IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. JORGE SANDERS-GALVEZ, Defendant-Appellant.	)	S.CT. NO. 17-2059

APPEAL FROM THE IOWA DISTRICT COURT
FOR DES MOINES COUNTY
HONORABLE MARY ANN BROWN, JUDGE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On the 29th day of November, 2018, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Jorge Sanders-Galvez, No. 6454250, Iowa State Penitentiary, 2111 330th Avenue, PO Box 316, Fort Madison, IA 52627.

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issues raised involve substantial questions of enunciating or changing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(f). First, appellant requests this court clarify the hearsay exception present sense impression. Iowa R. Evid. 5.803(1). The current interpretation has strayed from the common sense meaning and strains one's understanding of "[a] statement describing or explaining an event or condition, made *while* or *immediately* after the declarant perceived it." Iowa R. Evid. 5.803(1)(emphasis added).

Second, appellant requests this court to expand Sweet to include youth 21 and younger to coincide with current scientific research. Failure to expand Sweet violates Sanders-Galvez's right to be free from cruel and unusual punishment. Iowa Const. art. 1, § 17.

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by the Defendant-Appellant, Jorge Sanders-Galvez, from the judgment and sentence following appellant's conviction for the offense murder in the first degree in violation of Iowa Code sections 707.1, 707.2, and 703.1 (2015).[1] The Honorable Mary Ann Brown presided over the trial and sentencing in Des Moines County District Court.

Course of Proceedings: Sanders-Galvez and Jaron Purham were jointly charged with the offense murder in the first degree in violation of Iowa Code sections 707.1, 707.2, 703.1 and 703.2 (2015). The State alleged Sanders-Galvez acted either with premeditation or death resulted while he participated in a forcible felony. (Trial Information, 12/20/16)(Conf. App. pp. 5-9). Purham filed a motion to sever

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[1] The judgment and sentencing order also cites 703.2, joint criminal conduct, as authority for the conviction. (Judgment Entry, 12/18/17)(App. pp. 44-46). However, this case was tried under the theories Sanders-Galvez either act as the principle or an aider and abettor. (Instr. No.24 (murder 1st marshaling))(App. p. 52).

which was granted without objection. (Motion to Sever, 5/7/17; 5/18/17 tr. p.3 L.18-p.4 L.13)(App. pp. 5-6). The trial information was later amended to drop the joint criminal conduct allegation and to add language that Sanders-Galvez "aided and abetted in the killing of K.P.J.." (Motion to Amend Trial Information, 6/30/17; Order Granting Motion to Amend Trial Information, 7/18/18; Amended Trial Information, 7/20/17)(Conf. App. pp. 10-23).

Sanders-Galvez moved to exclude hearsay statements made by K.J. to a friend. (Defendant's First Motion in Limine, ¶43(a), 7/13/17)(App. p. 13). The court reserved ruling until the time of trial. (Ruling RE: Defendant's First Motion in Limine, p.5, 7/20/17)(App. p. 22).

The State filed a motion in limine requesting the court to admit videos and photographs taken from Sanders-Galvez's cellphone. One video showed Purham having sex with a woman at 2610 Madison, the house where K.J.'s belongings were found after his death. (State's Consolidated Motion in Limine, §V, 10/18/17)(Conf. App. p. 43). Sanders-Galvez

moved to exclude such evidence. (Motion in Limine & Request for Hearing on Preliminary Questions of Admissibility, ¶¶7-10, 10/20/17; State's Consolidated Reply to Defendant's Motions in Limine, §§III, VI(C)(1), 10/22/17)(App. pp. 26-27; Conf. App. pp. 42, 44-45). The district court reserved ruling until trial. (Order RE: Pending Final Pretrial Motions, ¶3, 10/25/17)(App. p. 32).

A jury trial commenced October 24th. In the midst trial the court held a hearing regarding the cellphone video of Purham having sex with a woman. (Vol.II p.98 L.19-p.103 L.18). The district court found the evidence to be relevant and not highly prejudicial, therefore, admissible under rule 5.404(b). (Vol.III p.102 L.12-p.103 L.18). At the close of the State's case-in-chief, the defense moved for judgment of acquittal arguing the State failed to make a showing on each and every element in the matter. (Vol.III p.239 L.1-3). Defense counsel specifically argued there was no evidence of any felony which would be necessary for the felony murder rule. (Vol.III p.239 L.3-6). The district court denied the motion

finding there was sufficient evidence of both premeditated murder and of felony murder with the felony being kidnapping. (Vol.III p.239 L.21-p.240 L.13). Defense counsel renewed his motion and it was again denied by the court. (Vol.III 422 L.7-25). The jury found Sanders-Galvez guilty of murder in the first degree. (Order RE: Jury Verdict and Scheduling Sentencing, 11/3/17)(App. pp. 42-43).

On December 18th, Sanders-Galvez appeared in open court and was adjudged guilty of murder in the first degree in violation of Iowa Code sections 707.1, 707.2, and 703.1. (Judgment Entry, 12/18/17)(App. pp. 44-46). The district court imposed a sentence of mandatory life without the possibility of parole. (Sent. p.8 L.11-25).

Notice of appeal was timely filed. (Notice, 12/19/17)(App. pp. 47-48).

Facts: Chrystal Hartman lived on the corner of 4th and Walnut in Burlington. (Vol.II p.77 L.18-24). On March 2, 2016, around 11:30 p.m., she was awakened by three gunshots. (Vol.II p.79 L.7-10, p.81 L.13-15). Hartman looked out her

window and saw headlights in the alley. (Vol.II p.79 L.10-11, p.86 L.25-p.87 L.3). By the time she ran down the stairs and outside she could only see the taillights of a vehicle turning the corner really fast. (Vol.II p.79 L.9-14, p.80 L.3-9, p.87 L.7-12). Hartman could not see the vehicle through the sleeting rain except for the headlights, so she was unable to provide police a description. (Vol.II p.79 L.18-25, p.88 L.14-15). Hartman estimated eight minutes after the car took off she saw a white Pacifica and a silver van parked in the alley. (Vol.II p.79 L.14-15, p.89 L.3-19, p.91 L.5-15, p.97 L.17-24). The Pacifica eventually drove to the corner, dropped a person off at the van, and then both vehicles left. (Vol.II p.90 L.13-24, p.92 L.5-p.93 L.5).

When Burlington police arrived at 4th and Walnut, two women pointed to the alley where officers found a body lying next to a garage in a patch of tall grass. (Vol.II p.106 L.6-10, p.110 L.10-p.111 L.13; Ex.D-8(close-up lower body and bleach bottle))(Conf. App. p. 57). No pulse was detected. (Vol.II p.116 L.13-19). A bleach bottle was found lying by the body.

(Vol.II p.113 L.16-23, p.155 L.17-24; Ex.D-6(close-up body in grass))(Conf. App. p. 55). Bleach appeared to have been poured over the body causing bleach stains on the leggings, socks, and shirt. (Vol.II p.113 L.16-23, p.155 L.17-22). The victim was later determined to be K. J. (Vol.II p.156 L.12-15). K.J.'s hands were above his head and a black plastic bag with white writing and pink drawstrings was over his head. His shirt was pulled up exposing his bra and midsection. K.J. was wearing leggings. He was not wearing shoes. (Vol.II p.156 L.12-p.157 L.3, p.162 L.3-8). In the middle-left of K.J.'s chest were two bullet holes: one in the bra and one more towards the center of the body. (Vol.II p.157 L.11-22). When the garbage bag was removed from K.J.'s head, officers saw that "another obstructor" was wrapped over his mouth and chin. (Vol.II p.167 L.6-15).

The Medical Examiner concluded K.J. died from two gunshot wounds to the chest, not from asphyxiation. (Vol.II p.256 L.14-21; p.273 L.1-8). The fatal gunshot wounds entered (1) the heart and (2) the aorta. (Vol.II p.273 L.6-22).

In addition, a white t-shirt was tied over K.J.'s mouth and chin. (Vol.II p.256 L.3-14, p.259 L.11-22; Ex.C-9(shirt covering mouth)). When removed the Medical Examiner found a tightly-compressed, black, plastic garbage bag in K.J.'s mouth. (Vol.II p.261 L.2-8).

K.J. was a transgender Burlington high school student. (Vol.II p.25 L.8-p.26 L.22, p.48 L.12-16). High school friend T.J. testified K.J. was well-liked. (Vol.II p.27 L.1-3). T.J. was with K.J. the night he was killed. (Vol.II p.30 L.2-4). They met up a youth center after school, then went to T.J.'s house, to the library, and then to Hy-Vee to use the Wi-Fi. (Vol.II p.30 L.5-p.32 L.6, p.41 L.16-p.43 L.21). T.J. estimated they were there 20 minutes until he had to leave to meet his 9:00 curfew. (Vol.II p.32 L.17-p.35 L.15). The Hy-Vee photos show him and K.J. leaving at 8:51. (Exs.J-4(T.J. exiting), J-6(K.J. exiting))(Ex. App. pp. 24-25). K.J. was wearing a jacket, leggings, tennis shoes, a pink headband, and his hair was loose. (Vol.II p.35 L.19-p.36 L.6). K.J. walked T.J. halfway home and then returned to Hy-Vee to retrieve his laptop and book bag.

(Vol.II p.37 L.1-22).

K.J. showed up at fifteen-year-old A.W.'s home around 10:00 p.m. (Vol.II p.45 L.16-20, p.50 L.15-18, p.53 L.7-p.54 L.7, p.66 L.22-23, p.67 L.12-17; Ex.G-13(four bras photo))(Ex. App. p. 16). It would take a person approximately three minutes to walk from Hy-Vee to A.W.'s home. (Vol.II p.45 L.9-13).

A.W. testified K.J. told her he "was scared" because "Lumni" was following him. (Vol.II p.56 L.11-p.57 L.5, p.66 L.17-21). "Lumni" is Sanders-Galvez's nickname, but A.W. did not know who Lumni was. (Vol.II p.57 L.6-7, p.68 L.16-22, p.324 L.2-8). A.W. offered K.J. a ride home, but he declined. (Vol.II p.57 L.8-12, p.63 L.3-6). Looking out her front window A.W. could see the end of a red car parked on the wrong side of the street facing the wrong way. (Vol.II p.57 L.18-p.59 L.3). A.W. retrieved four bras for K.J. and he placed them in his drawstring bag. (Vol.II p.59 L.6-17). K.J. left after 20 minutes. (Vol.II p.59 L.18-21, p.67 L.14-p.68 L.15). A.W. testified that as K.J. was leaving she looked out the window and

did not see the car. (Vol.II p.61 L.22-25, p.71 L.10-15). Before she turned around K.J. had left. (Vol.II p.61 L.22-p.62 L.2). She could not see him but he had to go to the right to take the stairs off the porch and the direction of his home, which was the opposite direction that the car had been facing. (Vol.II p.62 L.7-18, p.70 L.3-20, p.71 L.19-p.72 L.10, p.75 L.2-p.4).

After hearing about K.J.'s death, A.W. contacted law enforcement to report that he told her he had been followed by "Lumni". (Vol.II p.168 L.12-p.8, p.170 p.12-14). Law enforcement found a Facebook page for "Lumni Hoe" with pictures of Sanders-Galvez. (Vol.II p.169 L.13-21, p.171 L.18-p.172 L.2).

Burlington Police Officer Eric Short testified Sanders-Galvez had several ties to the area through his relatives. (Vol.II p.172 L.3-10). Sanders-Galvez would come to Burlington and stay for a few weeks and then return to St. Louis. (Vol.II p.172 L.11-15). Girlfriend Peyton Stineman-Noll, with whom he has a child, lived in Muscatine. (Vol.II p.172 L.16-22).

Law enforcement was able to determine a red 2010 Chevy Impala was registered to Malaka Samuel, who was pregnant with Purham's child. (Vol.II p.181 L.4-p.182 L.6, p.184 L.3-6, p.296 L.9-20). Samuel stayed for a time at 2610 Madison. (Vol.II p.182 L.6-7). Short and DCI Special Agent Matt George went to the rental house March 10th. (Vol.II p.298 L.9-10). No one answered the door. (Vol.II p.296 L.17-23). Short checked the garage and saw Dollar General trash bags. (Vol.II p.301 L.14-22). The garbage bag covering K.J.'s head had pink pull strings like Dollar General bags found by officers and the bleach was from Dollar General. (Vol.II p.301 L.23-p.302 L.12). The bags had the same white lettering of a suffocation warning. (Vol.II p.302 L.4-12).

A search of the house resulted in finding a backpack with K.J.'s photo ID, his laptop, and a backpack with four bras inside. (Vol.II p.305 L.1-10). Also found were Nike shoes connected to K.J. by the Hy-Vee video later obtained. (Vol.II p.305 L.11-24). Blue sheets were seized from the upstairs bed room. (Vol.II p.401 L.15-p.402 L.5). Fibers from those sheets

were consistent with fibers found in K.J.'s autopsy. (Vol.II p.435 L.16-p.436 L.23).

Police pulled Hy-Vee surveillance tapes. (Vol.II p.176 L.15-23, p.178 L.19-p.179 L.11). T.J. and K.J. left Hy-Vee at 8:52. (Vol.II p.186 L.4-11; Ex.E-2(DVD 8:52)). Then K.J. re-entered Hy-Vee at 8:55. (Vol.II p.187 L.5-18; Ex.E-3(DVD 8:55)). Purham entered the store at 9:41. (Vol.II .189 L.8-15; Exs.E-3(DVD 9:41), E-6(DVD 9:41)). K.J. was still in the store. (Vol.II p.189 L.16-22). A few minutes later Sanders-Galvez entered at 9:54. (Vol.II p.189 L.17-p.190 L.12; Exs.E-3(DVD 9:54); E-6(DVD 9:56)). At 10:00 K.J. exited the store and turned left (east) towards the street but then went back into the store to make a phone call. (Vol.II p.198 L.3-10, p.202 L.13-p.203 L.4; Exs.E-1(DVD 10:00), E-3(DVD 10:01), E-6(DVD 10:00)). While K.J. was on the phone, Purham and Sanders-Galvez exited Hy-Vee at 10:03. (Vol.II p.201 L.4-12, p.203 L.5-9; Ex.E-3(DVD 10:03). As K.J. again leaves Hy-Vee at 10:03, (Vol.II p.205 L.1-8; Ex.E-2(DVD 10:03)), Purham and Sanders-Galvez walked through the parking lot and got into the

Impala at 10:04 and drove off. (Vol.II p.206 L.9-p.207 L.3; Ex.E-5(DVD 10:03)). Purham was driving. (Vol.II p.211 L.1-6). The Impala drove up behind K.J. and past him. (Vol.II p.212 L.21-p.213 L.16; Ex.E-2(DVD 10:04)).

Short admitted the video only showed the parties were in the Hy-Vee at the same time. It does not show any contact between K.J. and Sanders-Galvez or Purham. (Vol.II p.307 L.20-p.309 L.17).

Earlier on March 2nd, Deangelo Haley and Terrance Polk, nicknamed "Little T", were playing video games, rapping, listening to music, and smoking a "considerable amount" of marijuana with Sanders-Galvez and Purham, nicknamed "Wikked West" or "West". (Vol.II p.190 L.7-11, p.320 L.8-p.322 L.11, p.347 L.1-24; Vol.III p.247 L.4-p.249 L.8). Sanders-Galvez had a "long-barreled" chrome revolver in his pocket. (Vol.II p.324 L.6-22). Then Sanders-Galvez and Purham decided to go pick-up salads from Hy-Vee and bring them back to the residence. (Vol.II p.325 L.16-p.326 L.3). They left in a red Impala. (Vol.II p.327 L.13-14). Haley

expected them to be gone approximately 20 minutes. (Vol.II p.327 L.22-25). Instead, they were gone two hours. (Vol.II p.328 L.16-20). At 10:32 Polk called to see what was taking so long, and Sanders-Galvez said they had to make a quick stop. (Vol.II p.329 L.1-p.330 L.1; Vol.III p.181 L.2-p.182 L.20; Ex.I-2a(call records, p.29))(Conf. App. p. 60). Polk finally went to Hy-Vee himself to buy some food. (Vol.III p.276 L.17-p.278 L.4; Ex.E-8(receipt))(Ex. App. p. 13). When they finally returned they again said they just had to make a quick stop. (Vol.II p.330 L.16-p.331 L.13). Polk testified Sanders-Galvez's behavior seemed normal. (Vol.III p.253 L.18-p.254 L.12).

That night Sanders-Galvez asked Haley to hold the gun. (Vol.II p.331 L.21-p.332 L.10). Then the next morning Sanders-Galvez returned to retrieve the gun. (Vol.II p.333 L.3-21).

Jessie Lewis, nicknamed "J.J.", rented the house at 2610 Madison Avenue with Demetrius Goode in March of 2016. (Vol.II p.362 L.15-16, p.364 L.21-24, p.365 L.4-8). Lewis's bedroom was on the first floor. (Vol.II p.366 L.3-6). Goode's

bedroom was on the second floor. (Vol.II p.366 L.7-16). However, Goode was usually sleeping at his girlfriend's house in March of 2016. (Vol.II p.366 L.24-p.367 L.6). In February and March of 2016, Polk, Marquantay Brown, Sanders-Galvez, Purham, and Samuel would sometimes stay at the residence. (Vol.II p.368 L.4-22). Lewis testified that the men sometimes brought girls over to the house. (Vol.II p.371 L.1-5).

On March 2nd, Lewis worked from 3:00 to 11:00 p.m. (Vol.II p.372 L.8-18). When he got home sometime after 11:15, no one was at the residence. (Vol.II p.373 L.5-23, p.385 L.4-16). Lewis went straight to bed. (Vol.II p.377 L.10-24).

On March 14th, a red Impala was spotted by Florissant, Missouri Officer Joshua Smith. (Vol.II p.449 L.18-p.450 L.11). A computer check of the license plate revealed the vehicle was associated with a homicide. (Vol.II p.450 L.9-11). Smith pulled the vehicle over but as he approached, it sped off. (Vol.II p.451 L.14-22). After the vehicle crashed into a guardrail, Parham fled on foot until tackled by Smith. (Vol.II p.452 L.5-p.453 L.21). Remaining in the red Impala were Chelsea

Thomas and her two-year-old son. (Vol.II p.454 L.8-18).

On the driver's side floorboards was a silver revolver with a wooden grip. (Vol.II p.455 L.1-3). The car clearly had not been cleaned for some time as there was trash and clothing throughout the inside. (Vol.II p.460 L.15-23). The gun was later seized by Burlington Detective Josh Tripp when he came to search the Impala. (Vol.II p.468 L.10-p.469 L.8). DCI criminologist Tara Scott's DNA tests revealed DNA of at least three people with the major contributor being Purham. (Vol.II p.548 L.19-p.549 L.15). She could not determine the other two minor contributors. (Vol.II p.550 L.17-21).

The Impala was taken to the DCI laboratory in Ankeny, where Scott continued her investigation. (Vol.II p.555 L.23-p.556 L.15). On the passenger floorboard was a bag with ammunition. (Vol.II p.561 L.8-20). In the pocket on the back of the front passenger seat, Scott found two items of paperwork belonging to Sanders-Galvez. (Vol.II p.555 L.25-p.556 L.19; Exs.A-29(contents of seat pocket), A-32(close-up DHS letter), A-33(close-up of decision letter))(Ex. App. pp. 5-7). Found in

the vehicle were two identification cards for "Jorge Galvez Marias." (Vol.II p.567 L.16-18; A-24(ID cards)). Also found was a USPS letter informing Purham they could not forward his mail from 2610 Madison to 835 Valley St., Burlington. (Vol.II p.567 L.16-p.569 L.22(Ex.A-26(Purham's forwarding request))(Ex. App. p. 4).

In all of Scott's testing of the crime scene at 2610 Madison Avenue and of the Impala there were no DNA profiles matching Sanders-Galvez. (Vol.II p.577 L.4-20). Nor were there any DNA profiles from the Impala matching K.J. (Vol.II p.577 L.21-p.578 L.5). The only DNA profiles that matched K.J. were from his own clothing and body swabs. (Vol.II p.578 L.6-13; Ex.10(lab report 10))(Conf. App. pp. 80-81).

DCI Agent Victor Murillo examined and test fired the gun found in the Impala. The firearm was a common Smith and Wesson Model 681 six-shot revolver. (Vol.II p.593 L.5-17, p.621 L.16-18). Murillo test fired bullets from the revolver and compared the bullets to the bullets found in K.J. (Vol.II p.603 L.1-13). The test fired bullets had the same characteristics as

the bullets recovered from K.J. (Vol.II p.604 L.17-p.608 L.4; Exs.F-9(photo 59A), F-10(photo-60E)) (Ex. App. pp. 14-15). However, the six live rounds that came with the gun were different than the bullets found in K.J. (Vol.II p.613 L.1-p.614 L.6). Other ammunition found in the Impala was also different than the bullets found in K.J. (Vol.II p.614 L.16-p.615 L.24; Ex.12(lab report 12))(Conf. App. pp. 82-83).

DCI Criminologist Richard Crivello conducted finger print comparisons on certain items. A Magtech .357-magnum, blue, cardboard box containing ammunition seized from the Impala was found to have Purham's finger print on the outside of the box. (Vol.III p.45 L.13-p.50 L.5, p.70 L.6-14). No latent finger prints were found inside the Impala. (Vol.III p.51 L.23-p.52 L.9). Purham's and Sanders-Galvez's finger and palm prints were found on the outside of the Impala. (Vol.III p.55 L.3-18, p.57 L.22-p.23 L.3, p.58 L.1-10; Ex.A-43(rear driver's side drawing), A-44(passenger-side prints))(Ex. App. p. 9). K.J.'s prints were not found on or inside the Impala. (Vol.III p.57 L.12-17, p.68 L.1-17).

Special Agent Matt George testified regarding a review of Sanders-Galvez's cellphone, Facebook records, and Sprint cellphone records. (Vol.III p.142 L.10-12). There were no calls or texts between Sanders-Galvez and K.J.. (Vol.III p.149 L.2-6, p.232 L.13-18). However, Sanders-Galvez's Facebook account ("Lumni Hoe") listed as a friend "Kandicee K.J.", which was K.J.'s female Facebook account, as one of Sanders-Galvez's 2000 plus Facebook friends. (Vol.III p.149 L.19-p.150 L.17, p.233 L.9-11; Ex.H-19(accepted Facebook friends 12/10/15))(Conf. App. p. 59). The account was at least one of 16 accepted December 10, 2015.[2] (Ex.H-19)(Conf. App. p. 59). K.J. also had a male account under "K.P.J." (Vol.III p.149 L.10-18). Both of K.J.'s names and "Lumni Hoe" appeared in a group chat, but there were no specific comments between "Lumni Hoe" and K.J.. (Vol.III p.152 L.4-21, p.232 L.19-p.233 L.3).

On March 1, 2016, "Lumni Hoe" texted he was at "Jay

[2] The date is listed as December 10th at 5:30 a.m. UTC which is different from Central Standard Time and the actual time was six hours earlier on December 9th. (Vol.III p.151 L.13-25).

Jays," who is Lewis. (Vol.III p.156 L.19-p.157 L.22, p.158 L.5-18; Exs. H-6(texts with Peter Xan) , H-14(texts with King Timmy))(Ex. App. pp. 18, 22). Also found on the cellphone were photos of 2610 Madison Avenue, some with embedded geolocation data designating 2610 Madison Avenue. (Vol.III p.160 L.1-p.164 L.25; Exs.L-19a(in kitchen at 2610), L-19b(embedded GPS coordinates for L-19a), L-20a(defendant on sidewalk at 2610), L-20b(embedded GPS coordinates for L-20a); L-21(extraction report), L-22(defendant with red car in front 2610)(Ex. App. pp. 27-32).

The State's theory was that Sanders-Galvez and Purham picked up K.J. to have group sex at 2610 Madison. (Vol.III p.101 L.3-11). So it presented testimony by George about photos found on Sanders-Galvez's phone of him with different women at 2610 Madison. (Vol.III p.166 L.1-24; Exs. L-17 (nude of Stineman-Noll), L-23(with woman))(App. p. 33; Conf. App. p. 79). The State also offered into evidence a December 13, 2016 video on Sander-Galvez's phone of him recording Purham having sex with a woman. (Vol.III p.167 L.2-p.170

L.5; Ex.H-15(sex tape). George testified he could see the spiral staircase that is a feature of the house, the texture of the wall that was similar or identical to that at 2610 Madison, and the woodwork was similar. (Vol.III p.167 L.14-p.170 L.5).

Also on Sanders-Galvez's Facebook were photos and a video of a .357 revolver sent from Damion Smith in December 2015. (Vol.III p.171 L.23-p.175 L.12). Sanders-Galvez testified he purchased the gun though Facebook for Purham. (Vol.III p.387 L.1-p.388 L.7).

George testified Sanders-Galvez's cellphone had a one hour "dead zone" period of time from 10:33 to 11:46 p.m. where there was no activity. (Vol.III p.183 L.2-25, p.216 L.7-p.217 L.11). The 911 calls for K.J.'s murder came in around 11:35 p.m. (Vol.III p.189 L.1-5).

In the early morning hours of March 3rd, Sanders-Galvez sent texts and Facebook messages indicating he was leaving. (Vol.III p.187 L.17-p.188 L.20, p.189 L.10-p.190 L.13; Exs.H-3(Facebook, p.244), L-10a(Facebook message))(Ex. App. pp. 17, 26). The next day he texted he was returning to the

"crib." (Vol.III p.190 L.14-p.191 L.17; Ex.L-10c(SMS message))(Conf. App. p. 61). On March 6th, Sanders-Galvez texted "Nolames" that he was in St. Louis. (Vol.III p.185 L.17-p.186 L.19; Ex.H-12(Nolames text))(Ex. App. pp. 20-21).

George testified that in the days following March 2nd Sanders-George web history revealed a number of searches involving "Burlington", "crime", and "arrest," (Vol.III p.217 L.12-p.230 L.25; Ex.L-11(web history))(Conf. App. p. 62).

Stineman-Noll was Sanders-Galvez's "on-and-off" girlfriend with whom he has a son. (Vol.III p.6 L.18-23, p.403 L.20-24). She testified that in February and March Sanders-Galvez, Purham, and Samuel were staying at Lewis's house, 2610 Madison. (Vol.III p.10 L.18-p.12 L.13). On two separate occasions in February when Stineman-Noll was with Sanders-Galvez she saw a gun with a silver barrel. (Vol.III p.13 L.1-25, p.15 L.3-8). One of those times it was on Lewis's bed in the downstairs bedroom. (Vol.III p.31 L.15-23).

Sanders-Galvez had been commenting to Stineman-Noll that he could not continue to stay at Lewis's house. (Vol.III

p.18 L.12-15). Then two days after K.J.'s death, he left for St. Louis, telling Stineman-Noll it was for a family emergency. (Vol.III p.18 L.19-p.19 L.7).

Stineman-Noll learned of K.J.'s death from Facebook. (Vol.III p.18 L.4-7). The next week Burlington police questioned her about her relationship with Sanders-Galvez and requested to speak to him. (Vol.III p.19 L.8-17). She told police that she did not know how to contact him. (Vol.III p.20 L.19-p.21 L.9). Then Stineman-Noll contacted Sanders-Galvez by phone and by Facebook to tell him the police wanted to talk to him about K.J.'s murder. (Vol.III p.21 L.10-p.22 L.22, p.24 L.4-20; Ex.H-8(3-10-16 text))(Ex. App. p. 19).

While Sanders-Galvez was in jail, he called Stineman-Noll to talk about her statements under oath given that day. (Vol.III p.25 L.10-p.26 L.17). In her statements she admitted to having seen Sanders-Galvez with a gun prior to K.J.'s death. (Vol.III p.26 L.18-25, p.28 L.21-25; Ex.K-1(DVD jail call)). When she explained all she did was say she had seen him with the gun, Sanders-Galvez called her stupid and asked whether

she thought that was smart. (Vol.III p.29 L.5-15; Ex.K-2(DVD jail call)). He said her statements did not help him. (Vol.III p.29 L.20-p.30 L.7; Ex.K-3(DVD jail call)). Stineman-Noll replied it would not have helped him if she had perjured herself. (Vol.III p.30 L.4-7; Ex.K-3(DVD jail call)). Sanders-Galvez told her she did not have to lie, she just needed to not say anything. (Vol.III p.30 L.8-11; Ex.K-3(DVD jail call)).

Andrea Bedford and Jacalynn Martinez were roommates on South 7th Street, Burlington. (Vol.III p.285 L.5-19). Bedford testified Sanders-Galvez called March 2nd to ask to come over. (Vol.III p.287 L.15-p.288 L.10, p.291 L.1-13, p.305 L.5-p.306 L.16). She could not remember exactly when he called but agreed it could have been the 11:52 p.m. call reported on the call records. (Vol.III p.289 L.15-p.291 L.13; Ex.I-2a(call records, p.29))(Conf. App. p. 60). The call records also show a call from Sanders-Galvez to Bedford at 9:41 p.m. (Ex.I-2a, p.29)(Conf. App. p. 60). Martinez only knew that Bedford asked if he could come over when she was going to bed. (Vol.III p.305 L.5-17). Sanders-Galvez came to Bedord's residence at

2:02 a.m. (Vol.III p.286 L.6-p.287 L.4). Sanders-Galvez left around 7:00 a.m. (Vol.III p.287 L.5-12). Bedford never saw him after that. (Vol.III p.287 L.13-14). Bedford testified there was nothing unusual about Sanders-Galvez's behavior. (Vol.III p.288 L.14-19).

Sanders-Galvez's testimony:

Sanders-Galvez testified he did not know K.J. (Vol.III p.371 L.11-17, p.378 L.20-22, p.379 L.1-2). He testified that on March 2nd, he did not have any personal contact with K.J., did not shoot K.J., nor do anything to harm K.J.. (Vol.III p.378 L.20-p.379 L.2).

On March 2nd he and Purham left Hy-Vee, went to Monique Davis's house for five to ten minutes, and then to 2610 Madison to pick up some marijuana. (Vol.III 372 L.4-p.273 L.3). While Sanders-Galvez was packaging the marijuana, Purham left saying he would be "right back." (Vol.III p.373 L.13-20). Polk called while he was packaging the marijuana. (Vol.III p.373 L.21-25). Sanders-Galvez told Polk he had to make a quick stop and then he would be back with the food. (Vol.III p.374

L.1-4).

Purham had not returned when Sanders-Galvez was finished packaging the marijuana, so he started walking to Haley's house. (Vol.III p.374 L.5-11). After 20 minutes of walking he saw the Impala and went into the middle of the street to wave Purham down. (Vol.III p.374 L.13-18, p.379 L.3-9). Purham pulled to a stop and pulled a gun. (Vol.III p.374 L.18-23). Sanders-Galvez chastised Purham and got into the car. (Vol.III p.374 L.19-23). On the way back to Haley's house, Purham asked Sanders-Galvez to "hold this [the gun] down" for him. (Vol.III p.375 L.5-12).

Upon their return, the four men smoked marijuana and played video games. (Vol.III p.375 L.15-16). When Sanders-Galvez and Purham were about to leave, Purham asked him to have Haley hold the gun because there were lots of police around and as felons they were not allowed to possess firearms. (Vol.III p.375 L.18-p.376 L.13). So Sanders-Galvez asked Haley to hold onto the firearm. (Vol.III p.376 L.20-24). Sanders-Galvez then had Purham drop him off at Bedford's

residence. (Vol.III p.376 L.25-p.377 L.9). The next morning Purham picked him up to go back to Haley's house. (Vol.III p.377 L.12-20). Purham demanded Sanders-Galvez retrieved the gun from Haley. (Vol.III p.377 L.21-p.378 L.19).

Sanders-Galvez testified he left Burlington because his cousin called to say that he needed to be back in St. Louis to start setting up for their show for their family-owned record label. (Vol.III p.404 L.18-p.405 L.25). Sanders-Galvez was checking the internet about K.J.'s death because he had been told he was a suspect. (Vol.III p.406 L.3-15).

Any relevant facts will be discussed in the argument below.

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR FELONY-MURDER WHERE THE UNDERLYING FELONY WAS KIDNAPPING. THERE WAS NO SHOWING OF REMOVAL OR CONFINEMENT BEYOND THAT ASSOCIATED WITH THE MURDER.

Preservation of Error: Error was preserved by Sanders-Galvez's motion for judgment of acquittal arguing there was no evidence of any felony which would be necessary for the felony murder rule and the trial court's denial thereof. (Vol.III p.239 L.3-6, p.239 L.21-p.240 L.13, p.422 L.7-25).

Scope of Review: A motion for judgment of acquittal is a means for challenging the sufficiency of the evidence. This court reviews sufficiency of evidence claims for a correction of errors at law. Iowa R. Crim. App. 6.907; State v. Sanford, 814 N.W.2d 611, 615 (Iowa 2012). The jury's finding of guilt will not be disturbed if there is substantial evidence to support the finding. State v. Torres, 495 N.W.2d 678, 681 (Iowa 1993). Substantial evidence is evidence that would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. State v. McCullah, 787 N.W.2d 90, 93 (Iowa 2010). The

evidence must at least raise a fair inference of guilt as to each element of the crime. Id. at 93. The ultimate burden is on the State to prove every fact necessary to constitute the crime with which a defendant is charged. State v. Gibbs, 239 N.W.2d 866, 867 (Iowa 1976). The record is viewed in the light most favorable to the State. Torres, 495 N.W.2d at 681. This court considers all the evidence in the record, not just the evidence supporting the finding of guilt. Id. Evidence which merely raises suspicion, speculation, or conjecture is insufficient. McCullah, 787 N.W.2d at 93.

Merits: Sanders-Galvez was convicted of being the principle or aiding and abetting in a murder in the first degree under two alternatives: (1) premeditated murder and (2) by killing of another while participating in a forcible felony. See Iowa Code §707.2(1)(a), (b). However, there was insufficient evidence of an underlying kidnapping felony, therefore, insufficient evidence of felony-murder. Reversal and remand is required because the verdict form did not request the jury to disclose which alternative it based its decision upon. (Forms of

Verdict, 11/3/17)(App. pp. 40-41). "When a general verdict does not reveal the basis for a guilty verdict, reversal is required." State v. Heemstra, 721 N.W.2d 549, 558 (Iowa 2006).

In order to prove Sanders-Galvez guilty of murder in the first degree, the State had to prove all the following elements:

> 1. On or about March 2, 2016, the defendant individually or someone he aided and abetted shot K.J..
>
> 2. K.J. died as a result of being shot.
>
> 3. The defendant individually or someone he aided and abetted acted with malice aforethought.
>
> 4. The defendant individually or someone he aided and abetted acted willfully, deliberately, premeditatedly and with specific intent to kill K.J. *and / or he individually or someone he was aiding and abetting was participating in the offense of Kidnapping.*

(Instr.No.24(murder 1st marshaling)(emphasis added))(Conf. App. p. 52). Kidnapping was defined for the jury as:

> ... a person confining another person or removing a person from one place to another, knowing that the person who confines or removes the other person has neither the authority nor consent of the other to do so; provided that the person does so with the intent

> to *secretly confine* the other person. A person is confined when his freedom to move about is substantially restricted by force, threat, or deception. The person may be confined either in the place where the restriction began or in a place to which he has been removed. No minimum time of confinement or distance of removal is required. It must be more than slight. *In this case the confinement or removal must have significance apart from the murder of K.J.*. In determining whether confinement or removal exists, you may consider whether (1) the risk of harm to K.J. was substantially increased, (2) the risk of detection was significantly reduced, or (3) escape was made significantly easier.

(Instr.No.19(kidnapping definition)(emphasis added))(App. p. 39); see State v. Robinson, 859 N.W.2d 464, 481 (Iowa 2015)("In the end, the question calls for an exercise of our judgment as to whether, on the totality of the circumstances, the State offered sufficient evidence that a jury could find beyond a reasonable doubt that the defendant's confinement of the victim *substantially* increased the risk of harm, *significantly* lessened the risk of detection, or *significantly* facilitated escape." (emphasis in original)). "Secretly confined" was defined as meaning "more than restricting the movements of K.J.. It means an intent to conceal or hide K.J. to prevent his

discovery." (Instr.No.19(secretly confined definition))(App. p. 39).

The problem in the present case is there were *no* witnesses to the murder. What is known is that K.J. left Hy-Vee at the same time Purham and Sanders-Galvez left Hy-Vee. During the time they were in Hy-Vee there was no interaction between them. None. When Purham and Sanders-Galvez left Hy-Vee they drove past K.J. and did not interact with him.

K.J. went to A.W.'s and said he was "scared" because "Lumni was following him." However, there was no statement as to when Lumni was following him. K.J. does not say Lumni had just followed him from the store. He just made a general statement. A.W. claimed she saw the taillights of a red car. But taillights in and of themselves are red and would put out a red glow discoloring the car. Further, K.J.'s disposition was not that of someone being followed. A.W. said that K.J. was his normal happy, smiling self. A.W. also offered to drive K.J. home but he declined.

K.J. was not seen again until his body was found in the

alley with two bullet wounds to his chest. His hands and feet were not bound. K.J. had a bag over his head and plastic shoved in his mouth. There was no evidence as to what happened after leaving A.W.'s house at approximately 10:20 p.m. and shots being fired at 11:30 in the alley. (Vol.II p.79 L.7-10, p.81 L13-15, p.59 L.18-21, p.67 L.14-p.68 L.15).

Also, there was no evidence of K.J. ever being in the Impala driven by Purham. There was no DNA or finger print evidence found in the Impala that matched K.J.'s DNA and fingerprints. (Vol.II p.577 L.21-p.578 L.5; Vol.III p.142 L.10-12).

There was no evidence of removal or confinement that had a significance apart from the murder of K.J.. (Instr. No.19(definition kidnapping))(App. p. 39). A bag was found in his mouth and over his head. There was no evidence as to when the bags were placed in his mouth and over his head. Witnesses heard shots, a car was seen speeding away, and his body was found in the alley. All that is known is that K.J. was in the alley and he was shot. The fact that he had a bag over his head and in his mouth does not offer a significance apart

from the murder itself. This court recognizes that every underlying offense of kidnapping "involves some act of intentional confinement or movement." Robinson, 859 N.W.2d at 475.

Further, idea of removal and confinement presume that the person is alive. Killing someone and leaving the body in an alley is not removal and confinement. And it definitely does not "add substantially to the heinousness of the [murder]." Id. at 476. The State cannot show that the removal and confinement of K.J. was "beyond that ordinarily associated with the underlying offense" of murder. Id. at 477. Leaving of K.J.'s body in the alley was part of the murder.

Finally, the fact that some of K.J.'s belongings were found at 2610 Madison does not prove that K.J. was taken from Madison to the alley. There was no evidence as to how those items got there. Lewis testified that he and Goode rented the house, but in March 2016 Polk, Brown, Sanders-Galvez, Purham, and Samuel also had access to the residence. (Vol.II p.362 L.15-16, p.364 L.21-24, p.365 L.4-8, p.368 L.4-22).

There was testimony that blue fibers found on K.J. were consistent with the blue polyester sheets found at 2610 Madison. (Vol.II p.169 L.14-p.170 L.11, p.401 L.22-15, p.433 L.2-p.439 L.9). But there is nothing unique about these fibers that conclusively determine they were from the navy blue polyester sheets found in the room.

Therefore, the State has failed to prove a kidnapping took place. Convictions cannot rest on mere suspicion, speculation, or conjecture. McCullah, 787 N.W.2d at 93. Without proof of a kidnapping offense, there is not sufficient evidence to prove felony-murder. Therefore, Sanders-Galvez's murder conviction must be reversed and remanded for trial solely on the offense of premeditated murder. See Heemstra, 721 N.W.2d at 558.

II. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING ON HEARSAY GROUNDS TO THE STATEMENT "LUMNI WAS FOLLOWING HIM."

Preservation of Error: Claims of ineffective assistance of counsel are an exception to the general rule of error preservation. State v. Dalton, 674 N.W.2d 111, 119 (Iowa

2004).

Scope of Review: This court reviews claims of ineffective assistance of counsel de novo. State v. Horness, 600 N.W.2d 294, 297 (Iowa 1999).

Merits: The issue on appeal is whether Sanders-Galvez was denied the effective assistance of counsel when trial counsel failed to object to A.W.'s statement, "He just said Lumni was following him." (Vol.II p.56 L.25-p.57 L.5). Counsel demonstrated by his objections to the earlier hearsay statement that "he was scared" that he did not want any of A.W.'s statements regarding Sanders-Galvez into evidence. Failure to object was a breach of an essential duty. Sanders-Galvez was prejudiced by the breach as it was the only direct evidence Sanders-Galvez was following K.J..

In order to prevail on a claim of ineffective assistance of counsel, the defendant must prove by a preponderance: (1) trial counsel failed to perform an essential duty and (2) he was prejudiced by counsel's breach. Millam v. State, 745 N.W.2d 719, 721 (Iowa 2008). "An attorney fails to perform an

essential duty when the attorney 'perform[s] below the standards demanded of a reasonably competent attorney.' " Id. at 721. Counsel's performance is measured against the standard of a reasonably competent attorney. State v. Clay, 824 N.W.2d 488, 495 (Iowa 2012). Counsel is presumed to have performed competently. Millam, 745 N.W.2d at 721.

A defendant suffers prejudice "by counsel's failure to perform an essential duty when 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " Id. at 722 (citation omitted). "A reasonable probability is one that is "sufficient to undermine confidence in the outcome."' " Id. (citation omitted). This court considers 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. Everett v. State, 789 N.W.2d 151, 158 (Iowa 2010).

The following exchange took place at trial as the State tried to get K.J.'s hearsay statements into evidence:

Q. Now, when [K.J.] first got to your house, did he say anything to you? A. He said --

MR. DIAL: I'm going to object. This is going into hearsay at this time.

MS. BEAVERS: Your Honor --

THE COURT: Your response?

MS. BEAVERS: -- this is an exception to the hearsay rule, much like the Court ruled in State v. Richards that it is an exception under 5.803, present sense impression under subsection 1, or it applies under subsection 3 that these are statements made by the victim. Because identity is also an issue in this case, motive is going to be a critical element in proving premeditation under the aiding abetting theory.

THE COURT: I believe that this could be an exception to the hearsay rule, being a present sense impression, but I think you may want to ask a question or two before this question to lay the foundation for the present sense impression.

MS. BEAVERS: All right. Thank you, your Honor.

Q. When K.J. came in your house, how was he acting? A. His normal self, he was smiling and talking.

Q. Did he give you any indication that he was having some concerns? A. No, he just said he was scared.
MR. DIAL: This is going into hearsay then, the answer is.

THE COURT: Overruled.

Q. Yeah, and can you speak up? Did he indicate to you he had any concerns? A. No.

Q. Okay. But you started to say he was what? A. *He just said he was scared. He didn't act scared or anything.*

Q. But he said he was scared? A. Yes.

Q. And did he say why he was scared? A. *He just said Lumni was following him.*

Q. I'm sorry, can you say that louder, please? A. *He said Lummi was following him.*

Q. *Lummi was following him? A. Yes.*

Q. Did you know who Lummi was? A. No.

(Vol.II p.55 L.12-p.57 L.7).

A. Breach: The statement "Lumni was following him" was clearly hearsay. So the question is whether it falls under any hearsay exception.

"'Hearsay' is a statement, other than one made by the declarant testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(c). Hearsay is not admissible unless it falls within one of the

exceptions provided by the rules of evidence. State v. Dullard, 668 N.W.2d 585, 589 (Iowa 2012); see Iowa Rs. Evid. 5. 802, 5.803. As the proponent of the hearsay evidence, the State carries the burden of proving that it falls within the hearsay exception. State v. Cagley, 638 N.W.2d 678, 681 (Iowa 2001). "However, when no contemporaneous objection is made, the issue becomes whether the defendant received ineffective assistance of counsel. Ineffective assistance claims are reviewed de novo, and the defendant bears the burden of proof on all aspects of this claim." State v. Oberbroekling, No. 09-0589, 2009 WL 5126254, *2 (Iowa Ct. Appeal December 30, 2009)(citing State v. Martin, 704 N.W.2d 665, 669 n.2 (Iowa 2005)); see State v. Carberry, 501 N.W.2d 473, 477 (Iowa 1993) (cases stating prejudice is presumed involved alleged evidentiary error preserved by objection).

1. Present Sense Impression:

One exception to the hearsay rule is present sense impression. "A statement describing or explaining an event or condition made while the declarant was perceiving the event or

condition, or immediately thereafter." Iowa R. Evid. 5.803(1).

This court first recognized present sense impression in State v. Flesher, 286 N.W.2d 215, 218 (Iowa 1979). The underlying theory of the present sense impression exception is that "substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation." Id. (quoting Advisory Committee Note, Fed. R. Evid. 803). The Flesher court reasoned that "a requirement that the declaration be made contemporaneously with the observation means that there will be little or no time for calculated misstatement and thus provide protection analogous to that provided by the impact of an exciting event." Id. at 217. (citation omitted). The phrase "immediately thereafter" is to be interpreted to mean "a time within which, under the conditions, it is unlikely that the declarant had an opportunity to form a purpose to misstate his observations." Kunde v. State, No. 07-0544, 2008 WL 783764, *4 (Iowa Ct. App. 2008)(quoting Flesher, 286 N.W.2d at 217). See United States v Honken, 378 F. Supp.2d 970, 990 (N.D. Iowa 2004)("The present sense

impression exception to the hearsay rule is rightfully limited to statements made while a declarant perceives an event or immediately thereafter.").

The foundation for A.W.'s testimony was insufficient to establish present sense impression. The testimony "Lumni was following him" was in response to the question "did [K.J.] say why he was scared?" (Vol.II p.56 L.20-p.57 L.5). First, earlier A.W. said K.J. was his "normal self, he was smiling and talking." (Vol.II p.57 L.8-10). When ask if K.J. gave her any indication he was having some concerns, A.W. responded, "*No*, he just said he was scared." (Vol.II p.56 L.11-13). So K.J. does not appear to have any immediate concerns. He even turned down a ride from A.W.. (Vol.II p.57 L.10-12).

The evidence failed to establish the statement "Lumni was following him" was made while K.J. was perceiving the event or condition, or immediately thereafter. See Rule 5.803(1). A.W. said *she* looked out the window and saw the taillights to a red car. However, there was no testimony that K.J. said that particular car was following him and Lumni was in it. Nor was

there any testimony K.J. thought he was being followed *at that particular time.* He could have believed that Lumni at some earlier point had been following him. K.J. did not demonstrated any immediate concern and was "[h]is normal self,...smiling and talking."

Given the lack of foundation that K.J. made the statement while perceiving the event or immediately thereafter, the evidence was inadmissible and should have been objected to on hearsay grounds.

B. Prejudice: Sanders-Galvez was clearly prejudiced by counsel's failure to object to the hearsay statement. "To establish prejudice, a defendant must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." State v. McCoy, 692 Nw.2d 6, 25 (Iowa 2005) (citations omitted).

> The prejudice prong of the Strickland test does not mean a defendant must establish that counsel's conduct more likely than not altered the outcome in the case. A defendant need only to show that the probability of a different result is sufficient to undermine confidence in the

outcome.

Clay, 824 N.W.2d at 496 (quoting Maxwell, 743 N.W.2d at 196).

The statement that Lumni was following him was the only evidence placing Sanders-Galvez with K.J. that night. It was by far the most damning evidence offered at trial. The Hy-Vee videos only showed that Sanders-Galvez was in the same store, but there was no contact between the two. Further, the video of Sanders-Galvez and Purham leaving Hy-Vee clearly showed that they passed K.J. in the parking lot without making any contact. "The purpose of the Sixth Amendment guarantee of counsel is to assure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." State v. Graves, 668 N.W.2d 860, 882 (Iowa 2003)(quoting Strickland, 466 U.S. 668, 691-91, 104 S.Ct. 2054, 2067, 80 L.Ed.2d 674, 696 (1984)). The admission of the inadmissible statement clearly undermines one's confidence in the first degree murder verdict.

Therefore, the defendant's conviction should be reversed and the matter remanded for a new trial.

III. THE TRIAL COURT'S ADMISSION OF A SEX TAPE FROM SANDERS-GALVEZ'S CELLPHONE WAS A VIOLATION OF 5.404(B) AND WAS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE. THE VIDEO OF CO-DEFENDANT HAVING SEX WITH A WOMAN FAILED TO ESTABLISH MOTIVE FOR MURDER OF A TRANSGENDER PERSON. FURTHER, THE VIDEO IS SO POOR IT DOES NOT CONNECT THE DEFENDANTS TO THE CRIME SCENE, BUT EVEN IF IT DID, IT WAS UNNECESSARY BECAUSE IT WAS ALREADY WELL ESTABLISHED SANDERS-GALVEZ WAS STAYING AT 2610 MADISON RESIDENCE.

Preservation of Error: Error was preserved by Sanders-Galvez's objection to the cellphone video of Purham having sex with another woman and the trial court's ruling allowing the evidence. (Defendant's First Motion in Limine, ¶¶52-54, 7/13/17; Motion in Limine & Request for Hearing on Preliminary Question of Admissibility, ¶¶7-10, 10/20/17; 10/23/17 tr. p.34 L.2-21; Order RE: Pending Final Pretrial Motions, ¶3, 10/25/17; Vol.III p.98 L.16-p.103 L.18)(App. pp. 15, 26-27, 32).

Scope of Review: This court reviews the district court's evidentiary rulings regarding the admission of prior bad acts for abuse of discretion. State v. Reynolds, 765 N.W.2d 283, 288 (Iowa 2009).

Merits: The issue presented is whether a video from Sanders-Galvez's cellphone of him recording Purham having sex with a woman was inadmissible bad acts evidence. See Iowa R. Evid. 5.404(b). Sanders-Galvez was accused of murder in the first degree, either as the principal or as an aider and abettor, under the alternatives of premeditation or while participating in a felony. Iowa Code §§ 707.1, 707.2, 703.1. (Amended Trial Information, 7/20/17)(Conf. App. p. 19). This court should find the sex video evidence was irrelevant to any material facts at issue regarding whether Sanders-Galvez murdered or aided and abetted Purham in the murder of K.J. Further, this court should find any probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The defendants' sexual escapades should not have been a part of the trial, and particularly the explicit video by a shirtless Sanders-Galvez recording his friend having consensual sex.

The sex video begins with the woman and Purham yelling and huffing. The recording scans over the woman from behind

and then stops at her backside where it then focuses on the act of intercourse. Sanders-Galvez speaks to Purham, but it is difficult to hear what is being said. However, the State claimed he said, "Kill that shit." (Vol.III p.454 L.13-14). Then a shirtless Sanders-Galvez flips the camera briefly onto himself and smiles. The video then shows a wall and what the State claims to be him going up the spiral stair case from 2610 Madison. (Ex.H-15(sex video)), compare (Vol.III p.100 L.19-p.101 L.2).

State argued the sex video was necessary to show motive for the murder and to show a connection between Sanders-Galvez and to the room at 2610 Madison. (10/23/17 tr. p.28 L.12-p.30 L.19, p.31 L.11-21; Vol.III p.100 L.10-18, p.101 L.3-11). The State also submitted any prejudicial effect could be cured by a cautionary instruction. (10/23/17 tr. p.30 L.20-p.31 L.2). The State later added that it needed the video to show Sanders-Galvez and Purham were comfortable having sex in front of each other. (Vol.III p.101 p.3-6).

Sanders-Galvez argued the evidence violated Iowa Rule of

Evidence 5.404(b). (Vol.III p.99 L.16-p.100 L.8). Sanders-Galvez argued there was little, if any, probative value to the evidence. (Vol.III p.99 L.22-p.100 L.2). Of particular concern to Sanders-Galvez was the prejudicial effect of the evidence. (Vol.III p.99 L.16-p.100 L.8).

Applying 5.404(b), the district court found that the evidence to be relevant to the State's theory that Purham and Sanders-Galvez took K.J. back to the house to have sex. (Vol.III p.103 L.3-10). Next, the district court concluded the video was not overly prejudicial, reasoning:

> It's not a long video and, as counsel also points out, it is not a crime. It's a consensual sex act, from all that can be told in the video, but it really does not appear to be highly prejudicial against the defendant and I will allow the evidence in.

(Vol.III p.103 L.11-16).

DCI Special Agent Jeff Uhlmeyer testified the video was pertinent because it showed:

> a subject on the couch with a female and the couch is near a – what turns out to be a spiral staircase, which is consistent with – it's a very unique feature of the house, the spiral staircase, and then as – as – as the video continues up the spiral staircase, it pans over

> to the wall and it's a very unique kind of textured wall that is shown very quickly in the video and, again, it's similar to or identical to the wall at 2610 Madison and as – as the camera goes up the staircase a little bit further, there's some woodwork that's similar.

(Vol.III p.167 L.15-25). The agent also testified that the video showed a date of December 31, 2015, which he claimed coincided with when Sanders-Galvez was staying at Lewis's house in Burlington.[3] (Vol.III p.168 L.1-15).

A. Prior Bad Acts Evidence:

Iowa Rule of Evidence 5.404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The purpose of rule 5.404(b), which is a codification of our common law, is to "exclude from the jury's consideration evidence which has no relevancy except to show that the defendant is a bad person and thus likely committed the crime

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[3] Appellate counsel could not find the December 31, 2015 date on the video copy submitted.

in question." State v. Castaneda, 621 N.W.2d 435, 439-40 (Iowa 2001). Our court has "long followed the rule against admitting bad-acts evidence to show 'that the defendant has a criminal disposition in order to generate the inference that he committed the crime with which he is charged.' . . . 'A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not who he is.'" State v. Sullivan, 679 N.W.2d 19, 23 (Iowa 2004). Therefore, if the evidence in question is relevant and material to a legitimate issue in dispute, then it is prima facia admissible despite its tendency to demonstrate a defendant's bad character or propensity to commit bad acts. State v. Mitchell, 633 N.W.2d 295, 298 (Iowa 2001). "When the State seeks to offer evidence of prior acts, the prosecutor must 'articulate a valid, noncharacter theory of admissibility for admission.'" State v. Henderson, 696 N.W.2d 5, 11 (Iowa 2005)(quoting Sullivan, 679 N.W.2d at 28); see also State v. Newell, 710 N.W.2d 6, 20 (Iowa 2006)("Moreover, . . . when prior-bad-acts evidence is offered 'to establish an ultimate inference of mens rea, the court should

require the prosecutor to "articulate a tenable noncharacter theory of relevance."" (citations omitted)).

This court has set forth a three-part test for determining the admissibility of prior bad acts evidence. See State v. Putnam, 848 N.W.2d 1, 8-9 n.2 (Iowa 2014)(adopting clear proof as an independent prong of three-prong test in addition to being a factor to be weighed in determining prejudice). First, the district court must determine whether the disputed evidence is relevant to a legitimate factual issue in dispute. Mitchell, 633 N.W.2d at 298. "The general test of relevancy is 'whether a reasonable [person] might believe the probability of the truth of the consequential fact to be different if [the person] knew of the proffered evidence.' " Putnam, 848 N.W.2d at 9 (quoting State v. Plaster, 424 N.W.2d 226, 229 (Iowa 1988)); Castaneda, 621 N.W.2d at 440 ("Evidence is relevant when it has 'any tendency to make the existence of any fact that is of *consequence* to the determination of the action more probable or less probable then it would be without the evidence.'" (quoting Iowa R. Evid. 5.401 (emphasis added)). If the court determines the evidence

is not relevant, then it is not admissible. Castaneda, 621 N.W.2d at 400; see Iowa R. Evid. 5.402.

Second, "[t]here also 'must be clear proof the individual against whom the evidence is offered committed the bad act or crime.' " Putnam, 848 N.W.2d at 9 (citation omitted).

> In assessing whether clear proof of prior misconduct exists, the prior act need not be established beyond a reasonable doubt, and corroboration is not necessary. There simply needs to be sufficient proof to prevent the jury from engaging in speculation or drawing inferences based upon mere suspicion.

Id.

Third, if the district court finds the disputed evidence to be relevant and that the clear proof element is satisfied, then it must determine "whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice." Castaneda, 621 N.W.2d at 400; see Putnam, 848 N.W.2d at 9; Iowa R. Evid. 5.403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ."). Should the district court conclude the probative value of the disputed evidence is

substantially outweighed by the danger of unfair prejudice, then it must exclude the disputed evidence. Mitchell, 633 N.W.2d at 298-99; Castaneda, 621 N.W.2d at 440.

"Unfair prejudice" is defined as "an undue tendency to suggest decisions on an improper basis." Id. at 440 (citations omitted). Such evidence is that which:

> appeals to the jury's sympathies, arouses its sense of horror, provokes its instincts to punish, or triggers other mainsprings of human action may cause a jury to base its decision on something other than the established propositions in the case. The appellate court may conclude that "unfair prejudice" occurred because an insufficient effort was made below to avoid the dangers of prejudice, or because the theory on which the evidence was offered was designed to elicit a response from the jurors not justified by the evidence.

Id. at 440-41 (citations omitted); see Taylor, 689 N.W.2d at 130. ("The more pertinent question is whether the evidence will prompt the fact finder to make a decision based on an emotional response to the defendant."). This court considers a series of factors in determining prejudice: (1) the need for the evidence in light of the issues or other evidence available, (2) whether there is clear proof the accused committed the prior bad acts,

(3) the strength or weakness of the evidence on the relevant issue, and (4) the degree to which the fact finder will be prompted to decide on an improper basis. Putnam, 848 N.W.2d at 9-10. "If the danger of the evidence's prejudicial effect substantially outweighs its probative value, the evidence must be excluded." Id. at 10.

The defendant respectfully submits, however, that evidence of Sanders-Galvez's prior bad acts failed to meet both prongs of the Rule 5.404(b) test. First, the evidence was not relevant as it was not probative of any material fact in question relating to the murder of K.J.. Second, the evidence clearly had an undue tendency to suggest the defendant's guilt on an improper basis. Just because Sanders-Galvez and Purham had sex with women in the house at 2610 Madison does not entail that they would abduct and murder K.J.. Evidence of their sexual escapades and the video recording of them was overly prejudicial as the evidence would lead the jury to convict Sanders-Galvez for being a bad person.

1. **Relevance:** The issue at trial was whether

Sanders-Galvez murdered or aided and abetting in the murder of K.J. (Instr. No. 24(murder 1st marshaling))(Conf. App. p. 52). The general test of relevancy is whether a reasonable person might believe the probability of the truth of the consequential fact to be different if the person knew of the proffered evidence. Putnam, 848 N.W.2d at 9.

The State's theory was that Sanders-Galvez and Purham took K.J. to the 2610 Madison to have sex and, upon discovering he was not a woman, killed him. (Vol.III p.442 L.6-p.443 L.20, p.459 L.15-p.450 L.14). It argued that the sex video showed motive for the murder. The problem is simply because Sanders-Galvez videoed Purham having consensual sex at 2610 Madison does not make it more or less likely that they *randomly* picked-up K.J. and took him back to 2610 Madison to have sex. There was no evidence that these two men would pick up strangers and bring them back to the residence. Further, K.J.'s friend, A.W., claimed he was afraid of Sanders-Galvez. Thus, there is no reason to believe K.J. would have willingly got into the car and gone to 2610 Madison.

Therefore, there is nothing about the sex video that makes it more or less likely that Sanders-Galvez and Purham took K.J. to the house.

More importantly, the video in no way makes more or less probable that Sanders-Galvez would kill a person upon discovering the person was not a woman, or aid and abet someone in such a homicide. There is nothing about the video that indicates Sanders-Galvez is homicidal or homophobic. It is simply a distasteful video of his friend having sex with a woman.

The State also argued that the video was relevant because it placed Sanders-Galvez and Purham in the house when they were having sex with these women. The fact that Sanders-Galvez were at the house does not make it more or less probable that they brought K.J. to the house and killed him. The background in the video is dark and difficult to view. The only clear things in the video are the people. There was no need to put the explicit sexual video into evidence just to show that Sanders-Galvez was at the house. It was clear from

Lewis's testimony that they were staying at the house.

Therefore, evidence of the sex tape was not relevant to the question of motive and place, and therefore, not admissible.

2. Prejudice: If this court concludes, however, that the prior bad acts evidence was relevant, the State still cannot establish that the probative value of the prior bad act evidence was not substantially outweighed by the danger of unfair prejudice to the defendant.

Any probative value from the evidence of the prior bad acts was substantially outweighed by the danger of unfair prejudice. In considering whether the probative value of the prior bad acts evidence was substantially outweighed by the danger of unfair prejudice, the court should have considered the following factors. See Taylor, 689 N.W.2d at 124. First, there was absolutely no need for the video to place Sanders-Galvez in the house. The fact that Sanders-Galvez was at 2610 was not in contention. Multiple witnesses and other evidence stated Sanders-Galvez stayed at 2610 Madison. (Vol.II p.368 L.4-13; Vol.III p.10 L.22-p.11 L.10, p.156 L.19-p.157 L.22, p.158

L.5-18, p.160 L.1-p.164 L.25); Cf. Reynolds, 765 N.W.2d at 291 (evidence of victim's affair with defendant's wife already disclosed).

Second, the evidence was weak as to the relevant issue of whether Sanders-Galvez murdered or aided and abetted in the murder of K.J.. Taylor, 689 N.W.2d at 124 (strength or weakness of the prior bad acts evidence on the relevant issue). There was absolutely no relevance of the video as it related to the murder. The evidence goes more to bad character.

Finally, the court should consider the degree to which the jury "will be prompted to decide the case on an improper basis." Id. There was a substantial danger that the jury in the present case would conclude that Sanders-Galvez and Purham were sexually depraved punks. "[T]he public policy for excluding bad-acts evidence 'is founded not on a belief that the evidence is irrelevant, but rather on a fear that juries will tend to give it excessive weight, and on a fundamental sense that no one should be convicted of a crime based on his or her previous misdeeds.'" Sullivan, 679 N.W.2d at 24 (quoting United States

v. Daniels, 770 F.2d 1111, 1116 (D.C. Cir. 1985)).

The concern here is that the jury will conclude Sanders-Galvez is a bad person because he posts on Facebook explicit videos of his having sex and "'may give character far more weight than it deserves.'" Sullivan, 679 N.W.2d at 24 (citation omitted). Empirical studies have shown that juries treat evidence of prior bad acts as highly probative because their common sense tells them that a person who has acted criminally before probably will act the same way again. Henderson, 696 N.W.2d at 14 (Lavorato, J., specially concurring). The evidence of the defendant's prior bad act distracts the jury from the issue at hand – whether he murdered or aided and abetted in the murder of K.J.

Furthermore, there was no limiting instruction given to cure the inflammatory nature and prejudicial effect of the prior bad acts evidence. This court has always made clear that the "better practice" is to give the jury a limiting instruction to curtail the danger of unfair prejudice. State v. Richards, 879 N.W.2d 140, 153 (Iowa 2016); see Putnam, 848 N.W.2d at 16

("We have explained before that in most cases a limiting instruction such as this is an antidote for the danger of prejudice..."); cf. Mitchell, 633 N.W.2d at 299-300 (reversed and remanded even though limiting instruction given); Castaneda, 621 N.W.2d at 442 (witness' testimony "was so inherently prejudicial that no amount of admonition by the court was sufficient to remove the prejudice").

Therefore, the district court erred in allowing the sexually explicit video evidence because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

B. Harmless Error:

The error here was not harmless. "[W]here a nonconstitutional error is claimed, under rule 5.103(a) [this court] presume[s] prejudice – that is, a substantial right of the defendant is affected – and reverse[s] unless the record affirmatively establishes otherwise." Sullivan, 679 N.W.2d at 30 (emphasis in original).

The record in the present case was not overwhelming. As

the discussion in Division I demonstrated the evidence here was weak. There was no physical evidence tying Sanders-Galvez to the murder of K.J.. A.W. testified that K.J. was afraid of Sanders-Galvez, so there was no reason to believe he would willingly enter Purham's car. Yet, there was no evidence of a struggle in the car. There was no evidence of K.J. ever being in the car such as DNA or fingerprints. The State's theory was the two men abducted K.J. at 2610 Madison and then drove him to the alley where they shot him. Yet, there was no evidence of a struggle at 2610 Madison where his belongings were found.

There was not even any discussion or hint of the murder on Sanders-Galvez's Facebook posts or his text messages.

There can be no doubt that the jury was influenced by the sexually explicit video. The video showed how callous these two young men were towards women. It was repugnant. But it was not evidence of murder. The evidence tipped the scales against Sanders-Galvez – affecting his substantial rights. The State cannot affirmatively establish the evidence did not

influence the outcome. Therefore, the admission of the sex video evidence was not harmless.

Therefore, the district court erred in finding the sex video recording evidence was admissible to show the act was consistent with other plans. The evidence was not relevant, the probative value was substantially outweighed by the danger of unfair prejudice, and the error was not harmless.

IV. THE LIFETIME SENTENCE WITHOUT THE POSSIBILITY OF PAROLE VIOLATES IOWA CONSTITUTION AS CRUEL AND UNUSUAL PUNISHMENT. SCIENCE DICTATES THE PRINCIPLES OF SWEET SHOULD BE EXPANDED TO JUVENILES 21 AND YOUNGER.

Preservation of Error: Sanders-Galvez challenges his sentence as illegal because it violates Section 1, Article 17 of the Iowa Constitution. A challenge to an illegal sentence is not subject to the usual requirements of error preservation and may be challenged at any time. State v. Zarate, 908 N.W.2d 831, 840 (Iowa 2018); Iowa R. Crim. Pro. 2.24(5) (2016). An unconstitutional sentence is an illegal sentence. State v. Bruegger, 773 N.W.2d 862, 871 (Iowa 2009).

Standard of Review: Illegal sentences are generally

reviewed for corrections of errors at law, however, where the challenge alleges an unconstitutional sentence review is *de novo*. Zarate, 908 N.W.2d at 840.

Merits: The Eighth Amendment prohibits the imposition of cruel and unusual punishment. "[It] guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic ' "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." ' " Miller v. Alabama, 567 U.S. 460, 465, 479 (2012)(citations omitted). Article I section 17 of the Iowa Constitution likewise prohibits cruel and unusual punishment. Iowa Const. art. I, § 17. ("Excessive bail shall not be required; excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted."). "Cruel and unusual punishment" is interpreted by referring to "evolving standards of decency that mark the progress of a maturing society." Roper v. Simmons, 543 U.S. 551, 560-61 (2005); see Miller, 567 U.S. at 469-70 ("we view the concept less through a historical prism than according to the evolving standards of decency that mark the progress of a

maturing society." (internal quotation marks omitted)).

In 2012 the Supreme Court held that *mandatory* life without parole for juvenile offenders violates the Eighth Amendment. Id. at 465, 479. This holding was the natural outcome following the Court's reasoning in Roper and Graham. See Graham v. Florida, 560 U.S. 48 (2011)(Eighth Amendment prohibits imposition of life without parole sentence on a juvenile for none homicide offenses); Roper, 543 U.S. 551 (Eighth Amendment prohibited the imposition of the death penalty for persons under 18). In reaching its conclusion that juveniles are different, the Court relied heavily on science and social science. See Miller, 567 U.S. at 471-472, 475 n.5. The Court noted that its conclusions in Roper and Graham had found even stronger scientific support by the time Miller was decided. Id. at 475 n.5.

This court adopted the reasoning of Roper, Graham, and Miller in a series of case leading it ultimately to categorically ban life without parole for juvenile offenders, Iowa's most severe penalty. See State v. Sweet, 879 N.W.2d 811, 832 (Iowa 2016)

(listing Iowa cases utilizing Roper-Graham-Miller reasoning under article 1, section 17 of the Iowa Constitution).

In light of the current science, Sanders-Galvez submits that the ban on life without the possibility of parole for juveniles be expanded to persons at least 21 and younger. "[B]eing informed by the medical community does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical standards." Moore v. Texas, ___ U.S. ___, ___, 137 S.Ct. 1039, 1049 (2017)(finding the lower court's analysis "failed adequately to inform itself of the medical community's diagnostic framework").

In considering whether to adopt a categorical approach to the class of offenders or offenses under the cruel and unusual punishment clause of the Iowa Constitution, this court has referred to the two-step process found in the cases of the United States Supreme Court. Applying this test, the court first looks to whether there is a consensus, or at least an emerging consensus, to guide the court's consideration of the question.

Second, the court exercises its independent judgment to determine whether to follow a categorical approach. Sweet, 879 N.W.2d at 835; Lyle, 854 N.W.2d at 386. The federalism concerns are entirely absent in our state court decision. Sweet, 879 N.W.2d at 835.

A. Consensus:

There is no legislative national consensus to baring life without parole sentences to persons 21 years of age and younger. However, "consensus is not dispositive." Lyle, 854 N.W.2d at 387 (quoting Kennedy v. Louisiana, 554 U.S. 407, 421 (2008)). As Miller made evident, constitutional protection for the rights of juveniles in sentencing for the most serious crimes is rapidly evolving in the face of widespread sentencing statutes and practices to the contrary. Lyle, 854 N.W.2d at 387.

B. Independent Judgment:

After examination of other state statutes, prosecution of juvenile offenders in adult court, professional opinions, and any other source, ultimately this court must make an independent judgment. Sweet, 879 N.W.2d at 836. "Iowans generally enjoy 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. at 287.

This court has recognized the Iowa Constitution is a living document. In In re Johnson, this court stated:

> ...we recognize that unlike statutes, our constitution sets out broad general principles. A constitution is a living and vital instrument. Its very purpose is to endure for a long time and to meet conditions neither contemplated nor foreseeable at the time of its adoption. Thus the fact a separate juvenile court system was not in existence at the time our constitution was adopted in 1857 should not blindly mandate an absurd result because our forefathers had not yet seen fit to establish a separate juvenile court system. Sometimes, as here, the literal language must be disregarded because it does violence to the general meaning and intent of the enactment.
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> ...Constitutions must have enough flexibility so as to be interpreted in accordance with the public interest. This means they must meet and be applied to new and changing conditions....

257 N.W.2d 47, 50 (Iowa 1977)(other citations omitted). As this court stated in Lyle:

> Time and experience have taught us much about the efficacy and justice of certain punishments. As a consequence, we understand our concept of cruel and unusual punishment is "not static." Instead, we consider constitutional challenges under the "currently prevail[ing]" standards of whether a punishment is "excessive" or "cruel and unusual." This approach is followed because the basic concept underlying the prohibition against cruel and unusual punishment "is nothing less than the dignity" of humankind. This prohibition "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.' " In other words, punishments once thought just and constitutional may later come to be seen as fundamentally repugnant to the core values contained in our State and Federal Constitutions as we grow in our understanding over time. As with other rights enumerated under our constitution, we interpret them in light of our understanding of today, not by our past understanding.

Lyle, 854 N.W.2d at 384-385 (citations omitted).

While there is not currently a consensus to bar life without parole sentences for persons 21 and younger, there is a consensus building. Developments in science and social science make clear that the brain continues to develop long past 18 to a person's early to mid 20s. See Melissa S. Caulum, Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System, 2007 WIS. L. REV. 729, 731 (2007)("When a highly impressionable emerging adult is placed in a social environment composed of adult offenders, this environment may affect the individual's future behavior and structural brain development.") (citing Craig M. Bennett & Abigail A. Baird, Anatomical Changes in Emerging Adult Brain: A Voxel-Based Morphometry Study, 27 Hum. Brain Mapping 766, 766–67 (2006)); Damien A. Fair et al., Functional Brain Networks Develop From a "Local to Distributed" Organization, 5 PLOS Computational Biology 1-14 (2009); Margo Gardner & Laurence Steinberg, Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An

Experimental Study, 41 Dev. Psychol. 625, 626, 632, 634 (2005)(examining 306 individuals in 3 age groups—adolescents (13-16), youths (18-22), and adults (24 and older) and explaining that adolescents and youths more likely to make risky decisions in groups than adults); Sara B. Johnson, Robert W. Blum, and Jay N. Giedd, Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy, 45 J. Adolescent Health 216 (Sept. 2009)(Longitudinal neuroimaging studies demonstrate that the adolescent brain continues to mature well into the 20s. This has prompted intense interest in linking neuromaturation to maturity of judgment. Public policy is struggling to keep up with burgeoning interest in cognitive neuroscience and neuroimaging.), available at https://www.jahonline.org/article/S1054-139X(09)00251-1/fulltext; David Pimentel, The Widening Maturity Gap: Trying and Punishing Juveniles As Adults in an Era of Extended Adolescence, 46 Tex. Tech L. Rev. 71, 84 (2013)("we should expect some irrational, emotion-driven behavior from emerging

adults, those aged eighteen to twenty-five, and that it is not until their late twenties that it is reasonable to expect them to have the brain development necessary to behave like fully rational adults"); Michael Rocque, The Lost Concept: The (Re)emerging Link Between Maturation and Desistance from Crime, Criminology & Criminal Justice 5 (2014), available at https://www.researchgate.net/profile/Michael_Rocque/publication/265043782_The_lost_concept_The_reemerging_link_between_maturation_and_desistance_from_crime/links/54085dd80cf2c48563bb7310.pdf (last viewed 7/16/18); Alex Stamm, Young Adults are Different, too: Why and How We Can Create a Better Justice System for Young People Age 18 to 25, 95 Tex. L. Rev. See Also 72(2017); Laurence Steinberg, A Social Neuroscience Perspective on Adolescent Risk Taking, 28 Developmental Rev. 78, 91 (2008)("the presence of friends doubled risk taking among the adolescents, increased it by fifty percent among the youths, but had no effect on the adults"); Laurence Steinberg, Lia O'Brien, Elizabeth Cauffman, Sandra Graham, Jennifer Woolard, and Marie Banich, Age Differences

in Future Orientation and Delay Discounting, 80 Child Development 28, 39 (Jan./Feb. 2009); Elizabeth Williamson, Brain Immaturity Could Explain Teen Crash Rate, Wash. Post, Feb. 1, 2005 at A01 (National Institutes of Health ("NIH") study suggests "the region of the brain that inhibits risky behavior is not fully formed until age 25")(cited in United States v. Gall, 374 F.Supp.2d 758, 762 n.2 (S.D. Iowa 2005), reversed for sentencing error United States v. Gall, 446 F.3d 884 (8th Cir. 2006)); see also State v. Null, 836 N.W.2d 41, 55 (Iowa 2013) ("[T]he human brain continues to mature into the early twenties."). While older teenagers may show greater intellectual development, that is not the same as the ability to control the influence of peers, impulsive behavior, and risky experimentation associated with late adolescence and early adulthood. Null, 836 N.W.2d at 55 (citing Elizabeth Scott & Laurence Steinberg, Rethinking Juvenile Justice, 34 (2008)).

These scientific developments have lead legislators, the legal community, social workers, and the business community to recognize that eighteen is not a magic age of maturity and

responsibility. "The features of youth identified in Roper and Graham simply do not magically disappear at age seventeen—or eighteen for that matter." State v. Sweet, 879 N.W.2d 811, 838 (Iowa 2016). In a resolution to the American Bar Association's House of Delegates urging the expansion of Miller to prohibit capital punishment of anyone who was 21 years old at the time of the offense, it was noted that "both state and federal legislators have created greater restrictions and protections for late adolescents in a range of areas of law." American Bar Association, Death Penalty Due Process Review Project Section of Civil Rights and Social Justice: Report to the House Delegates, at 8-10, 12-13 (submitted Feb. 2018)(citations omitted)[hereinafter ABA], available at https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/2018_hod_111.pdf (last viewed 7/12/18). In 1984 the National Minimum Drinking Age Act incentivized states to raise the legal age for alcohol purchases to 21. Id. California, Hawaii, New Jersey, Maine, and Oregon have raised the legal age to purchase cigarettes to age 21. Id. Many car rental

companies require renters be at least 20 or 21, with higher rental fees for individuals under age 25. Id. at 8-9. Under the Free Application for Federal Student Aid (FASFA), the Federal Government considers individuals under age 23 legal dependents of their parents. Id. at 9. The Internal Revenue Service allows students under 24 to be dependents for tax purposes. Id. The Affordable Care Act allows individuals under 26 to remain on their parent's health insurance. Id. Many child welfare and education systems in states across the country now extend their services to individuals through age 21. Id.

In the criminal system 45 states allow youth up to age 21 to remain under the jurisdiction of the juvenile justice system. Id.; see Stamm, at ___; Jeree Thomas, Raising the Bar: State Trends in Keeping Youth Out of Adult Courts, Washington, DC: Campaign for Youth Justice, at 19 (discussing legislative proposals to raise juvenile court jurisdiction to 21 or 22). Many states have created special "Youthful Offender" or "Serious Offender" status that allows individuals in late

adolescence to benefit from similar protections to the juvenile justice system related to confidentiality of their proceedings and record sealing. ABA, at 9-10.

> Furthermore,...[i]n countries like England, Finland, France, Germany, Italy, Sweden, and Switzerland, late adolescence is a mitigating factor either in statute or in practice that allows many 18 to 21 year olds to receive similar sentences and correctional housing to their peers under 18.

Id. at 10.

The Supreme Court relied upon a number of amicus briefs in Roper, Graham, and Miller that referenced numerous scientific studies on the development of the human brain. See Null, 836 N.W.2d at 54-55. In 2008, Elizabeth Scott and Laurence Steinberg compiled all the research and analyzed it in one book. See id. (citing Scott and Steinberg, Rethinking Juvenile Justice (2008)). The studies showed that "through adolescence and into early adulthood, the regions of the brain and systems associated with impulse control, the calibration of risk and reward, and the regulation of emotions undergo maturation. In short, the research clarifies that substantial

psychological maturation takes place in middle and late adolescence and even into early adulthood." Id. (internal quotation omitted).

At least one state, Vermont, has made changes to its legislation when it comes to who is considered a juvenile, due to the studies referenced above. See Robert Sheil, Esq., The Transformation of Juvenile Justice Jurisdiction in Vermont: Landmark Legislation Enacted in the 2016 Legislative Session, Vt. B.J., Fall 2016. Connecticut, Illinois, and Massachusetts were considering in 2017 whether to provide greater protection to young adults. See ABA, at 10.

In Roper, the Court gave three reasons for why juveniles are constitutionally different from adults and cannot be classified as the worst offenders. Roper, 543 U.S. at 569. First, "as any parent knows" and science has shown, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young." Id. "These qualities often result in impetuous and ill-considered actions and decisions."

Id. Second, juveniles are "more vulnerable or susceptible to negative *influences and outside pressures*...." Id. This is due in part because "juveniles have less control, or less experience with control, over their own environment." Id. Third, a juvenile's character is not as well formed as an adult's. Id. at 570. Juveniles are still developing who they are – their personalities "are more transitory, less fixed." Id. Even psychologists have difficulty differentiating "between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Id. at 573. The fact that juveniles are still developing their personalities "means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." Id. at 570, 125 S.Ct. at 1195, 161 L.Ed.2d 1.

Sanders-Galvez was only twenty-one years old at the time he committed the assault on L.R. (Written Arraignment, 3/9/17)(App. p. 4). Sanders-Galvez was in this transition phase of adolescence, where he was not physically capable of

making rational choices and to control his impulses. His actions qualify as "impetuous and ill-considered." When considering what punishment should apply to Sanders-Galvez, it is appropriate to consider his age—he was barely over the age of majority, and, by all scientific accounts, was still not fully developed as an adult.

Murder in the first degree is a serious crime. However, when taking into consideration the fact that Sanders-Galvez was not a mature adult, the reality of life in prison without the opportunity for parole is too harsh a punishment. Life without parole shares many of the same characteristic of death sentence. Graham, 560 U.S. at 69. A life without parole sentence "alters the offender's life by a forfeiture that is irrevocable." It is a "denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." Id. at 70 (citation omitted). While Sanders-Galvez does argue that the offense of murder in the first was not supported

by a sufficiency of the evidence (see Division I), he does acknowledge that the murder of K.J. was vicious. Even if this court does find that the evidence supported a murder conviction, given the factors explained above, Sanders-Galvez should not be punished the same as a mature adult.

"The constitutional analysis is not about excusing juvenile behavior, but imposing punishment in a way that is consistent with our understanding of humanity today." Lyle, 854 N.W.2d at 397.

C. Sanders-Galvez requests relief in the form of discretionary sentencing applying the Miller factors to his case.

"[T]he deprivations of prison life weigh most heavily on juveniles, who do not have the emotional maturity and faith in themselves needed to survive such profound adversity." Ioana Tchoukleva, Note, Children Are Different: Bridging the Gap Between Rhetoric and Reality Post Miller v. Alabama, 4 Cal. L. Rev. Circuit 92, 104 (Aug. 2013). Prisons create "an aversive developmental context" due to hostile relationships with correctional officers and victimization by older offenders.

Elizabeth S. Scott & Laurence Steinberg, Social Welfare and Fairness in Juvenile Crime Regulation, 71 La. L. Rev. 35, 67-68 (Fall 2010). Life without parole is a particularly harsh punishment for juveniles who have their whole lives before them – possibly 70 years – in prison. Graham, 560 U.S. at 70-71. Sanders-Galvez will suffer the same needless adverse consequences faced by juveniles just because he is slightly past that which is considered to be the age of minority.

At the time of the offense, Sanders-Galvez was 21 years old. He was only slightly above the arbitrary age of majority established in Roper. Roper, 543 U.S. at 574. In Sweet, the court categorically held that juveniles could not be sentenced to life without parole. Sweet, 879 N.W.2d at 839. Applying the scientific evidence that indicates that the brain has not fully developed until mid to late twenties, and, as such, individuals cannot be considered adults until they have reached full maturity, Sanders-Galvez should still be considered an adolescent and have his sentence vacated. See id. at 838. At the very least, Sanders-Galvez should be entitled to a hearing to

consider his characteristics and the nature of the crimes. See Miller, 567 U.S. at 477-78.

CONCLUSION

For the reasons stated in Division I, II, and III, above, the defendant respectfully requests this court to reverse his conviction and remand with instructions.

For the reasons stated in Division IV, above, the defendant respectfully requests this court to vacate his judgment and remand for resentencing in accordance with Miller and Sweet.

ORAL SUBMISSION

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $8.03, and that amount has been paid in full by the Office of the Appellate Defender.

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Shellie L. Knipfer Dated: 11/26/18

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