached because the jury found Harrison intentionally participated in the predicate robbery (or knowingly aided and abetted someone else's participation, with the same specific intent). There was no conclusive presumption that imputed vicarious liability to Harrison for any act that Collins might have committed on his own. Harrison was only held accountable for *his own actions* accompanied by *his own knowledge/intent*—the jury made those findings without presumptively imputing vicarious liability.

Cf. Conner, 362 N.W.2d at 456 (holding that "[a]ccomplice liability is not akin to the evidentiary or procedural presumptions that are condemned in *Sandstrom*"). Second, to the extent that Harrison's youth-related incapacity could have raised doubts about whether he formed the culpable mentes reae specified in the jury instructions, Harrison should have raised that defense at trial. Indeed, Harrison's closing argument repeatedly leveraged his young age to argue that he did not expect Collins to brandish a firearm or shoot McHenry. *See* TrialTr.V4 p.75,ln.14–p.76,ln.14; TrialTr.V4 p.79,ln.5–16. Now, his present claim that *most* juveniles are unable to foresee the probable consequences of their actions is mooted by the jury's specific findings of fact: with regard to every single required element of felony murder, Harrison acted intentionally or knowingly aided and abetted Collins as Collins acted intentionally. Thus, even if Harrison and amici were entirely correct about the implications of the developmental research they cite, Harrison's claim would still be wholly meritless.

D. Juveniles can foresee the risks to human life that are inherently associated with armed robbery.

Harrison emphasizes that most juveniles have difficulty with "the anticipation of consequences and impulse control." *See* Def's Br. at 15–16 (quoting *State v. Null*, 836 N.W.2d 41, 55 (Iowa 2013)). This,

to Harrison and amici, renders it impossible to punish juveniles for any crimes predicated on foreseeability of adverse consequences. *See* Def's Br. at 14–16, 18–21; Amici Br. at 24–35. If foresight mattered in felony murder, youth-related issues in "anticipation of consequences" could support this argument—but difficulties with "impulse control" would *still* be irrelevant. The State submits that research and caselaw recognizes juveniles' diminished culpability arises from heightened "impetuousness and recklessness"—*not* because of broad intellectual deficiencies that would render them unable to foresee obvious risks. *See State v. Lyle*, 854 N.W.2d 378, 394 (Iowa 2014) (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)). Simply put, juveniles may lack perfectly reliable brakes, but they still have functioning headlights.

> Adolescents are just as likely as adults to know what's risky and what isn't, and no worse than adults at estimating whether doing something risky will lead to a bad consequence. Nor does it seem that adolescents are any worse than adults in how they make decisions. Studies of people's intellectual capabilities and their ability to reason logically show that by the time they're sixteen, teenagers are just as good at those things as adults. . . .
>
> [A]dolescent risk-taking is not just about the prefrontal cortex. Adolescents are far more sensitive to rewards than adults are — compared to life as an adolescent, life for an adult is like walking past a plate of warm chocolate-chip cookies with cotton in your nose, or running your fingers over an angora sweater with surgical gloves on. . . .

> This supersensitivity to rewards makes adolescents naturally more attentive to the good things that might arise from their risky behavior. In our research, when we ask people to rate risky activities in terms of how dangerous they are, or how likely they are to lead to negative consequences, we don't see big differences between teenagers and adults. Everyone agrees that things like driving drunk or venturing into a dangerous neighborhood are risky. The notion that adolescents take risks because they don't know any better is ludicrous.

LAURENCE STEINBERG, AGE OF OPPORTUNITY; LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 91–92 (2015). Juveniles do not lack capacity to foresee the probable results of their actions—they simply assign more weight to potential rewards than to attendant risks, for reasons related to both neurochemistry and psychosocial development. And while peer pressure matters, it does not supplant awareness of risks: "the recklessness-enhancing effect of being around peers is strongest when adolescents actually know that there is a high probability of something bad happening." *Id.* at 99. All in all, "[t]he adolescent who commits a crime is rarely so deficient in his decision-making capacity that he cannot comprehend the immediate harmful consequences of his choice or its wrongfulness, as might be true of a mentally disordered person or a young child." ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 131 (2008). The argument that juveniles are unable to foresee risks should be dismissed out of hand.

Amici claim juveniles are more likely to commit felony murder, and conclude they should not be punished for it. Amici Br. at 24–30. Certainly, "impulse control" arguments can mitigate some culpability (although they dramatically strengthen incapacitation/rehabilitation rationales for incarceration with parole eligibility). *See State v. Propps*, 897 N.W.2d 91, 102 (Iowa 2017). But those arguments do not touch the foresight straw-man that (in their view) animates felony murder. Even with that view of felony murder, offenders must be culpable for killings *they can foresee* during forcible felonies, regardless of how easy or difficult it might have been for them to make different choices.

Harrison and amici are fighting against an emerging consensus: juveniles are typically able to foresee risks associated with misconduct.

> Some theorists have tried to explain adolescents' greater affinity for risky activities in terms of deficiencies in the cognitive skills necessary to make good choices, but this proposition has not been supported empirically. Specifically, adolescents are no worse than adults at perceiving risk or estimating their vulnerability to it . . . , and increasing the salience of the risks associated with making a poor or potentially dangerous decision has comparable effects on adolescents and adults. Indeed, most studies find few, if any, differences between adolescents' and adults' evaluations of the risks inherent in a wide range of dangerous behaviors . . . . In other words, adolescents' greater involvement in risk taking, compared with adults', does not appear to stem from youthful ignorance, irrationality, delusions of invulnerability, or misperceptions of risk.

See Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEV. PSYCH. 193, 193–94 (2010) (citations omitted).[3] As a result, even

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[3] While it is not necessary to dispute "impulse control" claims to defeat the foresight-related argument raised by Harrison and amici, the State must caution this Court that researchers are increasingly disputing the prior "consensus" that adolescents take risks because of structural/neurological factors that handicap their impulse control.

> Recent theorizing and research regarding the neurodevelopment of the adolescent brain has generated considerable attention in both the popular media and the scientific literature. The most striking generalization stemming from this work is that the adolescent brain does not fully mature until at least age 25, with the implication that adolescent decision-making and judgment is similarly limited up to this age. This conclusion rests on research indicating that the myelination and pruning of the prefrontal cortex (PFC) continues into adulthood. . . . As a result, it is proposed that adolescents suffer from a structural as well as functional deficit . . . leading to less than "rational" behavior during adolescence. . . .
>
> In summary, our review of the evidence regarding structural differences in brain development suggest that the adolescent brain undergoes rapid change during this age period, but connections to maladaptive risk behavior depend on both individual differences and the type of risk taking. Evidence linking brain structure and function to risky behavior tends to be inconclusive . . . . Furthermore, cognitive control reaches maturity by early adulthood when sensation seeking is in decline but the adverse effects of risk taking begin to peak. Thus, the developmental imbalance that is suggested to be at the root of such adolescent risk taking is unlikely to explain this rather late appearance of developmental risk.

if foreseeability were the touchstone of felony murder, it would not be fundamentally unfair to hold juveniles accountable for such killings because they are not uniquely unable to foresee the potential risks and adverse consequences associated with participating in forcible felonies.

II. Harrison's Sentence of Incarceration for Life With Immediate Parole Eligibility Is Not Cruel or Unusual Punishment for Felony Murder, Even for a Juvenile.

Preservation of Error

A challenge to an illegal sentence evades error preservation and may be raised at any time. *See State v. Oliver*, 812 N.W.2d 636, 639 (Iowa 2012); *State v. Bruegger*, 773 N.W.2d 862, 871 (Iowa 2009).

Standard of Review

Rulings regarding the constitutionality of sentences and/or sentencing statutes are reviewed de novo. *Lyle*, 854 N.W.2d at 382.

Merits

Harrison was sentenced to life in prison with immediate parole eligibility. *See* Sent.Tr. p.43,ln.17–p.45,ln.24. Harrison raises both a categorical challenge and an as-applied challenge to this sentence.

See Daniel Romer et al., *Beyond Stereotypes of Adolescent Risk-Taking: Placing the Adolescent Brain in Developmental Context*, DEV. COG. NEURO. 474 (forthcoming 2017) at 4–6, 26–27, *available at* https://pdfs.semanticscholar.org/35f6/7faba3031f4a7a388533e69887e801e7817d.pdf. There is no such thing as *stare decisis* in science.

A. Harrison's categorical challenge fails to recognize that life-with-parole sentences for felony murder serve legitimate penological goals.

Categorical challenges involve two steps. First, "we look to whether there is a consensus, or at least an emerging consensus, to guide the court's consideration of the question. Second, we exercise our independent judgment to determine whether to follow a categorical approach." *See State v. Sweet*, 879 N.W.2d 811, 835 (Iowa 2016).

Harrison concedes there is no consensus against sentencing juvenile murderers to life in prison with immediate parole eligibility. *See* Def's Br. at 18. On this, he is correct. *See, e.g.*, *People v. Jordan*, No. D064010, 2016 WL 6996216, at *14 (Cal. Ct. App. Nov. 30, 2016) (noting California cases "have rejected arguments by juvenile offenders that a sentence for first degree murder violates the proportionality principle of the California Constitution even though the defendant was not the person who committed the killing, when the defendant knowingly participated in a serious crime that led to the murder"); *State v. Ali*, 855 N.W.2d 235, 258–59 (Minn. 2014) (confirming that juvenile convicted of felony murder could receive life sentences on remand and noting "[w]e have repeatedly affirmed consecutive life sentences for juveniles for the kinds of crimes that [he] committed").

Harrison claims a consensus exists among legal scholars, who "have specifically argued for the abolishment of the felony murder rule as applied to juveniles." *See* Def's Br. at 18. But scholarly criticism of felony murder as applied to juvenile offenders is generally premised on mandatory LWOP sentencing that accompanies a first-degree murder conviction in most jurisdictions. *See, e.g.*, Steven A. Drizin & Allison McGowen Keegan, *Abolishing the Use of the Felony-Murder Rule When the Defendant Is a Teenager*, 28 NOVA L. REV. 507, 536, 541 (2004) (arguing that "it is debatable as to whether we should ease the prosecution's burden for a crime that can carry the death penalty or life without possibility of parole, and especially debatable when child defendants are involved," and proposing that "children of all ages who are convicted of felony-murder should be exempted from the sentence of life without the possibility of parole"); Erin H. Flynn, Comment, *Dismantling the Felony-Murder Rule: Juvenile Deterrence and Retribution Post-Roper v. Simmons*, 156 U. PA. L. REV. 1049, 1065–68 (2008) (arguing that "[i]f convicted of a felony-murder charge, juveniles are often subject to corresponding mandatory sentencing laws that remove a judge's discretion to account for a juvenile offender's individual characteristics and his level of threat to public safety").

Recent developments in Iowa's juvenile sentencing jurisprudence have neutered those critiques—juvenile offenders are ineligible for LWOP, and individualized sentencing for juveniles is generally required. *See, e.g.*, Iowa Code § 902.1(2)–(3); *Sweet*, 879 N.W.2d at 835–39; *Lyle*, 854 N.W.2d at 398–04. Certainly, there is no consensus against Iowa's relatively lenient treatment of juvenile murderers—other than a clear consensus that such leniency should not be constitutionally required. *See, e.g.*, *Conley v. State*, 972 N.E.2d 864, 877–80 & n.3 (Ind. 2012); *State v. Houston*, 353 P.3d 55, 75–77 (Utah 2015).

On the second step, Harrison argues that traditional penological justifications for felony murder—deterrence and retribution—become "wholly improper when considering juveniles." *See* Def's Br. at 19–21. Harrison misses the whole point of Iowa's juvenile sentencing cases:

> Completely eliminating the mandatory imposition of a prison term, even when the term is indeterminate and the individual is immediately eligible for parole, would not serve the proportionality concept we have addressed in our previous juvenile sentencing cases. In those cases, we sought to eliminate the mandatory nature of mandatory minimums and sentences that were the functional equivalent of life without parole because those sentences did not offer juveniles a "meaningful opportunity" to demonstrate their rehabilitation before the parole board. Our goal was not to excuse the behavior of juveniles, but rather to impose punishment in a way that was consistent with the lesser culpability and greater capacity for change of juvenile offenders. . . .

> While juveniles may be more prone to reform and rehabilitation because of their age and the attendant characteristics of youth, they must also understand the severity of their actions. Harm to a victim is not lessened because of the young age of an offender, and "[t]he constitutional analysis is not about excusing juvenile behavior, but imposing punishment in a way that is consistent with our understanding of humanity today." Allowing a sentence of merely probation for forcible felonies may excuse the criminal behavior of the juvenile offender and disproportionately weigh this equation to only consider the age and culpability of the offender without the harm he or she caused to a victim.

Propps, 897 N.W.2d at 101–02 (quoting *Lyle*, 854 N.W.2d at 398). "[W]hile youth is a mitigating factor in sentencing, it is not an excuse." *Lyle*, 854 N.W.2d at 398 (quoting *Null*, 836 N.W.2d at 75). Retribution is still a legitimate penological goal that justifies harsh sentencing for juveniles who commit murder while participating in forcible felonies. *See Sweet*, 879 N.W.2d at 846 (Mansfield, J., dissenting) ("Society may want to punish a horrendous murder beyond the time necessary to rehabilitate the murderer."); *State v. Makuey*, No. 16–0162, 2017 WL 1735626, at *3 (Iowa Ct. App. May 3, 2017) ("Few, if any, criminal acts are more deserving of the maximum penalty that can be imposed than causing the death of another fellow human being."). Harrison's youth-related diminished culpability rules out LWOP, but it does not excuse his conduct or render retributive imperatives inapplicable.

Because of juveniles' diminished sensitivity to risks and/or potential adverse consequences, and because felony murder liability is not limited to foreseeable killings, deterrence is less relevant here. But incapacitation and rehabilitation take center stage, especially when Harrison claims that uncontrollable youth-related impulses led him to aid and abet this killing while participating in this armed robbery. *See* Def's Br. at 11, 20. The Iowa Constitution bars our courts from sentencing Harrison to LWOP based on as-yet-premature findings of "irretrievable corruption"—but Harrison's willing participation in this robbery-turned-killing shows his *present* dangerousness and demands indefinite incapacitation pending his maturation and rehabilitation. "Nothing that the [U.S.] Supreme Court has said in these cases" or that the Iowa Supreme Court has said in its divergent line of cases "suggests trial courts are not to consider protecting public safety in appropriate cases through imposition of significant prison terms." *Null*, 836 N.W.2d at 75. Accordingly, because there are legitimate penological justifications for this punishment *beyond* just retribution, this Court should refuse to override the legislature's judgment as to the proper absolute minimum punishment for juveniles convicted of felony murder, and it should reject Harrison's categorical challenge.

This categorical challenge is also foreclosed by *Louisell*, where the Iowa Supreme Court severed unconstitutional portions of the prior version of section 902.1. *See State v. Louisell*, 865 N.W.2d 590, 599–601 (Iowa 2015). After concluding that it was unconstitutional to sentence every juvenile convicted of a Class A felony to a life term with a 25-year mandatory minimum before parole eligibility, the court severed that unconstitutional provision from the sentencing statute—but it left the mandatory *indeterminate* life sentence intact, which meant it was not "constitutionally infirm." *See id.* Indeed, *Louisell* noted this was "consistent with prevailing constitutional principles for first-degree murder," and it rejected calls to vest sentencing courts with discretion to substitute a definite term-of-years sentence for the indefinite life sentence because doing so would have undermined "[t]he legislative purpose of prescribing the most severe sentences for offenders convicted of murder in the first degree—including juveniles." *See id.* at 600–01. Just like in *Louisell*, this Court should reject any claim that Article I, Section 17 requires that Harrison be sentenced to something more lenient than life in prison with immediate eligibility for parole. Thus, Harrison's categorical challenge is foreclosed by both legitimate penological goals and by *Louisell,* and it must be rejected.

B. Harrison's as-applied challenge does not attempt to grapple with the moral depravity of his actions.

Determining whether a sentence is grossly disproportionate to the defendant's crime requires application of the three-step test set out in *Solem v. Helm*, 463 U.S. 277, 290-92 (1983). The first step is to weigh the gravity of the offense and the harshness of the penalty to determine if they raise "an inference of gross disproportionality." *See Oliver*, 812 N.W.2d at 649–50. That step is a "threshold inquiry"—without an inference of gross disproportionality, "we need not proceed to steps two and three of the analysis, the intrajurisdictional and interjurisdictional comparisons." *Id.* at 653 (citing *Bruegger*, 773 N.W.2d at 873). Harrison cannot make this threshold showing.

The preliminary threshold analysis "involves a balancing of the gravity of the crime against the severity of the sentence." *Bruegger*, 773 N.W.2d at 873 (citing *Solem*, 463 U.S. at 291). This step of the *Solem* test proves fatal to almost all gross disproportionality claims—"it is rare that a sentence will be so grossly disproportionate to the crime as to satisfy the threshold inquiry and warrant further review." *Oliver*, 812 N.W.2d at 650 (citing *State v. Musser*, 712 N.W.2d 734, 749 (Iowa 2006); *see also Bruegger*, 773 N.W.2d at 873. Certainly, this will never happen when the crime leaves an innocent man dead.

Harrison claims his sentence fits into the *Bruegger* mold, where "defendants who commit acts of lesser culpability within the scope of broad criminal statutes carrying stiff penalties should be able to launch an as-applied cruel and unusual punishment challenge." *See* Def's Br. at 22 (quoting *Bruegger*, 773 N.W.2d at 884). But he cannot establish any "unusual combination of features that converge to generate a high risk of potential gross disproportionality" in this particular case. *See Bruegger*, 773 N.W.2d at 884. Felony murder is not broad enough to encompass "acts of lesser culpability"—in every felony murder case, participation in a forcible felony directly leads to a victim's death, and Harrison committed such a killing as a principal or aider and abettor. *See id.*; *see also* Jury Instr. 17, 21; App. 69, 73. And this case does not involve use of juvenile adjudications, prior convictions, or other sentencing enhancements. *See Bruegger*, 773 N.W.2d at 885. Harrison received the *minimum* permissible sentence for an unenhanced crime, at the intersection of the gravest possible harm to another, with malice aforethought, during participation in *another* forcible felony offense. Iowa courts have never sustained a gross disproportionality challenge to an indeterminate sentence for felony murder, and likely never will. *See, e.g.*, *State v. Rhode*, 503 N.W.2d 27, 41 (Iowa Ct. App. 1993).

Even if a juvenile convicted of felony murder could establish that his/her forcible felony was "inane juvenile schoolyard conduct," *Harrison's* forcible felony was "cold and calculated adult conduct" that warrants indefinite incarceration. *See Lyle*, 854 N.W.2d at 401. Harrison escorted his prey to where Collins was waiting, armed with a gun and ready to rob him. Harrison still disputes the inference that he knew Collins had a gun, but he *admitted* the plan was to rob McHenry. *See* State's Ex. 146. They could not have planned a robbery without some basis for believing they could credibly intimidate McHenry (especially when they had no way of knowing if *McHenry* was armed). And then, after Collins shot McHenry, Harrison accepted half of the ill-gotten gains and spent the remainder of the evening with Collins, apparently unperturbed by McHenry's death. TrialTr.V2 p.85,ln.21–p.95,ln.15; Ct.Ex.B p.5,ln.18–p.15,ln.10; Ct.Ex.B p.17,ln.5–p.18,ln.2. Harrison's present claim that he thought they would rob McHenry without a dangerous weapon deserves no more consideration than Harrison gave McHenry's family during his allocution at sentencing. *See* Sent.Tr. p.42,ln.6–24; *cf. State v. Knight*, 701 N.W.2d 83, 88 (Iowa 2005) ("[A] defendant's lack of remorse is highly pertinent to evaluating his need for rehabilitation and his likelihood of reoffending.").

"[T]he fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of legislatures, not courts.'" *Harmelin v. Michigan*, 501 U.S. 957, 998 (1991) (Kennedy, J., concurring) (quoting *Rummel v. Estelle*, 445 U.S. 263, 275–76 (1980)). Under Article I, Section 17 of the Iowa Constitution, courts "owe substantial deference to the penalties the legislature has established for various crimes." *See Oliver*, 812 N.W.2d at 650. Harrison has failed to overcome that deference to legislatively prescribed punishments; as such, he has failed to raise any tenable inference of gross disproportionality and his as-applied challenge to his sentence warrants no further analysis. *See id.* at 653 (citing *Bruegger*, 773 N.W.2d at 873).

Even if Harrison could advance to the intrajurisdictional and interjurisdictional analyses, his claim would fail. No felony murder in Iowa is punished more leniently than Harrison's, nor should one be. *See* Iowa Code §§ 707.2, 902.1; *cf. Makuey*, 2017 WL 1735626, at *3. And, as discussed above, there is no interjurisdictional consensus against sentencing juvenile murderers to life in prison with immediate parole eligibility. *See, e.g.*, *Conley*, 972 N.E.2d at 877–80 & n.3. Thus, this as-applied challenge can never establish gross disproportionality.

III. Harrison Was Not Entitled to a Jury Instruction to Eliminate Third-Degree Robbery as a Potential Predicate Felony.

Preservation of Error

Harrison's counsel did object to the felony murder instruction—but that objection exclusively concerned the "juveniles are different" argument in Division I. *See* TrialTr.V4 p.11,ln.13–p.30,ln.1. There was no specific objection to the jury instruction defining robbery, apart from the same "juveniles are different" objection raised before. *See* TrialTr.V4 p.31,ln.7–10. Harrison's counsel maintained this decision not to object at trial was deliberate. *See* Sent.Tr. p.22,ln.1–p.24,ln.13.

Harrison argues error was preserved when he raised this issue in his motion in arrest of judgment. *See* Def's Br. at 23 (citing Motion in Arrest of Judgment (11/17/16); App. 99). But that was too late to give the trial court an opportunity to correct the alleged error and submit a modified jury instruction. "[O]bjections to giving or failing to give jury instructions are waived on direct appeal if not raised before counsel's closing arguments." *State v. Fountain*, 786 N.W.2d 260, 262–63 (Iowa 2010). "[I]t is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider." *State v. Pearson*, 876 N.W.2d 200, 205

(Iowa 2016) (quoting *DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002)). And it would be "fundamentally unfair" if Harrison were permitted to "await the verdict, which might have acquitted him, before alerting the trial court of his complaint." *See State v. Jackson*, 397 N.W.2d 512, 514 (Iowa 1986). That is the type of "ambush" that Iowa's error preservation rules are intended to prevent. *See DeVoss*, 648 N.W.2d at 63; *see also State v. Traywick*, 468 N.W.2d 452, 455 (Iowa 1991) ("The defendant cannot await the jury verdict and then raise an issue of which he was aware from the beginning."). Error was not preserved for this claim; this Court should not consider it.

Harrison does not urge consideration of this issue under an ineffective-assistance rubric. He cannot do so for the first time in his reply brief. *See State v. Embree*, No. 14–0709, 2015 WL 9450466, at *8 n.1 (Iowa Ct. App. Dec. 23, 2015) (citing *State v. Carroll*, 767 N.W.2d 638, 644 (Iowa 2009)).

Standard of Review

"Alleged errors in the submission or refusal to submit jury instructions are reviewed for correction of errors at law." *State v. Tipton*, 897 N.W.2d 653, 694 (Iowa 2017) (citing *Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 707 (Iowa 2016)).

Merits

Harrison argues the jury should have been instructed that, if he only participated in a simple assault, then he committed third-degree robbery—which is a misdemeanor, and cannot support felony murder. *See* Def's Br. at 24–26. But third-degree robbery was codified in 2016, and did not exist when Harrison and Collins killed McHenry in 2014. *See* Iowa Code § 711.3A (2016).

Section 4.13 would apply if, prior to sentencing, the legislature reduced the applicable punishment for a crime Harrison committed. *See* Iowa Code § 4.13(2). But Harrison wants a robbery he committed in 2014 to be reclassified from a felony to a misdemeanor by a statute enacted in 2016. "[S]ection 4.13 is not that broad. It gives a defendant the benefit of a more lenient sentence; it does not require that the characterization of the crime of which he is convicted be changed." *State v. Chrisman*, 514 N.W.2d 57, 63 (Iowa 1994) (citing *State ex rel. Abrogast v. Mohn*, 260 S.E.2d 820, 823 (W. Va. 1979)). Harrison was not entitled to an instruction differentiating between felony robbery and misdemeanor robbery, because this crime was committed when all robberies were felonies and misdemeanor robbery did not exist. Criminal offenses are not subject to ex post facto recategorization.

Even if Harrison were entitled to such an instruction, he could not prevail on this claim. "Errors in jury instructions are presumed prejudicial unless the record affirmatively establishes there was no prejudice." *State v. Ambrose*, 861 N.W.2d 550, 554 (Iowa 2015) (quoting *Asher v. Ob–Gyn Specialists, P.C.*, 846 N.W.2d 492, 496 (Iowa 2014)). Here, the jury affirmatively found McHenry was shot to death during commission of a robbery, in which Harrison participated. *See* Jury Instr. 21; App. 73. The trial court agreed that any error was undoubtedly harmless "based on the fact that the facts of this case clearly showed a firearm was involved, that a shooting was involved," and that McHenry was killed. *See* Sent.Tr. p.30,ln.25–p.32,ln.3. There is no room to speculate that the jury might have viewed this as a robbery committed through a simple misdemeanor assault, given its other findings. *E.g.*, *State v. Seiler*, 342 N.W.2d 264, 268 (Iowa 1983) ("Because this jury could not have failed to find the intentional infliction of physical injury which would necessarily trigger a finding of first-degree burglary, the erroneous jury instruction did not constitute reversible error."). Thus, even if error were preserved on this claim and even if Harrison were entitled to such an instruction, there would still be no cause to vacate this conviction.

IV. Harrison's Trial Counsel Was Not Ineffective for Failing to Challenge the Use of Felony Robbery as a Predicate Felony Under *Heemstra*.

Preservation of Error

Again, Harrison's objection to the felony murder instruction exclusively concerned the "juveniles are different" argument. *See* TrialTr.V4 p.11,ln.13–p.30,ln.1. This *Heemstra* argument was also not present in Harrison's motion in arrest of judgment and was never ruled upon below; thus, error was not preserved. *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Harrison raises this claim under an ineffective-assistance rubric. *See* Def's Br. at 26. Iowa appellate courts are permitted to address these claims on direct appeal "when the record is sufficient to permit a ruling." *See State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005) (citing *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000)). The State believes the record is sufficient to resolve this purely legal claim.

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *Thorndike v. State*, 860 N.W.2d 316, 319 (Iowa 2015).

Merits

To establish ineffective assistance of counsel, "a defendant must typically show that (1) counsel failed to perform an essential duty and

(2) prejudice resulted." *State v. Keller*, 760 N.W.2d 451, 452 (Iowa 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Here, both elements start from the merits of Harrison's *Heemstra* argument—if that argument would have been meritorious, it might have foreclosed a first-degree murder conviction on a felony murder theory, and there would be no valid strategic reason for sandbagging it.

Heemstra's chief concern was that first-degree murder would engulf all malicious killings and eliminate second-degree murder if "willful injury causing death" automatically became felony murder. *See Heemstra*, 721 N.W.2d at 553–58. But that danger is not present when the predicate felony is "a different crime altogether, one that requires the showing of a different intent." *See State v. Tucker*, 810 N.W.2d 519, 522 (Iowa Ct. App. 2012). Robbery requires "intent to commit a theft" and requires that an assault be committed "to assist or further the commission of the intended theft or the person's escape from the scene thereof." *See* Iowa Code § 711.1(1). Thus, robbery is qualitatively different and does not implicate the "bootstrapping" concerns identified in *Heemstra* that ultimately required merger.

Indeed, *Heemstra* quoted authorities that specifically identified robbery as an independent felony that was not subject to merger. *See*

Heemstra, 721 N.W.2d at 556 (quoting *Commw. v. Quigley*, 462 N.E.2d 92, 95 (Mass. 1984)) (noting "rape, arson, robbery and burglary are sufficiently independent of the homicide" to support felony murder); *id.* at 558 (quoting *People v. Moran*, 158 N.E. 35, 36 (N.Y. 1927)) ("The felony that eliminates the quality of the intent must be one that is independent of the homicide and of the assault merged therein, as, e.g., robbery or larceny or burglary or rape."). *Heemstra* understood robbery as an "inherently dangerous" crime and expressly endorsed its use as a predicate for felony murder.

The Iowa Court of Appeals has thrice rejected similar claims that counsel was ineffective for not arguing for *Heemstra*-type merger in felony murder cases where the predicate felony was a robbery.

> We cannot rule out the possibility our supreme court might ultimately extend the merger rule for felony murder to the predicate felony of robbery. But it has not done so yet. Accordingly, we reject Pollard's argument that his attorney provided subpar representation by not objecting to robbery as the underlying felony.

State v. Pollard, No. 13–1255, 2015 WL 405835, at *1 (Iowa Ct. App. Jan. 28, 2015); *see also State v. Morris*, No. 14–1780, 2016 WL 3269518, at *8–10 (Iowa Ct. App. June 15, 2016); *State v. McCoy*, No. 14–0918, 2016 WL 3269458, at *4–7 (Iowa Ct. App. June 15, 2016).

Harrison recognizes those cases, but argues "[t]his case presents the exact reason why [an extended rule] must be implemented." *See* Def's Br. at 29. But his only argument is that "the only assault that occurred was the gunshot wounds." *See* Def's Br. at 30. This does not provide any intelligible basis for distinguishing the key holdings from *Pollard*, *Morris*, or *McCoy*—all three rejected Harrison's argument *before* noting *Tribble* provided independent grounds to affirm. *See Morris*, 2016 WL 3269518, at *10; *McCoy*, 2016 WL 3269458, at *7; *Pollard*, 2015 WL 405835, at *5. That negates any real possibility of prejudice, and it also precludes breach—this exact claim had already been rejected three times (and had not been taken for further review). Declining to bet on a claim with a 0–3 record is not a breach of duty.

Moreover, Harrison's argues *Tribble* could not apply because the State stated, in its closing argument, that "the only assault that occurred was the gunshot wounds." *See* Def's Br. at 29–31 (citing TrialTr.V4 p.47,ln.20–p.49,ln.3). That is not quite correct; the State argued a robbery occurred whenever there was "a shooting to further the commission of a theft," but never argued this was the *only* assault. *See* TrialTr.V4 p.47,ln.20–p.49,ln.3. This matters for prejudice—if Harrison had argued for extension of *Heemstra*, and if the judge had

submitted jury instructions requiring the State to show an additional "independent assaultive act" under *Tribble* and *Millbrook*, then the State's argument would have adapted to meet its new burden of proof; it might have emphasized circumstantial proof that Harrison fought with McHenry while Collins took aim and fired from behind him. *See* TrialTr.V4 p.61,ln.1–14; *see also* TrialTr.V2 p.13,ln.9–p.15,ln.11; State's Ex. 92, 104; App. 142. ---. Or the State might have argued that firing the *first* bullet was the first assaultive act that established felonious robbery, and each subsequent shot fired was an additional assaultive act that could establish felony murder under *Tribble*. *See State v. Tribble*, 790 N.W.2d 121, 129 (Iowa 2010) (holding *Heemstra* does not require merger if "two independent [assaultive] acts both contribute to the death of the victim").[4] In any event, Harrison cannot simply assert prejudice from a *Heemstra* violation in the face of strong evidence that McHenry was shoved and shot multiple times.

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[4] "Unit of prosecution" cases have no applicability in this context, because an ongoing/continuous act becomes *qualitatively* different when it causes death. *Pollard*, 2015 WL 405835, at *5 n.1 (rejecting claim that "the victim's death resulted from one continuous struggle without any break in the action to support two distinct assaults," and noting: "we do not find any directives in *Velez* or *Ross* that would undermine the analysis from *Tribble*"). Even so, the State would have the opportunity to request the jury be properly instructed on how to decide if mutiple assaults were separate acts. *See State v. Love*, 856 N.W.2d 721, 725–28 (Iowa 2015) (Mansfield, J., concurring specially).

Even if this *Heemstra* claim had merit, there would still be no reasonable probability that Harrison could establish that this entire robbery-turned-killing involved only one assaultive act. Thus, even if there was a breach, Harrison cannot establish it was prejudicial.

V. Harrison's Trial Counsel Was Not Ineffective for Permitting Testimony About Collins' Conviction for First-Degree Murder or for Stipulating to Admission of Shirley Dick's Testimony from Collins' Trial.

Preservation of Error

Again, this is an ineffective-assistance claim. *See* Def's Br. at 32. Iowa appellate courts are permitted to address these claims on direct appeal "when the record is sufficient to permit a ruling." *See Wills*, 696 N.W.2d at 22 (citing *Artzer*, 609 N.W.2d at 531). The State believes this record is sufficient to establish that these decisions were reasonable trial strategy, as contemporaneously noted by trial counsel.

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *Thorndike*, 860 N.W.2d at 319.

Merits

To establish ineffective assistance of counsel, "a defendant must typically show that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *Keller*, 760 N.W.2d at 452 (citing *Strickland*,

466 U.S. at 687). Failure to prove a single element is fatal to the claim. "If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently." *See Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001).

Harrison argues his trial counsel was ineffective for allowing Shirley Dick's perpetuated testimony to be read at trial, and for allowing Detective Youngblut to testify that Collins had already been convicted for first-degree murder. *See* Def's Br. at 32–37. But these were reasonable strategic decisions, which "normally do not rise to the level of ineffective assistance of counsel" even if those strategies ultimately fail to secure an acquittal. *See Ledezma*, 626 N.W.2d at 143 (citing *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995)).

Harrison's trial counsel had a clear strategy: blame Collins for this killing, and minimize Harrison's involvement. *See* TrialTr.V4 p.67,ln.4–22; TrialTr.V4 p.70,ln.4–p.71,ln.3; TrialTr.V4 p.74,ln.13–p.75,ln.25; TrialTr.V4 p.77,ln.2–p.78,ln.1. Counsel argued Harrison "was just a 16-year-old kid caught up in something with nothing showing that he knew ahead of time that there was going to be a robbery, nothing showing that ahead of time he knew there was going to be anything but a drug transaction." *See* TrialTr.V4 p.79,ln.5–16.

"Selection of the primary theory or theories of defense is a tactical matter." *Schrier v. State*, 347 N.W.2d 657, 663 (Iowa 1984) (citing *State v. Mulder*, 313 N.W.2d 885, 891 (Iowa 1981)). Generally, "strategic decisions made after 'thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.'" *See Ledezma*, 626 N.W.2d at 143 (quoting *Strickland*, 466 U.S.at 690–91). Even if proactively shifting blame to Collins in this way was a mistake, "[i]mprovident trial strategy, miscalculated tactics or mistakes in judgment do not necessarily amount to ineffective counsel." *See State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992).

Shirley Dick's testimony only included her observations about *Collins*, whom she identified with particularity—so it supported the defense theory that Collins was solely responsible for killing McHenry. *See* PretrialTr. (9/30/16) p.17,ln.24–p.18,ln.8 (counsel for both sides agreed to permit jury to hear Shirley Dick's testimony because it was "consistent with both of our theories"). Testimony that Collins was convicted of first-degree murder established that his culpability for killing McHenry had already been proven. *See* TrialTr.V3 p.34,ln.17–p.35,ln.5; TrialTr.V3 p.40,ln.19–24; *see also* PretrialTr. (9/30/16) p.17,ln.19–p.18,ln.8 (agreeing to admission of testimony on that fact).

Both of these items, if not introduced during the State's case-in-chief, might well have been introduced by the defense—both tended to shift blame for this killing towards Collins and away from Harrison, which was Harrison's only conceivable route to an acquittal.

Both of Harrison's claims involve issues that were discussed prior to trial, which indicates that Harrison's counsel had considered both their potential inadmissibility and the strategy/tactics involved—this is not a situation where counsel was simply inattentive to facts or incorrect about the law. *See* PretrialTr. (9/30/16) p.17,ln.19–p.18,ln.8; *see also Ledezma*, 626 N.W.2d at 142 (noting "ineffective assistance is more likely to be established when the alleged actions or inactions of counsel are attributed to a lack of diligence as opposed to the exercise of judgment"). Thus, although Harrison identifies two items that his counsel *could have* excluded, the State would submit that stipulating to their admissibility was a reasonable strategic decision and does not amount to a breach of duty.

Even if Harrison could prove breach, he cannot prove prejudice. Patricia DePatten also identified Collins, so both Collins and Harrison would have been connected to this robbery-turned-killing even without Shirley Dick's testimony. *See* TrialTr.V1 p.88,ln.7–p.89,ln.11; State's

Ex. 61; App. 136. The text messages establishing that Collins had arranged to meet McHenry mere blocks from the scene of the murder and that Harrison was with Collins throughout the entire day were also independently sufficient to connect both of them to this killing. *See* TrialTr.V1 p.48,ln.18–p.54,ln.2; TrialTr.V1 p.179,ln.15–p.181,ln.2; TrialTr.V2 p.49,ln.23–p.55,ln.1; TrialTr.V3 p.12,ln.20–p.15,ln.17; State's Ex. 20; App. 114; State's Ex. 25–34; App. 115–24. And even if that had been unpersuasive, Harrison *admitted* his involvement in the robbery, and the State played that recorded admission at trial. *See* TrialTr.V3 p.31,ln.24–p.33,ln.6; State's Ex. 146. So Harrison cannot show a reasonable probability that, but for Shirley Dick's perpetuated testimony, he might have been acquitted. *See, e.g.*, *Lamasters*, 821 N.W.2d at 866 (quoting *Strickland*, 466 U.S. at 694) (noting prejudice "must be affirmatively proven by a showing 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'").

Regarding the testimony that Collins was already convicted of first-degree murder, note that Harrison argued that Collins really *was* guilty of first-degree murder. *See* TrialTr.V4 p.70,ln.13–20 ("Keith Collins is the one getting rid of the gun because he's the one that had it.

He's the one that did the shooting."); *see also* TrialTr.V4 p.74,ln.13–21 ("Somewhere around 26th and Hickman Lane, [Harrison] was present when suddenly [Collins] pulls a gun and shoots Aaron McHenry."). Indeed, there was no other way to explain McHenry's death—he was shot multiple times from various angles at close range, and he was not found carrying either cash or saleable quantities of marijuana. He was obviously shot by someone with intent to kill and/or rob him, and Harrison had no viable route to disclaiming liability for felony murder that did not involve shifting *all* of the blame onto Collins. Therefore, there is no possibility that evidence showing that Collins had already been convicted of first-degree murder could have affected the outcome of Harrison's trial, because such a defense was Harrison's only hope.

Harrison can establish neither breach nor prejudice for his ineffective-assistance claims. His counsel made a reasonable strategic decision to agree to admission of Shirley Dick's perpetuated testimony and of facts regarding Collins' conviction for first-degree murder. And even if counsel had excluded both, there was no plausible possibility of a different result. Thus, Harrison's claims must fail.

CONCLUSION

The State respectfully requests that this Court affirm Harrison's conviction and sentence.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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