IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. KEYON DASHAWN HARRISON Defendant-Appellant	SUPREME COURT NO. 16-1998 POLK COUNTY No. FECR285476

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE PAUL SCOTT

APPELLANT'S FINAL BRIEF AND ARGUMENT

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ROUTING STATEMENT

The Iowa Supreme Court should retain jurisdiction in this appeal. This case present substantial constitutional questions regarding the applicability of the felony murder rule to juveniles. Iowa R. App. P. 6.1101(2)(a). Additionally, the issues in this case raise a "substantial issue of first impression," which also presents a fundamental and urgent issue of broad public importance requiring prompt or ultimate determination by the Supreme Court." Iowa R. App. P. 6.1101(2)(c), (d). Additionally, the applicability of adult criminal laws to juveniles is a rapidly evolving area of legal principles. Iowa R. App. P. 6.1101(2)(f). As such, the Supreme Court should retain jurisdiction in this matter.

STATEMENT OF THE CASE

Nature of the Case

This is an appeal by Keyon Dashawn Harrison ("Harrison") following a conviction of murder in the first degree. Following an approximately four (4) day jury trial, a jury eventually returned a unanimous guilty verdict, finding Harrison guilty of the charge of Murder in the first degree in violation of Iowa §§ 707.1 and 707.2(1)(b) (Felony Murder). Harrison was subsequently sentenced to Life with the Possibility of Parole.

Course of the Proceedings

On June 10, 2015, by way of trial information, the State of Iowa charged Keyon Harrison ("Harrison") with Murder in the First Degree in violation of Iowa Code §§ 707.1 and 707.2 and Robbery in the First Degree in violation of Iowa Code §§ 711.1 and 711.2. (APP-001, Trial Information). On June 15, 2015, Harrison filed a written arraignment and plea of Not Guilty as to all charges. (APP-027, Written Arraignment). After several continuances, Harrison's jury trial was set for October 3, 2016. (APP-030, Order Continuing Trial).

Prior to the trial, the State of Iowa sought a pretrial ruling on several evidentiary issues pursuant to Iowa R. Evid. 5.104. (APP-033, 5.104 Motion). Harrison's attorneys did not object to several of the items and the trial eventually commenced as scheduled on October 3, 2016. (Tr. Individual Voir Dire P. 1). Before the presentation of any evidence, but after the trial had begun, the State amended the trial information and dropped the charge of Robbery in the First Degree and instead pursued a claim based solely upon Murder in the First Degree. (APP-050, Amended Trial Information). Additionally, during the course of the trial, the State eventually dismissed the premeditation Murder in the First Degree charge and solely presented the jury with Murder in the First Degree based upon the Felony-Murder Rule. (APP-052, Jury Instructions). After several days of testimony, the

jury returned a guilty verdict of Murder in the First Degree. (APP-093, Return of Verdict).

Following the verdict, Harrison's counsel filed a motion in arrest of judgment and a motion for a new trial. (APP-099, Motion in Arrest of Judgment; APP-095, Motion for a New Trial). The State of Iowa resisted both motions. (APP-097, Resistance to Motions). The motions were set for a hearing at the time of Harrison's sentencing on November 22, 2016 (APP-102, Order Setting Hearing). The district court denied Harrison's motion in arrest of judgment and motion for a new trial and sentenced Harrison to Life with the Possibility of Parole. (APP-105, Sentencing Order; Tr. Sentencing P. 30-34). Harrison filed a timely notice of appeal on November 22, 2016. (APP-108, Notice of Appeal).

Statement of the Facts

On the afternoon of November 7, 2014, several neighbors in the 2600 block of Hickman Lane, in Des Moines, Iowa heard five repeated gunshots. (Tr. Trial Day 1 P. 24-25; Tr. Trial Day 1 P. 77-81; Tr. Trial Day 2, 14-16). Prior to hearing gunshots, one neighbor, Jorge Gutierrez witnessed a black male sitting by himself on a retaining wall in the dead end of Hickman Lane and another black male and a white male walking nearby, about half a block away near Hickman Road. (Tr. Trial Day 2, 9-12). Eventually Mr. Gutierrez observed the white male and black male begin to shove each other. (Tr. Trial Day 2 P. 13-14). Shortly after seeing the

shoving between the black male and white male, Mr. Gutierrez went inside and heard the gun shots. (Tr. Trial Day 2 P. 14-15). Mr. Gutierrez then saw the two black males running away and saw the white male laying motionless on the ground. (Tr. Trial Day 2 P. 15-16). Other neighbors did not see the shoving, but after hearing the gunshots, several observed two black males running from the scene. (Tr. Trial Day 1 P. 80; Tr. Trial Day 1 P. 25).

The white male was eventually identified as Aaron McHenry, as one of his friends and roommates arrived at the scene and provided his identification card and were able to identify a tattoo. (Tr. Trial Day 1 P. 48-53). After reviewing the cellular phone located on the victim, it was determined that Mr. McHenry was attempting to sell marijuana to another individual and that they were supposed to meet at the nearby Family Dollar to complete the transaction. (Tr. P. 53, APP-120, Exhibit 30). On Mr. McHenry's person, the police were able to locate marijuana residue in Mr. McHenry's pockets. (Tr. Trial Day 3 P. 11-12). According to testimony from the investigating detectives, this is indicative of marijuana being stolen from the person. (Tr. Trial Day 3 P. 11-12).

The investigating officers were eventually able to piece together several of the events of the day to establish that before Mr. McHenry's death Harrison and Collins were together. (Tr. Trial Day 3 P. 30-31). They were then able to view Harrison at a liquor store before the shooting. (Tr. Trial Day 3 P. 31). Then after the shooting,

it was determined that Harrison and Collins were at Broadlawns Hospital. (Tr. Trial Day 3 P. 31). After leaving the hospital, Harrison and Collins left with Harrison's girlfriend to go to her house. (Tr. Trial Day 2 91-93). On the way back from the hospital, Harrison was observed holding two bags of marijuana the size of a baseball. (Tr. Trial Day 2 P. 92-93). When the group returned to Harrison's girlfriend's house, Harrison and Collins smoked some of the marijuana. (Tr. Trial Day 2, P. 93).

Meanwhile, back at the scene, one of the neighbors was eventually able to identify one of the black males that may have been involved in the shooting. Patricia DePatten thought the individual looked like someone from her school and bared a slight resemblance to a famous rapper. (Tr. Trial Day 1 P. 83-84). Based on that information, Des Moines Police Officers contacted the Hoover High School Resource Officer and found two individuals who fit the description. (Tr. Trial Day 1 P. 108). Patricia DePatten was then shown two separate photo arrays and was able to positively identify Keith Collins as one of the individuals involved. (Tr. Trial Day 1 P. 88-89). Another witness was also able to positively identify Keith Collins from the Photo Array (APP , Shirley Dick Testimony P. 372-373).

Based upon the information obtained at the scene, Des Moines Police eventually executed a search warrant on Keith Collins apartment. (Tr. Trial Day 2 P. 38-39). At Keith Collins apartment they found Harrison along with another female and a small child. (Tr. Trial Day 2 P. 41-42). Located on Harrison's person

was a small amount of marijuana. (Tr. Trial Day 2 P. 42). No gun or ammunition were located on Harrison's person or in the apartment. (Tr. Trial Day 1 P. 128-129). However, Harrison was taken into custody and questioned by officers. (Tr. Trial Day 3 P. 28-29). After being questioned by officers, it is reported that Harrison was talking with his mother and Harrison stated that Harrison knew Keith Collins was going to hit a "lick." (Tr. Trial Day 3 P. 32-33). According to the Detective working the case, a "lick" means to perform a robbery or rip them off. (Tr. Trial Day 3 P. 32-33).

During the course of the investigation it was determined that Keith Collins' phone was used on several occasions to communicate with Mr. McHenry in an attempt to purchase marijuana. (Tr. Trial Day 3 P. 13-14). This included conversations shortly before the murder. (Tr. Trial Day 3 P. 13-14; APP-119-125, Exhibit 29-35). Additionally, Mr. McHenry's phone number was listed as "Lick" in Collins' phone. (Tr. Trial Day 3 P. 85; APP-115, Exhibit 25). Based upon this information, Harrison and Collins were eventually charged with Murder in the First Degree. (APP-001, Trial Information).

Many additional relevant facts are discussed within the Argument section, *infra*.

ARGUMENT

I. THE FELONY MURDER RULE IS FUNDAMENTALLY UNFAIR AS APPLIED TO JUVENILES

Preservation of Error

The applicability of the felony murder rule to juveniles was raised and presented before the district court. As such, error was preserved on this issue. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." (citing *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998)).

Standard of Review

"When a violation of a constitutional right is claimed, the standard of review is de novo." *In re Detention of Hodges*, 689 N.W.2d 467 (Iowa 2006).

Discussion

Despite no evidence that Harrison knew a murder was going to happen, no evidence that Harrison had a dangerous weapon on his person, no evidence that Collins had a weapon on his person, no evidence that Harrison pulled a trigger and no evidence that Harrison killed any individual, Harrison was convicted of murder in the first degree. In this case, Harrison requests that this Court hold that the felony murder rule is inapplicable to juveniles such as Harrison.

A. The Felony-Murder Rule

Iowa Code § 707.2 (1) states that "[a] person commits murder in the first degree when the person commits murder under any of the following circumstances:…(b) The person kills another person while participating in a forcible felony." This is known as the felony murder rule. "The felony-murder rule began as a common-law doctrine of criminal law that any death resulting from the commission or attempted commission of a felony constitutes murder." *State v. Tribble*, 790 N.W.2d 121, 124 (Iowa 2010). Through Iowa Code § 707.2 (1), Iowa's felony murder rule has been limited to only those felonies classified as "forcible." *Id.* at 125. Iowa Code § 702.11 defines "forcible felonies" as "any felonious child endangerment, assault, murder, sexual abuse, kidnapping, robbery, human trafficking, arson in the first degree, or burglary in the first degree."

> 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. This reduced quantum of proof in establishing first-degree murder has caused the felony-murder doctrine to be called "[o]ne of the most controversial doctrines in the field of criminal law…" Erwin S. Barbre, Annotation, *What Felonies are Inherently or Foreseeably Dangerous to Human Life for Purposes of Felony-Murder Doctrine*, 50 A.L.R.3d 397, 399 (1973).

State v. Heemstra, 721 N.W.2d 549, 554 (Iowa 2006); *see also* Nelson E. Roth & Scott E. Sundby, *Felony-Murder Rule a Doctrine at Constitutional Crossroads*, 70

Cornell L. Rev. 446 (1985) (herein after "Roth & Sundby"). The criticism of the felony murder rule has grown louder when applied to juveniles. *See generally*, Erin H. Flynn, Comment, *Dismantling the Felony-Murder Rule: Juvenile Deterrence and Retribution Post- Roper v. Simmons*, 156 U. Pa. L. Rev. 1049 (2008); Alison Burton, Note, *A Commonsense Conclusion: Creating a Juvenile Carve Out to the Massachusetts Felony Murder Rule*, 50 Harv. C.R.-C.L. L. Rev 169 (2017); 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 (2004).

B. Juveniles are Different

Beginning with the United States Supreme Court decision in *Roper v. Simmons*, a major change in the jurisprudential landscape has occurred regarding juvenile culpability and social standards. 543 U.S. 551 (2005). In *Roper*, the United States Supreme Court found that based upon the trends of the various states and the overwhelming scientific authority, it was a violation of the Eighth and Fourteenth Amendments of the United States Constitution to sentence a juvenile to death. *Id.* at 568-575. The United States Supreme Court followed this logic in many other juvenile cases that came after *Roper* was decided. *See Graham v. Florida*, 560 U.S. 48 (2010) (holding life without parole is unconstitutional for non-homicide offenses); *J.D.B. v. North Carolina*, 564 U.S. 261 (2011) (holding age is a factor in the Miranda/custodial interrogation analysis); *Miller v. Alabama*, 567 U.S. ----, 132

S.Ct. 2455 (2012) (holding life without the possibility of parole for all juveniles for any offense is unconstitutional); *Montgomery v. Louisiana*, 577 U.S. ----, 136 S.Ct. 718 (2016) (holding *Miller* applied retroactively); *see also* Cara H. Drinan, *The Miller Revolution*, 101 Iowa L. Rev. 1787 (2016).

During this same time period, the Iowa Supreme Court proved to be at the forefront of this developing law. *State v. Null*, 836 N.W.2d 41 (Iowa 2013) (holding that sentences which deprive a meaningful opportunity to be released are unconstitutional); *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013) (juvenile sentencing reform was to be retroactive and each person was entitled to an individualized hearing); *State v. Lyle*, 854 N.W.2d 378 (Iowa 2014) (juveniles cannot be sentenced to long term mandatory minimums and general objection to "one size first all" mandatory minimums); *State v. Seats*, 856 N.W.2d 545 (Iowa 2015); *State v. Sweet*, 897 N.W.2d 811 (Iowa 2016); *State v. Roby*, 897 N.W.2d 127 (Iowa 2017).

One of the essential bases for this rapidly evolving area of the law is that juveniles are inherently different than adults:

> First, children lack the risk calculation skills adults are presumed to possess and are inherently sensitive, impressionable, and developmentally malleable. Second, the best interests of the child generally support discretion in dealing with all juveniles. In other words, "the legal disqualifications placed on children as a class…exhibit the settled understanding that the differentiating characteristics of youth are universal." *J.D.B. v. North Carolina,*

> 564 U.S. ----, ----, 131 S.Ct. 2403-04, 180 L.Ed.2d 310, 324 (2011).

State v. Lyle, 854 N.W2d 378, 389 (Iowa 2014). This has expanded to recognize that the law generally treats juveniles differently than adults. *State v. Null*, 836 N.W.2d 41, 53 (Iowa 2013) (recognizing the statutory differences between adults and juveniles with possession of alcohol, possession of tobacco, selling firearms, obtaining driver's licenses, etc.). Additionally, recent developments in science have created a clear recognition that juveniles are developmentally different than adults in important ways. In adopting the clear scientific evidence relied upon by the United States Supreme Court in *Roper*, the Iowa Supreme Court has recognized that juveniles brains are not fully developed for executive functioning which effect behaviors "such as reasoning, abstract thinking, planning, the anticipation of consequences, and impulse control." *Id*. at 55.

> [S]ocial scientists recognized that juveniles achieve the ability to use adult reasoning by mid-adolescence, but lack the ability to properly assess risks and engage in adult-style self-control. Elizabeth S. Scott & Laurence Steinberg, *rethinking Juvenile Justice* 34 (2008). The influence of peers tends to replace that of parents or other authority figures. *Id.* at 34, 38-39. Risk evaluation is not generally developed. *Id.* at 34, 40-43. Adolescents also differ from adults with respect to self-management and the ability to control impulsive behavior. *Id*. at 43-44. Finally, identity development, which is often accompanied by experimentation with risky, illegal, or dangerous activities, occurs in late adolescence and early adulthood. *Id.* at 50-52.

Null, 836 N.W.2d at 55.

C. Due Process Requirements

> The Fifth Amendment to the United States Constitution states that no person shall "be deprived of life, liberty, or property, without due process of law," and the Fourteenth Amendment also states that no state shall "deprive any person of life, liberty or property without due process of law." Article I, section 9 of the Iowa Constitution states that "no person shall be deprived of life, liberty, or property, without due process of law."

More v. State, 880 N.W.2d 487, 499 (Iowa 2016). If a trial lacks fundamental fairness, "it violates the guarantees of due process in the United States and Iowa Constitutions." *More*, 880 N.W.2d at 499. In *In re Winship*, the United States Supreme Court recognized that "the Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. 358 (1970). Further, the Iowa Supreme Court has recognized that "a mandatory presumption violates the due process clause because it undermines the fact finder's responsibility to find the ultimate facts beyond a reasonable doubt." *State v. Winders*, 359 N.W.2d 417, 419 (Iowa 1984). If a presumption is found, it calls into question the more important presumption of innocence guaranteed under the Constitutions. *Sandstrom v. Montana*, 442 U.S. 510, 522 (1979) ("[T]his presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.") (quoting *Morissette v. United States*, 342 U.S. 246, 274-275 (1952)).

D. The Felony-Murder Rule Applied to Harrison is Unconstitutional

The felony-murder rule "operates by eliminate[ing] proof of some of the elements of murder that would otherwise be necessary to prove if the death were prosecuted as murder without relying on the underlying felony offense. *State v. Tribble*, 790 N.W.2d 121, 124 (Iowa 2010). "First-degree murder under Iowa Code section 707.2(1) requires proof that the murder was committed 'willfully, deliberately, and with premeditation.' In contrast, first-degree murder based on the felony-murder rule under section 707.2(2) does not require proof of any of these elements; they are presumed to exist if the State proves participation in the underlying forcible felony." *State v. Heemstra*, 721 N.W.2d 549, 544 (Iowa 2006). This presumption, as identified in *Heemstra*, is in direct violation due process protections under both the Iowa and United States Constitutions. *See Sandstrom v. Montana*, 442 U.S. 510, 522 (1979).

One set of commentators has explicitly recognized that the felony-murder rule "is viewed either as providing a conclusive presumption of the culpability required for murder, or as a distinct crime for which the killing does not have a separate *mens rea* element apart from the felony." Roth & Sundby at 492.

> The Supreme Court's holding in *Sandstrom v. Montana* constitutionally prohibits conclusive presumptions because they violate a defendant's presumption of innocence and because they intrude upon the jury's duty to affirmatively find each element of the offense. The felony-murder rule violates both rationales

> of *Sandstrom* when it operates as a conclusive presumption of the defendant's culpability for murder. The Model Penal Code's rebuttable presumption also fails to resolve the constitutional infirmity of the rule. The operative effect of the Code's presumption is that of a mandatory presumption, and as such it does not meet the criteria of either *Ulster County Court v. Allen* [442 U.S. 140 (1979) or *Sandstrom*.

Id. at 491-492.

The Court addressed an issue touching on the contours of the felony murder rule over thirty years ago in *Conner v. State*, 362 N.W.2d 449 (Iowa 1985). In *Conner*, the defendant asserted that the felony murder rule as applied to accomplice/aiding and abetting liability created an unconstitutional presumption in violation of *Sandstrom*, *Mullaney v. Wilbur* 421 U.S. 684 (1975) and *Connecticut v. Johnson*, 460 U.S. 73 (1983). 362 N.W.2d at 456. The Iowa Supreme Court ultimately rejected this argument and also held that "it is a matter of substantive law that places responsibility on a wrongdoer for the direct and indirect consequences of his joint criminal conduct with another." *Id.*

Conner, however, was not decided under the Iowa Constitution, did not involve the application of the felony murder rule as applied to juveniles, and is in direct contradiction to the Iowa Supreme Court's recognition of the presumptions that are created with the felony murder rule as outlined in *Heemstra*. 721 N.W.2d at 544. In turn, it is also inconsistent with the holding in *Sandstrom* and its progeny. 442 U.S. 510, 522 (1979). In fact, in *Conner*'s subsequent petition for writ of habeas

corpus, at least one of the judges on the Eighth Circuit Court of Appeals recognized the jury instructions provided in the underlying case were an unconstitutional presumption. *Conner v. Director of Div. of Adult Corrections, State of Iowa*, 870 F.2d 1384 (1989) (Heaney, J, dissenting). Additionally, *Conner* was decided under the Federal Constitution (not the Iowa Constitution), did not address the application of the felony murder rule to juveniles, and did not—because it could not—take into account developing scientific reach and case law recognizing that juveniles are different. In short, *Conner* is not controlling here.

This is especially true given the situation in this case. Harrison was only implicated in participating in the "lick" in this case and in no other way participated in the actual acts that resulted in the murder. This is important as has been repeatedly recognized the purpose of the felony-murder rule is that it should generally be foreseeable that a murder could flow from a violent felony. *See Heemstra*, 721 N.W.2d at 544 ("Because violence is the *sine qua non* of felony murder under Iowa's statute, as well as at common law, the felony-murder statute limits itself to felonies involving violence."). It is "inherently dangerous" and therefore foreseeability is essentially imputed upon the defendant. This is the exact issue with applying the felony-murder rule to individuals such as Harrison.

As stated in section IB. *supra*, juveniles are developmentally different than adults. Scientifically speaking, juveniles' frontal lobes (the prefrontal cortex) are

developing at this stage in their life and as such they do not have fully developed "'executive functions', such as reasoning, abstract thinking, planning, ***the anticipation of consequences, and impulse control***." *State v. Null*, 836 N.W.2d 41, 55 (Iowa 2013) (emphasis added). This is exactly why the application of the felony-murder rule to Harrison in this case is fundamentally unfair and a violation of Due Process under either the more stringent Iowa Constitution or the United States Constitution. The jury was allowed to presume malice aforethought based on Harrison's participation in a Robbery, when Harrison was not developed enough to appreciate not only the assumption, but the natural consequence of the robbery (i.e. the murder). Further, even if Harrison had the ability to appreciate the potential consequences of his actions in participating in a robbery (in which he did not have a gun or pull any triggers), the science indicates that Harrison lacked the ability to control his impulses in the participation of the murder. *Id.* Applying the well-known and undisputed science of juvenile development to the felony-murder rule in a case of accomplice/aiding and abetting liability is fundamentally unfair and a violation of Harrison's protections under the Iowa and the United States Constitutions. Accordingly, the district court erred in instructing the jury on the felony-murder rule for Harrison. As such, this Court should reverse his conviction and remand to the district court for a new trial.

II. HARRISON'S PUNISHMENT IS IN VIOLATION OF THE CRUEL AND UNUSUAL PUNISHMENT CLAUSES OF THE UNITED STATES AND IOWA CONSTITUTION AS IT IS GROSSLY DISPROPORITIONATE TO HARRISON'S ACTIONS

Preservation of Error

A challenge of Harrison's sentence as violating the cruel and unusual punishment clause of the United States and Iowa Constitution was raised and decided by the district court. As such, error was preserved on this issue. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." (citing *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998)).

Standard of Review

"When a violation of a constitutional right is claimed, the standard of review is de novo." *In re Detention of Hodges*, 689 N.W.2d 467 (Iowa 2006).

Discussion

Harrison did not personally murder any individual, no evidence was presented that he knew a murder would happen or was likely to happen, yet Harrison was punished as if he murdered another individual in cold blood. Because this punishment is grossly disproportionate to Harrison's ultimately culpability, this Court should find that it violates the cruel and unusual punishment clauses of the Iowa and United States Constitution. Harrison asserts both that the sentence of life

with the possibility of parole is facially/categorically unconstitutional to juveniles convicted under the felony murder rule and as-applied/grossly disproportionate to Harrison.

A. Facially/Categorical Prohibition to Life Sentence for Juvenile Felony Murder Conviction

In looking at a categorical sentencing constitutional challenge, a two-step analysis occurs. *State v. Roby*, 897 N.W.2d 127, 138 (Iowa 2017). First, the courts look to see if there is a "consensus or at least an emerging consensus,' to guide our consideration of the question." *Id.* (quoting *State v. Sweet*, 879 N.W.2d 811, 835 (Iowa 2016)). Next, the courts will use their "'independent judgment' to decide the question." *Id*. In this case, the question is should the sentence of life with the possibility of parole be categorically prohibited to juveniles convicted of felony murder?

As to the first prong, Harrison is not aware of any state that has categorically held that life with the possibility of parole should be categorically prohibited for juveniles convicted of felony murder. However, Harrison would point that many legal scholars throughout the contrary have not only routinely held that the felony murder rule is improper, but have specifically argued for the abolishment of the felony murder rule as applied to juveniles. Erin H. Flynn, Comment, *Dismantling the Felony-Murder Rule: Juvenile Deterrence and Retribution Post- Roper v. Simmons*, 156 U. Pa. L. Rev. 1049 (2008); Alison Burton, Note, *A Commonsense*

Conclusion: Creating a Juvenile Carve Out to the Massachusetts Felony Murder Rule, 50 Harv. C.R.-C.L. L. Rev 169 (2017); 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 (2004). These arguments are all based upon the same premises as the cases which eliminated the death penalty and sentences of life with parole for juveniles. These include recognition that juveniles are different developmentally, physiologically and in maturity. *Compare generally State v. Null*, 836 N.W.2d 41, 55 (Iowa 2013) *with* 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 (2004). Thus, while no other states have taken this next logical step, the tidal wave of reform regarding juvenile justice is clearly heading in this direction.

However, the general lack of current consensus between the states does not stop the analysis. Instead, this Court must then move forward and use its independent judgment to formulate its own analysis. *State v. Roby*, 897 N.W.2d 127, 141 (Iowa 2017). "Iowans have generally enjoyed a greater degree of liberty and equality because we do not rely on a national consensus regarding fundamental rights without also examining any new understanding." *Id.* (quoting *State v. Lyle*, 854 N.W.2d 378, 387 (Iowa 2014). Harrison requests that this Court apply this

rationale to do away with life sentences for convictions of felony murder by juveniles.

In *Lyle*, the Iowa Supreme Court "prohibited statutorily imposed mandatory minimums" to juveniles. *Id.* (citing *Lyle*, 854 N.W.2d at 404). The basis for eliminating these mandatory minimums was a recognition that: "(1) Juveniles have diminished culpability, and (2) penological justifications are less applicable to them." *Id.* These recognitions are absolutely essential in this analysis when applied to the felony-murder rule sentencing structures.

"Two primary justifications are given for the felony murder rule: deterrence and retribution." Alison Burton, Note, *A Commonsense Conclusion: Creating a Juvenile Carve Out to the Massachusetts Felony Murder Rule*, 50 Harv. C.R.-C.L. L. Rev 169, 172 (2017). Yet, both of these justifications are wholly improper when considering juveniles. As outlined in section IB. *supra*, juveniles are fundamentally different than adults. In essence, they lack the ability to sufficiently appreciate or prohibit their actions. *State v. Null*, 836 N.W.2d 41, 55 (Iowa 2013). Thus, if juveniles lack the ability to form the proper foreseeability, lack the appreciation of consequences, and are highly impulsive, the primary purposes of the felony murder rules harsh sentences are completely undermined. Accordingly, this Court should find that sentencing juveniles to life for a conviction of the felony murder rule is

unconstitutionally cruel and unusual under the Iowa Constitution and the United States Constitution.

B. As-Applied Prohibition of Life Sentence to Harrison

In *Enmund v. Florida*, the United States Supreme Court recognized that in determining whether a punishment is cruel and unusually disproportionate, the courts must look to the culpability of the individual. 458 U.S. 782, 797 (1982). The defendant in *Enmund*, was tried and convicted under the theory of aiding and abetting a felony that resulted in murder. *Id.* at 784-785. The defendant was not present for the murder, had no gun, and had no influence whatsoever in the cause of the ultimate murder, but for his participation in the underlying robbery. *Id.* Despite this, he was ultimately convicted of felony-murder and sentenced to death under Florida's capital murder statutes. *Id.* The United States Supreme Court held that it was unconstitutionally cruel and unusual to apply the death penalty to the defendant in this case because it did not take into account the individual culpability of the defendant. *Id*. at 798. In so holding the United States Supreme Court recognized:

> It is fundamental that "causing harm intentionally must be punished more severely than causing the same harm unintentionally." H. Hart, Punishment and Responsibility 162 (1968). Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike and attributed to Enmund the culpability of those who killed the Kerseys. This was impermissible under the Eighth Amendment.

Id.

It is readily admitted that *Enmund* is a death penalty case, and death can be considered different. However, in *State v. Bruegger*, the Iowa Supreme Court recognized that "at least in some instances, 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." 773 N.W.2d 862, 884 (Iowa 2009). "The question is, then, whether this is a relatively rare case where an individualized assessment of the punishment imposed should be permitted." *Id.* This case absolutely falls within that exception.

As has been discussed throughout this brief and the accompanying amicus, juvenile development, culpability and maturity are vastly different than adults. This alone, should require an individualized sentence for Harrison's conviction of felony murder. However, Harrison should be entitled to an individualized showing of cruel and unusual sentence based on the particular facts of this case. At best, the evidence established that Harrison knew a "lick" was going to occur and that he actively participated in the robbery. (Exhibit 146, Exhibit 147). At best, his involvement was walking the victim to the scene of the murder and shoving him. (Tr. Trial Day 2 P. 13-14). No evidence was established that Harrison knew Collins had a gun. No evidence was established that Harrison knew Collins was going to use the gun. No evidence was established that Harrison had any involvement with the actual eventual murdering of the victim by Collins. Yet, as the State of Iowa asserted in its closing

"you don't have to be the triggerman to be responsible for a crime." (Tr. Trial Day 4 P. 51). However, Harrison asserts that in order to be punished with the most severe penalty available for juveniles, you need to be the "triggerman." Or at the very least the State must establish sufficient culpability to warrant such a severe sentence. In this case, the State of Iowa failed to meet that burden. As such, the punishment of a life sentence to Harrison, for a murder he did not commit and was merely a complacent actor, is grossly disproportional. As such, this Court should find that Harrison's punishment of life is in violation of the Iowa and United States Constitutions' prohibitions of cruel and unusual sentences.

III. THE DISTRICT COURT IMPROPERLY INSTRUCTED THE JURY REGARDING ROBBERY AND THE FELONY MURDER RULE.

Preservation of Error

During the course of the trial, Harrison objected to the felony murder instruction and raised this issue in a Motion in Arrest of Judgment following trial. As such, error was preserved on this issue. *See Meier v. Senecaut,* 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." (citing *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998)).

Standard of Review

Challenges to jury instructions are reviewed corrections of errors at law. *Alcala v. Marriott Intern., Inc.*, 880 N.W.2d 699, 707 (Iowa 2016) (quoting *Anderson v. State*, 692 N.W.2d 360, 363 (Iowa 2005)).

Discussion

The felony-murder rule is only applicable during the commission of a "forcible felony." Iowa Code § 707.2(1)(b). The jury in this case was instructed as follows regarding the felony-murder rule:

> The State must prove all of the following elements of Murder in the First Degree:
>
> 1. On or about November 7, 2014, the defendant or someone he aided and abetted was participating in the crime of robbery.
> 2. During the course of the robbery, the defendant or someone he aided and abetted shot Aaron McHenry.
> 3. Aaron McHenry died as a result of being shot.
> 4. The defendant or someone he aided and abetted acted with malice aforethought.
>
> If the State has proved all of these elements, the defendant is guilty of Murder in the First Degree…

(APP-073, Instruction No. 21).

The jury was also provided the following definitional instruction regarding robbery: "A person commits a robbery when, having the specific intent to commit a theft, the person commits an assault to assist or further the commission of the intended theft or the person's escape form the scene thereof with or without the stolen property." (APP-078, Instruction No. 26). The jury

was provided the standard model assault instruction for a simple misdemeanor assault. (APP-080, Instruction No. 28).

On July 1, 2016, Iowa Code § 711.3A became effective and as such, not all crimes which were previously considered a felonious robbery remained felonious robberies. Iowa Code § 711.3A states as follows:

> 1. A person commits robbery in the third degree when, while perpetrating a robbery, the person commits an assault as described in section 708.2, subsection 6, upon another person.
> 2. Robbery in the third degree is an aggravated misdemeanor.

Thus, anyone who participates in a robbery in the third degree cannot be convicted of felony-murder. *See* Iowa Code § 707.2(1)(b) and Iowa Code § 702.11. The jury in this case was not correctly informed regarding the types of "assaults" that would constitute a forcible felony robbery charge and as such the jury was not instructed properly regarding this element. (APP-052, Jury Instructions). Because the jury was not properly informed regarding the specific types of assault necessary to create a felonious robbery, this Court should reverse the district court and remand for a new trial so the jury may be properly informed regarding the elements of felony-murder, felonious robbery and the necessary assault to predicate a felonious robbery. *See Deboom v. Raining Rose, Inc.*, 772 N.W.2d 1, 5 (Iowa 2009) ("Reversal is warranted if the instructions have misled the jury. Prejudicial error occurs when the district

court 'materially misstates the law.'") (quoting *Anderson v. Webster City Cmty. Sch. Dist.*, 620 N.W.2d 263, 265 (Iowa 2000)).

IV. THE FELONY-MERGER DOCTRINE APPLIES TO HARRISON'S FELONY-MURDER CONVICTION AND HARRISON'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ATTACK THE FELONY-MURDER BY ROBBERY WHEN THE UNDERLYING ASSAULT SERVED THE BASIS FOR THE UNDERLYING ROBBERY[1]

Preservation of Error:

"Ineffective assistance of counsel claims are not bound by traditional error-preservation rules." *State v. Ondayog*, 722 N.W.2d 778, 784 (Iowa 2006) (citing *State v. Lucas*, 323 N.W.2d 228 (Iowa 1982)).

Standard of Review:

Claims of ineffective assistance of counsel are reviewed de novo. *Id.*

Discussion:

A successful ineffective-assistance-of-counsel claim requires proof by a preponderance of the evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *State v. Bearse*, 748 N.W.2d 211, 214-15 (Iowa 2008). The Iowa Supreme Court has recognized "the prejudice prong of the *Strickland* test

[1] Harrison's co-defendant has additionally raised these same issues in his appeal which is currently pending. *See* State v. Collins Supreme Court 16-1094. To the extent possible, Harrison incorporates the same assertions, but has individualized the assertions as they apply directly to Harrison.

does not mean a defendant must establish that counsel's deficient conduct more likely than not altered the outcome in the case. A defendant need only show that the probability of a different result is sufficient to undermine confidence in the outcome." *State v. Clay*, 824 N.W.2d 488, 496 (Iowa 2012) (quoting *Bowman v. State*, 710 N.W.2d 200, 203 (Iowa 2006). Reviewing courts "consider the totality of the evidence, what factual findings would have been affected by counsel's errors, and whether the effect was pervasive or isolated and trivial." *Id*. (citing *State v. Graves*, 668 N.W.2d 860, 882–83 (Iowa 2003)).

In *State v Heemstra*, the Iowa Supreme Court held that "if an act causing willful injury is the same act that causes the victim's death, the former is merged into the murder and therefore cannot serve as the predicate felony for felony-murder purposes." 721 N.W.2d 549, 558 (Iowa 2006). The Court explained that if the merger did not apply, "all assaults that immediately precede a killing would bootstrap the killing into first-degree murder, and all distinctions between first-degree and second-degree would be eliminated." *Id*. at 557. In subsequent cases, the Court explained that the act that causes the death must be a separate act from the underlying felony to utilize the felony-murder rule. *State v. Tribble*, 790 N.W.2d 121, 126 (Iowa 2010)("[W]hile the evidence must establish the first act was an element of the predicate felony, the evidence must further establish that a separate act caused the death of to another."). "A single act giving rise to both the

commission of the felony and death merges into murder, and the culpability of conduct is determined under the various categories of murder." *Id*. at 128. The Court has further explained the merger is not dependent on whether the underlying felony is a lesser-included of murder. *State v. Millbrook*, 788 N.W.2d 647, 652 (Iowa 2010). The Court of Appeals has elaborated, stating "the supreme court recognized the concern that because a homicide generally results from the commission of an assault, i.e. '[d]eath is obviously a bodily injury,' every felonious assault ending in death could automatically be elevated to first-degree murder." *State v. Tucker*, 810 N.W.2d 519, 522 (Iowa App. 2012)(internal citations omitted).

The underlying felony at issue in this case was robbery, and the jury was instructed that a robbery is committed when a person "having the specific intent to commit a theft, the person commits an assault to assist or further the commission of the intended theft or the person's escape from the scene thereof with or without the stolen property." (APP-078, Instruction No. 26). The jury was then further informed:

> An assault is committed when a person does an act which is intended to either:
>
> 1. Cause pain or injury to another person; or
> 2. Result in physical contact which will be insulting or offensive to another person; or
> 3. Place another person in fear of immediate physical contact which will be painful, injurious, insulting or offensive to the

> other person when coupled with the apparent ability to do the act.

(APP-080, Instruction No. 28). Based upon these instructions, the jury found Harrison guilty of felony-murder.

Harrison acknowledges that the Iowa Court of Appeals has at least twice before ruled on whether robbery can serve as the predicate felony for the felony-murder rule. *State v. McCoy*, 2016 WL 3269458 (Iowa Ct. App.) and *State v. Pollard*, 2015 WL 405835 (Iowa Ct. App.). However, in each of those cases, the Iowa Court of Appeals recognized that the Iowa Supreme Court has never ruled on the issue and that the Iowa Supreme Court "may ultimately extend the merger rule for felony murder to the predicate felony of robbery. But it has not done so yet." *State v. McCoy*, 2016 WL 3269458 at * 6 (Iowa Ct. App.) and *State v. Pollard*, 2015 WL 405835 at *3-4 (Iowa Ct. App.). This case presents the exact reason why it must be implemented.

In this case, no felonious robbery/assault was alleged to occurred, but for the shooting of the victim. Admittedly some evidence was presented that indicated some shoving may have occurred prior to the shooting. (Tr. Trial Day 2 P. 13-14). But the record provided no evidence as to who performed the pushing and shoving and there was certainly no evidence that it arose to the level of a felonious robbery. Instead, at best, it amounted to a simple assault which would constitute Robbery in

the Third Degree. *See* Iowa Code § 711.3A(2). Indeed, even during the closing arguments, the State never asserted any other assaults occurred. Instead the state said that the only assault that occurred was the gunshot wounds. (Tr. Trial Day 4 P. 47-48). The attorney for the State stated the following during closing arguments:

> And what we know is the definition of robbery is essentially having the specific intent to commit a theft and they commit an assault, in this case a shooting to further the commission of the theft. So robbery's a pretty simple definition, right, intent to steal, plus assault, equals robbery….
>
> And if robbery is the theft of marijuana, plus the gunshot wounds, doesn't that suggest that this evidence proves that a robbery took place?

(Tr. Trial Day 4 P. 47-48). This exact argument forms the basis for Heemstra's prohibition of felonious assault (or willful injury) to serve as the predicate felony for the felony-murder doctrine. *Heemstra*, 721 N.W.2d at 558.

Heemstra has been the law of this State for over a decade and has had various versions litigated through the Courts. 721 N.W.2d 549 (Iowa 2006); *Goosman v. State*, 764 N.W.2d 539 (Iowa 2009); *State v. Tribble*, 790 N.W.2d 121 (Iowa 2010). Thus, the felony-murder merger rule was well known and formed an essential duty for Harrison's counsel to request a proper specific act jury instruction consistent with the Iowa Supreme Court's ruling in Heemstra. Additionally, Harrison's trial counsel should have objected to the State's improper assertion of the law and sought a

mistrial based upon those improper assertions that the gunshot wounds constituted the assault to create the robbery. (Tr. Trial Day 4 P. 47-48).

In this case, Harrison was also clearly prejudiced by the failure to seek a proper jury instruction and a mistrial based upon the assertions of the State during closing arguments. As noted, the State's only theory for the underlying robbery was that the gunshots which ultimately killed the victim served the basis for the felony-murder rule. (Tr. Trial Day 4 P. 47-48). Thus, had the jury been properly instructed regarding the underlying felony-murder rule and the requirement of independent separate acts, there is a reasonable probability that Harrison would not have been convicted of felony murder. *See Tribble*, 790 N.W.2d at 128 ("The first act must relate to an element of the predicate felony, while the second independent act must kill another person.").

It is worth noting that the mere fact that there were multiple shots does not constitute separate acts. Instead if the shots are fired in rapid sequence, they constituted they constitute a continuation of the first assault. *State v. Ross*, 845 N.W.2d 692, 695 (Iowa 2014). That is exactly what happened in this case. The testimony from the neighbors stated that the shots were "bam-bam-bam-bam-bam." (Tr. Day 1 P. 24). Thus, Harrison was prejudiced by the failure to properly instruct the jury regarding the independent act requirements and a failure to object to the

arguments made in closing argument. As such, this Court should reverse the district court and award Harrison a new trial.

V. HARRISON'S TRIAL COUNSEL FAILED TO OBJECT TO TESTIMONY AND VIOLATED HARRISONS RIGHT TO CONFRONTATION AS PROTECTED UNDER THE IOWA AND UNITED STATES CONSTITUTION

Preservation of Error:

"Ineffective assistance of counsel claims are not bound by traditional error-preservation rules." *State v. Ondayog*, 722 N.W.2d 778, 784 (Iowa 2006) (citing *State v. Lucas*, 323 N.W.2d 228 (Iowa 1982)).

Standard of Review:

Claims of ineffective assistance of counsel are reviewed de novo. *Id.*

Discussion:

A. Conviction of Keith Collins

A successful ineffective-assistance-of-counsel claim requires proof by a preponderance of the evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *State v. Bearse*, 748 N.W.2d 211, 214-15 (Iowa 2008). The Iowa Supreme Court has recognized "the prejudice prong of the *Strickland* test does not mean a defendant must establish that counsel's deficient conduct more likely than not altered the outcome in the case. A defendant need only show that the probability of a different result is sufficient to undermine confidence in the

outcome." *State v. Clay*, 824 N.W.2d 488, 496 (Iowa 2012) (quoting *Bowman v. State*, 710 N.W.2d 200, 203 (Iowa 2006). Reviewing courts "consider the totality of the evidence, what factual findings would have been affected by counsel's errors, and whether the effect was pervasive or isolated and trivial." *Id.* (citing *State v. Graves*, 668 N.W.2d 860, 882–83 (Iowa 2003)).

In addition to the claim of ineffective assistance of counsel regarding the felony-murder rule and instructions, Harrison also asserts claims of ineffective assistance regarding certain testimony presented at the trial. First, during the testimony of the lead detective on the case, the State elicited the following testimony:

> Q. And based on the eyewitness identifications that we've already talked about from Patricia DePatten and Shirley Dick, was Keith Collins arrested that night?
>
> A. Yes.
>
> Q. For what crime?
>
> A. Murder, first degree.
>
> Q. And you previously testified in the trial of Keith Collins?
>
> A. Yes.
>
> Q. You know Keith Collins had been convicted of Murder in the First Degree?
>
> A. Yes.
>
> Q. And sentenced for that crime?
>
> A. Yes.

(Tr. Day 3 P. 34-35). Harrison's trial counsel did not object to this testimony and in fact, when the issue was raised in pretrial files, Harrison's counsel did not object to the State of Iowa's request to use this evidence. (APP-033, 5.104(1) Motion; Tr. Pretrial Motions P. 12; Tr. Pretrial Motions 17).

"Generally evidence of another's conviction or acquittal is inadmissible." *State v. Scott*, 619 N.W.2d 371, 374-375 (Iowa 2000) (citing 23 C.J.S. *Criminal Law* § 996, at 261 (1989); *see also State v. Carter*, 847 S.W.2d 941, 947 (Mo. Ct. App. 1993)("Evidence of either the conviction or acquittal of one jointly accused with a defendant is inadmissible as substantive evidence of defendant's guilt or innocence.")); *Adams v. State*, 531 S.W.2d 626, 627-28 (Tex. Crim. App. 1976)(general rule is that it is not permissible to show, for any purpose, that another jointly or separately indicted for same offense has been convicted or acquitted)). The issue arose in *Scott* were a co-defendant had been acquitted for the same possession with intent to deliver charges as the principle defendant in *Scott*. 619 N.W.2d at 374. The Iowa Supreme Court stated that it was not only improper to allow this testimony to be presented, but also constituted reversible error. *Id.* at 376.

In this case, Harrison's counsel breached an essential duty by failing to object to this testimony. Additionally, this breach of an essential duty also caused a great amount of prejudice to Harrison's trial. It is important to note that the State readily admitted that Keith Collins was the "shooter" in this case and that Harrison was an

accomplice/aider and abettor to the underlying felony. (Tr. Day 4 P. 50). Thus, the evidence that the codefendant had previously been convicted and the State's sole theory is accomplice/aiding and abetting caused a massive amount of prejudice to Harrison. In effect, it instructed the jury that part of their job had already been completed, specifically that Keith Collins had committed murder in the first degree. This constituted a breach of an essential duty and prejudice. As such, Harrison is entitled to a new trial.

B. Trial Testimony of Shirley Dick

A central witness to the State's case against both Harrison and Keith Collins was Shirley Dick. Ms. Dick testified in Keith Collins trial, but in between the Keith Collins trial and Harrison's trial, Ms. Dick unexpectedly passed away. (APP-033, 5.104 Motion). In pretrial filings, the State of Iowa indicated that it would like to present Ms. Dick's 911 call and her prior testimony from the Keith Collins Trial. (APP-033, 5.104 Motion; Tr. Pretrial Motions P. 17-18). Additionally, Harrison's counsel never deposed Ms. Dick so at no point did Harrison's counsel have a fair opportunity to confront or question Ms. Dick. The State of Iowa ultimately did play the 911 call to the jury and read into the record the trial testimony of Ms. Dick from Keith Collins trial without objection from Harrison's counsel. (Tr. Pretrial Motions P. 17-18; Tr. Trial Day 1 Tr. P. 193-194; Exhibit 24; APP-172, Court Exhibit C).

"The Confrontation Clause of the United States Constitution states the accused has the right "to be confronted with the witnesses against him. U.S. const. amend. VI. Identically, the confrontation clause of the Iowa Constitution states the accused has the right 'to be confronted with the witnesses against him.' Iowa Const. Art. I, § 10." *State v. Kennedy*, 846 N.W.2d 517, 522 (Iowa 2014). In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court held that the confrontation clause applied to testimonial statements made outside the presence of the accused. *Id.* "Courts can only admit these testimonial statements in subsequent proceedings if the declarant is unavailable and there has been a prior opportunity for cross-examination." *Id.* (citing *Crawford*, 541 U.S. at 59).

In this case, it is undisputed that Ms. Dick was unavailable. (Tr. Pretrial Motions P. 17-18). It is also undisputed that Harrison did not have a prior opportunity to confront Ms. Dick, as he was not a part of the Keith Collins' trial and did not depose Ms. Dick. (Tr. Pretrial Motions P. 17-18). Further, it cannot reasonably be disputed that Ms. Dick's testimony in the Keith Collins' trial was not testimonial. In fact, it is difficult to envision a clearer example of testimonial than this case. Thus, Ms. Dick's testimony should have been excluded as a clear violation of the Iowa and United States Constitutions' Confrontation Clauses. Yet,

Harrison's counsel failed to object to this testimony. This is a clear violation of an essential duty.

Similarly, Harrison was reasonably prejudiced by this violation. Harrison had no opportunity to cross examine Ms. Dick and illicit potentially helpful testimony for his case. Instead, he was limited only to the cross examination of Keith Collins' attorneys who may have had a completely different theory of the case and certainly had no interest in asking questions which may be relevant to Harrison. Based upon Harrison's ability to rightfully confront one of his accusers, it reasonably caused him prejudice and as such, this Court should reverse Harrison's conviction and remand for a new trial.

Alternatively, should this Court find that Harrison's claims of ineffective assistance of counsel are individually inadequate to support a reversal, Harrison specifically asks this Court to find that the cumulative effect of the ineffective assistance of counsel errors surrounding the felony-murder merger, the admission of Keith Collins conviction and the admission of Shirley Dick's testimony from the Keith Collins trial constitute prejudice under *Strickland*. *State v. Clay*, 824 N.W.2d 488, 500 (Iowa 2012). Given the cumulative effect of these items, this Court should find that Harrison was prejudice and remand for a new trial.

CONCLUSION

Harrison respectfully requests that this Court reverse his conviction of murder in the first degree. Specifically, Harrison request that this Court find that the felony-murder rule is inapplicable for juveniles. Harrison also requests that this Court hold that the jury was improperly instructed regarding the felony-murder rule and was not properly instructed regarding the requirement that the underlying robbery must arise to the level of a felonious robbery and not Robbery in the Third Degree. Harrison also requests that this Court find that Harrison received ineffective assistance of counsel for the failure to request an independent act instruction as outlined in *State v. Heemstra* regarding the underlying robbery. Harrison also requests that this Court find Harrison received ineffective assistance of counsel due to Harrison's trial counsels' failure to object to the testimony of the codefendant's conviction and the admissibility of non-testifying lay witness's testimony from the codefendant's trial. Finally, Harrison requests that this Court determine that Harrison's sentence of life with the possibility of parole is unconstitutionally cruel and unusual in violation of the Iowa and United States Constitutions.

REQUEST FOR ORAL ARGUMENT

Harrison respectfully requests oral argument in this matter.

Respectfully Submitted,

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ATTORNEY'S COST CERTIFICATE

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Proof Brief and Argument was $0.00, as it was electronically filed.

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Dated: October 28, 2017

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I certify on October 28, 2017, I will serve this document on the Appellee's Attorney, Iowa Attorney General's Office, by electronically filing it.

I further certify that on October 28, 2017, I will electronically file this document with the Clerk of the Iowa Supreme Court.

I further certify that on October 28, 2017, I will place a copy of this document in the U.S. Mail directed to

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