IN THE SUPREME COURT OF IOWA
Supreme Court No. 17–1075

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KENNETH LEROY HEARD,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE ROBERT J. BLINK, JUDGE

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Was It Unconstitutional to Sentence Heard as an Adult Without a Specific Finding By the Jury That Heard Was at Least 18 Years Old?

Authorities

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II. Did the Trial Court Err in Denying the Request to Compel Marco Brown to Take the Witness Stand to Invoke His Fifth Amendment Privilege In Front of the Jury, to Enable Heard to Argue That Brown Was Invoking That Privilege Because He Was the Killer?

Authorities

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Porth v. State, 868 P.2d 236 (Wyo. 1994)
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State v. Baldon, 829 N.W.2d 785 (Iowa 2013)
State v. Bedwell, 417 N.W.2d 66 (Iowa 1987)
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State v. McGraw, 608 A.2d 1335 (N.J. 1992)
State v. Mitchell, 487 P.2d 1156 (Or. Ct. App. 1971)
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State v. Russell, 893 N.W.2d 307 (Iowa 2017)
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Wayne LaFave, *Criminal Procedure* § 24.4(c) (4th ed. 2015)

III. Did the Trial Court Err in Determining This Verdict Was Not Against the Weight of the Evidence?

Authorities

State v. Ary, 877 N.W.2d 686 (Iowa 2016)
State v. Ellis, 578 N.W.2d 655 (Iowa 1998)
State v. Nitcher, 720 N.W.2d 547 (Iowa 2006)
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ROUTING STATEMENT

Heard asks for retention. *See* Def's Br. at 9. Neither of Heard's two claims mentioned in his routing statement are truly novel, and both can be analyzed by applying established legal principles. *See, e.g.*, *State v. Quigley*, No. 15–0551, 2016 WL 2748415, at *1 n.2 (Iowa Ct. App. May 11, 2016); *State v. Ellis*, No. 09–1210, 2011 WL 944428 (Iowa Ct. App. March 21, 2011) (citing *State v. Bedwell*, 417 N.W.2d 66, 69 (Iowa 1987)). Therefore, this case should be transferred to the Court of Appeals. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

Kenneth Leroy Heard was charged with first-degree murder, a Class A felony, in violation of Iowa Code sections 707.1, 707.2(1)(a), and 902.1 (2007), for shooting and killing Joshua Hutchinson on December 13, 2007. Heard was tried for the first time in 2008, and the jury found him guilty as charged. His conviction was affirmed on direct appeal. *See State v. Heard*, No. 09–0102, 2010 WL 2090851 (Iowa Ct. App. May 26, 2010). Heard filed a PCR action that alleged ineffective assistance of counsel at his trial, and relief was granted. Heard was retried in 2017 and was again found guilty as charged.

In this direct appeal, Heard argues: (1) his sentence is illegal because the trial court was required to submit an instruction that asked the jury to find, beyond a reasonable doubt, that he was over the age of 18 when the crime was committed; (2) the trial court erred by denying his motion to compel a witness (Marco "Juice" Brown) to take the witness stand and invoke his Fifth Amendment privilege against self-incrimination in the presence of the jury, so that Heard could argue the jury should infer that Brown killed Hutchinson; and (3) the jury's verdict was against the weight of the evidence.

Statement of Facts

On December 13, 2007, Joshua Hutchinson was found dead in the backyard area of a Des Moines apartment complex; he had been shot multiple times. *See* TrialTr.V3 p.8,ln.20–p.10,ln.10; TrialTr.V3 p.12,ln.8–p.14,ln.12; TrialTr.V3 p.18,ln.7–p.19,ln.19; State's Ex. 20; C-App. 20. Lyndsey Winslow, who lived nearby, was startled awake during the preceding evening by "[f]our to five" loud sounds that she "thought was firecrackers." *See* TrialTr.V3 p.7,ln.15–25. After that, she looked out the window and "saw taillights speeding out of the apartment complex driveway." *See* TrialTr.V3 p.8,ln.1–6. Lyndsey did not see any other cars leaving the area. *See* TrialTr.V3 p.8,ln.7–9.

Hutchinson's sister, Ashley, remembered that Jacquisha Majors (now Jacquisha Harris) had picked up Hutchinson from their house, earlier that day. *See* TrialTr.V2 p.154,ln.4–p.155,ln.2. Hutchinson was friends with Heard, Marco "Juice" Brown, and Deland "DB" Stanley. *See* TrialTr.V2 p.151,ln.3–p.152,ln.10. That group called themselves "3 In, 3 Out," and Hutchinson got a tattoo on his neck reflecting his membership in the group. *See* TrialTr.V2 p.152,ln.11–p.153,ln.7; TrialTr.V2 p.158,ln.19–p.159,ln.3; TrialTr.V3 p.81,ln.10–p.82,ln.2. Heard was the group's leader. *See* TrialTr.V2 p.159,ln.18–p.160,ln.5.

Phillip "Self" Findley was not a member of 3 In, 3 Out. *See* TrialTr.V3 p.81,ln.10–p.83,ln.23. But he was friends with Heard, and he received a call from Heard on December 12, 2007, telling him that "there was trouble" and he should come over to Keisha's house. *See* TrialTr.V3 p.84,ln.8–p.85,ln.11. Findley drove there; Keisha, Brown, Heard, and Hutchinson were already there when he arrived. *See* TrialTr.V3 p.85,ln.12–16. Heard called Findley into the bathroom, where Heard told him that Hutchison was planning to rob him and had been snitching to the police. *See* TrialTr.V3 p.85,ln.17–p.87,ln.13; *cf.* TrialTr.V4 p.42,ln.8–p.43,ln.1. Heard told Findley that, because of what Hutchinson did, he was "thinking about killing" Hutchison. *See*

TrialTr.V3 p.87,ln.14–19. Then, Heard changed the subject and talked about plans to get money. *See* TrialTr.V3 p.88,ln.7–21.

When Heard said it was time to go, he told Hutchinson to ride along with him in Keisha's car. He told Brown to ride with Findley. *See* TrialTr.V3 p.89,ln.12–p.90,ln.4. Findley did not know where they were going—he followed Keisha's car. TrialTr.V3 p.90,ln.5–p.91,ln.10. Findley followed Keisha as she parked behind an apartment building, and everybody got out. Heard led Hutchinson, Brown, and Findley into the backyard of the nearby apartment building, and they stood around a picnic table. *See* TrialTr.V3 p.92,ln.3–p.94,ln.17. Hutchison told them "he got to use the bathroom" and walked up to a tree. *See* TrialTr.V3 p.92,ln.3–p.94,ln.22. Suddenly, some gunshots rang out. Brown was still standing next to Findley, near the picnic table, and Findley did not see a gun in Brown's hand. *See* TrialTr.V3 p.94,ln.18–p.95,ln.6. Out of the corner of his eye, Findley saw Hutchison fall to the ground; Findley saw Heard standing right to Hutchinson, while Findley and Brown were still "[a]bout 6 feet" away from them. *See* TrialTr.V3 p.95,ln.7–p.96,ln.17. A forensic exam of Hutchinson's body established that, when he was shot in the head, the gun was fired from "2 to 3 inches" away, at most. *See* TrialTr.V4 p.127,ln.4–p.128,ln.8.

Findley and Brown started running back to their car as soon as they heard the sound of the first gunshot. *See* TrialTr.V96,ln.18–p.98,ln.1. They drove away. Findley soon received a call from Heard, who asked him: "Are you cool?" *See* TrialTr.V3 p.98,ln.2–p.99,ln.11. Findley dropped Brown off at Keisha's house and then went home. *See* TrialTr.V3 p.99,ln.12–25.

When questioned by police, Findley initially denied knowing any of the people involved and denied having any knowledge of this entire episode because he did not want to appear to be snitching. *See* TrialTr.V3 p.100,ln.1–p.103,ln.9. Eventually, Findley cooperated. *See* TrialTr.V4 p.16,ln.5–p.18,ln.25; State's Ex. 57.

Jaquisha "Keisha" Majors (now Jacquisha Harris) used to hang around with Stanley, Brown, Heard, and Hutchinson. *See* TrialTr.V4 p.23,ln.12–p.25,ln.10. Keisha knew about 3 In, 3 Out—and she knew they had recently been "robbing people." *See* TrialTr.V4 p.25,ln.17–p.26,ln.16. At the time, Stanley was "locked up" in the Polk County Jail. Keisha stayed in communication with Stanley, and she would hang out with the rest of the group. *See* TrialTr.V4 p.27,ln.5–19. Keisha knew people were upset with Hutchison because he "lost some of the drugs" that the group had intended to sell. *See* TrialTr.V4 p.27,ln.5–p.29,ln.6.

On December 12, 2007, Keisha was with Heard and Brown, and she drove them to a Taco Bell. *See* TrialTr.V4 p.29,ln.7–p.30,ln.20. Keisha was going to Hutchinson's house to pick up some items that belonged to Stanley. *See* TrialTr.V4 p.30,ln.21–p.32,ln.6. Heard told Keisha to tell Hutchison that Heard wanted him to come along and join up with them at Taco Bell. *See* TrialTr.V4 p.32,ln.1–p.33,ln.5. Hutchinson ran back in to talk to his sister, then got into Keisha's car. *See* TrialTr.V4 p.32,ln.16–p.33,ln.12. After a while, Keisha left the Taco Bell with Brown, Heard, and Hutchinson, and they all spent the rest of the day together. *See* TrialTr.V4 p.33,ln.10–p.36,ln.22. When Hutchinson said he needed to go back home to baby-sit for his sister, Heard told him: "We've got that thing later. Hold on." *See* TrialTr.V4 p.34,ln.4–20. At some point that afternoon, Stanley called Keisha. Hutchinson asked to talk to him, but Stanley heard his voice and said: "I don't want to speak to him. Put [Heard] on the phone. What is he even doing around you?" *See* TrialTr.V4 p.36,ln.16–p.38,ln.20. Then, Keisha gave the phone to Heard. She did not hear anything they said during the ensuing conversation. *See* TrialTr.V4 p.38,ln.21–p.39,ln.15.

The group went to Keisha's house, and Hutchinson laid down on Keisha's bed and fell asleep. *See* TrialTr.V4 p.39,ln.7–p.41,ln.14.

Heard used Keisha's phone; shortly after that, Findley showed up. *See* TrialTr.V4 p.41,ln.15–p.42,ln.7. Heard and Findley had a conversation in Keisha's bathroom, with Brown present. *See* TrialTr.V4 p.42,ln.8–p.43,ln.1. When they came out, Heard told Keisha to wake Hutchison. She did so. *See* TrialTr.V4 p.43,ln.2–23. Heard told Keisha that he needed her to drive them somewhere. Heard and Hutchison got into Keisha's car, and Heard "gave [Keisha] turn-by-turn directions." *See* TrialTr.V4 p.43,ln.24–p.45,ln.7. Heard directed Keisha to park, and she saw Findley park his car next to hers. *See* TrialTr.V4 p.45,ln.8–19. Heard and Hutchinson got out and walked away towards what Keisha thought was a picnic table. *See* TrialTr.V4 p.45,ln.20–p.47,ln.14.

Keisha was turning her car around when the gunshots rang out. When she looked, she saw Brown and Findley running away from the picnic table area. *See* TrialTr.V4 p.47,ln.3–p.48,ln.5. Then, Heard got to her passenger door and yelled "Open up the door." Keisha obeyed, and Heard got into her car and said "Drive." *See* TrialTr.V4 p.48,ln.6–p.49,ln.8. As Keisha drove away, Heard called Brown and Findley—he was "questioning them, asking them what they did with the gun." *See* TrialTr.V4 p.49,ln.9–p.50,ln.7. Keisha took Heard to a friend's house, where she saw Heard "pull off a rubber glove" and change his clothes.

See TrialTr.V4 p.50,ln.5–p.51,ln.2. Then, Keisha and Heard returned to Keisha's house. Brown was already there when they arrived. *See* TrialTr.V4 p.51,ln.3–20. Keisha noted that "[Brown] was real quiet, and later on he was crying." *See* TrialTr.V4 p.52,ln.1–3. Heard was not similarly troubled—he wanted to make sure Hutchinson died.

> While we were laying there, [Heard] walked in and he was like "I want to go back," and I'm like "Go back to where?" And he was like "Go back over there to make sure" — "to see if he was really dead or not." And I told him "I'm not going back over there." He was like "Well, what if he's alive and still breathing? He could say that you were part of it." I'm like "I wasn't part of anything." I let it be known I didn't know that anything was going to happen to Josh that night.
>
> [. . .]
>
> [Heard] was saying that he wanted to go back. He described how he shot Josh. He said that while they were standing over there, Josh had mentioned that he needed to use the bathroom or go to the bathroom, and I guess he was turning to go to the bathroom, and [Heard] told him "No, don't," and he shot him. And he described that when he shot him, his body slumped over, and he shot some more times.

See TrialTr.V4 p.52,ln.4–p.53,ln.3. When detectives called and asked Keisha to come down to the police station and talk with them, Heard instructed Keisha to lie and told her what to say. *See* TrialTr.V4 p.55,ln.21–p.57,ln.10. Keisha did as she was told. *See* TrialTr.V4 p.57,ln.11–p.58,ln.8. Over the next few days, Heard invited Keisha to

skip town with him, but Keisha declined. *See* TrialTr.V4 p.59,ln.9–p.60,ln.8. Eventually, Keisha decided to tell police what she knew—which included something Brown told her about the gun Heard used.

> [Brown] explained to me that [Heard] told him to get rid of the gun, and I asked him what did he do with it. Because the phone call that happened on the highway, [Brown] — someone in the car with [Brown] and [Findley] explained that they just threw the gun out the window, and [Heard] told them to go back and get it.
>
> So after I was no longer around [Heard] anymore, I did — I asked [Brown] about where the gun was at, and he explained to me that he hid it in the alley, and he told me it was somewhere in the alley under the same street that his dad lived on.

See TrialTr.V4 p.61,ln.17–p.65,ln.2. Detectives found the gun where Keisha said Brown said he hid it. *See* TrialTr.V5 p.14,ln.14–p.16,ln.24; TrialTr.V5 p.28,ln.20–p.29,ln.2. Brown had already told detectives that the gun "was thrown to him by Mr. Heard" after the shooting. *See* TrialTr.V5 p.27,ln.11–17; TrialTr.V5 p.36,ln.14–p.39,ln.6.

Detectives who interviewed Stanley noted "he was quite upset over the fact of his friend being killed," and he offered some leads:

> [H]e thought it'd be one of two shooters. He thought it'd be either Marco Brown or Kenneth Heard. He lays out reasons why he believes that this would have happened. Good information.

See TrialTr.V5 p.20,ln.15–p.23,ln.20; TrialTr.V5 p.70,ln.3–7.

Brown testified at Heard's first trial. But when the parties tried to depose him in preparation for Heard's retrial, Brown categorically refused to answer questions and claimed Fifth Amendment privilege. *See* PretrialTr. (1/13/17) p.5,ln.11–16. Heard's PCR action had ended with a grant of relief based, in part, on Heard's claim that his counsel had been ineffective for failing to cross-examine Brown effectively. *See* PCR Findings (12/31/15); App. 29. As such, the trial court held that Heard never had the opportunity for effective cross-examination, so reading the transcript of Brown's testimony from Heard's first trial would violate *Crawford v. Washington* and Rule 5.804(b)(1). *See* Order (2/14/17) at 6–9; App. 61–64. Heard sought permission to call Brown to the witness stand during trial, so that the jury would know he invoked his Fifth Amendment privilege against self-incrimination. *See* Motion (2/20/17); App. 65; Brief (2/20/17); App. 70. However, the trial court denied that request based on Iowa precedent stating that "'the jury is not entitled to draw any inferences favorable to the prosecution or the defense' from a witness predetermined to invoke the Fifth Amendment privilege." *See* Ruling (4/26/17) at 1; App. 95 (quoting *State v. Bedwell*, 417 N.W.2d 66, 69 (Iowa 1987)).

Additional facts will be discussed when relevant.

ARGUMENT

I. The *Alleyne* Claim Does Not Target an Illegal Sentence. Heard's *Alleyne* Claim Should Be Preserved for PCR.

Preservation of Error

This challenge was not raised during trial or during Heard's sentencing hearing. If it truly alleges that Heard's sentence is illegal, error preservation rules do not apply. *See* Iowa R. Crim. P. 2.24(5)(a); *State v. Lyle*, 854 N.W.2d 378, 382 (Iowa 2014).

However, this argument does not challenge Heard's sentence as substantively illegal or unconstitutional. Iowa's error preservation rules "allow challenges to *illegal* sentences at any time, but they do not allow challenges to sentences that, because of procedural errors, are illegally *imposed*." *Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001) (citing *State v. Wilson*, 294 N.W.2d 824, 825 (Iowa 1990)). Heard is arguing this sentence would have been legal if an additional element about age had been included in the marshalling instructions that were submitted to the jury. *See* Def's Br. at 18–20. But this is a challenge to the trial procedure, not the sentence itself. *See, e.g.*, *United States v. Reyes*, 755 F.3d 210, 212 (3d Cir. 2014) (citing *Alleyne v. United States*, 570 U.S. 99, 118 (2013) (Sotomayor, J., concurring)) (observing that "*Alleyne* announced a procedural, rather than substantive rule").

Note that Heard's claim is different from the motions to correct illegal sentences that were raised in juvenile sentencing cases decided under Article I, Section 17 of the Iowa Constitution—those challenges all alleged "the absence of a sentencing procedure" that, when absent, turns the sentence into one that is *substantively* unconstitutional. *See State v. Roby*, 897 N.W.2d 127, 137 (Iowa 2017) (quoting *Lyle*, 854 N.W.2d at 402). But this *Alleyne* claim only challenges the procedure used to determine whether unique protections were even applicable. No challenge to the method of making that finding could render the resulting sentence *substantively* illegal. *See, e.g.*, *Beagle v. Stewart*, No. 2:17-cv-12760, 2017 WL 3704372, at *3 (E.D. Mich. Aug. 28, 2017) (explaining that "a sentence imposed in violation of *Alleyne* may nevertheless be accurate, whereas a sentence imposed in violation of *Miller* is necessarily invalid"). Neither *Alleyne* nor Iowa's cases on juvenile sentencing can transform this claim about jury instructions into a challenge to an illegal sentence that would evade the general rule that "timely objection to jury instructions in criminal prosecutions is necessary in order to preserve any error thereon for appellate review." *See State v. Taggart*, 430 N.W.2d 423, 425 (Iowa 1988); *accord State v. Alexander*, 853 N.W.2d 295, 297–98 & n.1 (Iowa Ct. App. 2014).

Because Heard's claim does not really attack an illegal sentence, it cannot be brought "at any time" under Rule 2.24(5)(a) and does not evade generally applicable rules of error preservation. Heard can raise this claim under an ineffective-assistance rubric in a PCR action on the instructional claim, or he may seek relief based on a claim that he *was* a juvenile at the time of the offense, or he may raise both claims. *E.g.*, *State v. Munoz–Gonzales*, No. 17–0361, 2018 WL 1433697, at *1 (Iowa Ct. App. Mar. 21, 2018) (noting that applicant had prevailed on similar claim in a second PCR action "in which he argued his sentence on the first-degree murder count was illegal because he was a minor when he committed the offense"). Neither of those claims have been raised in this appeal. *See* Def's Br. at 18–20. Heard's present claim is not cognizable as an exception to error preservation requirements, and this Court should decline to reach its merits. This claim needed to be preserved by timely objection, and that did not occur.

Standard of Review

If this Court reaches the issue, this illegal-sentence claim would be reviewed for errors at law. *See State v. Valin*, 724 N.W.2d 440, 444 (Iowa 2006); *State v. Shearon*, 660 N.W.2d 52, 57 (Iowa 2003).

Merits

Heard is asserting that he had a Sixth Amendment right to have a jury find, beyond a reasonable doubt, that he was not a juvenile at the time of the offense. *See* Def's Br. at 18–20. A similar *Alleyne* claim was recently rejected by the Iowa Court of Appeals in *State v. Quigley*:

> Quigley also asserts he has a Sixth Amendment right to have a jury determine the applicability of "any fact that increases" a penalty. Here, the district court found a fact—Quigley's age—that did not *decrease* the penalty. Because we agree that fact was found in the record, we need not address his constitutional claim.

State v. Quigley, No. 15–0551, 2016 WL 2748415, at *1 n.2 (Iowa Ct. App. May 11, 2016). Other courts have also rejected similar claims. *E.g.*, *United States v. Leanos*, 827 F.3d 1167, 1169–70 (8th Cir. 2016) (collecting cases that support its holding that "the requirements of *Alleyne* do not apply to a district court's determination of whether the safety valve provided in 18 U.S.C. § 3553(f) applies"). The principle that animates these holdings is that neither *Alleyne* nor *Apprendi* preclude judicial fact-finding when the fact at issue "does not trigger or increase the mandatory minimum, but instead prohibits imposition of a sentence below a mandatory minimum" that is already prescribed and made mandatory "as a result of the guilty plea or jury verdict." *See United States v. Harkaly*, 734 F.3d 88, 97–98 (1st Cir. 2013).

Note that, if Heard *was* a juvenile at the time of this murder, he would not be entitled to *Alleyne* procedural protections on any facts found by the sentencing court under section 902.1(2)(a). *See, e.g.*, *People v. Hyatt*, 891 N.W.2d 549, 564–66 (Mich. Ct. App. 2016) ("[T]he procedure described by *Miller* is missing key components for purposes of *Apprendi* and its progeny [including *Alleyne*]: nowhere in *Miller's* individualized sentencing mandate is the idea that *Miller* altered the maximum punishment available for juvenile offenders or made the imposition of any punishment contingent on fact-finding."). Heard is entitled to trial by jury on all elements comprising the crime, but not on the presence or absence of potentially mitigating facts that could warrant relief under Article I, Section 17. Therefore, if this Court reaches the merits of this claim, it should reject it.

Even if Heard's *Alleyne* claim were cognizable and had merit, there would be no reason to remand for a new trial on the issue of his involvement in this murder—the proper remedy would be a remand for trial on the issue of age alone, resembling the remedy ordered in recent habitual offender cases. *See, e.g.*, *State v. Harrington*, 893 N.W.2d 36, 47–48 (Iowa 2017). This Court should not allow Heard to obtain a whole new trial on this unpreserved instructional challenge.

II. The District Court's Refusal to Permit Heard to Call Marco "Juice" Brown to Encourage the Jury to Draw Inferences from Brown's Refusal to Testify and His Invocation of the Fifth Amendment Privilege Against Self-Incrimination Was Not Reversible Error.

Preservation of Error

Error was preserved by the ruling that overruled Heard's motion to compel Brown to take the stand. *See* Ruling (4/26/17); App. 95; *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Standard of Review

Heard argues his challenge implicates a constitutional right and that review is de novo. *See* Def's Br. at 21. But this challenge pertains to admission of evidence and control over the flow of the trial process, which are generally entrusted to the trial court's sound discretion, and rulings on such matters are typically reviewed for abuse of discretion. *See, e.g.*, *State v. Russell*, 893 N.W.2d 307, 314 (Iowa 2017); *United States v. McAlister*, 693 F.3d 572, 583 (6th Cir. 2012). Indeed, Heard notes that "[t]he trial judge in appraising the claim must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence." *See* Def's Br. at 29 (quoting *Hoffman v. United States*, 341 U.S. 479, 487 (1951)). Exercise of that discretion typically receives some level of deference on appellate review.

Merits

Heard frames this issue as arising out of a conflict between his Sixth Amendment right to compel witnesses to testify in his defense and Brown's Fifth Amendment right to refuse to incriminate himself. *See* Def's Br. at 24–28. This framing is accurate and helpful, because "when a witness' privilege against self-incrimination under the Fifth Amendment collides with an accused's right to compulsory process under the Sixth Amendment, the latter must give way ." *See State v. McDowell*, 247 N.W.2d 499, 500–01 (Iowa 1976). *McDowell* rejected a challenge involving a similar "blanket" assertion of privilege:

> [T]he evidence shows defendant and another person were in a Penney store browsing through clothes. Defendant herself asserts that the other person was Dietrick; she subpoenaed Dietrick as a witness. The supervisor saw that other person place merchandise in defendant's pursue. Defendant and the other person left, the supervisor followed, defendant fled and tried to 'ditch' one of the articles, and the supervisor and others apprehended her and found another tagged article in her purse. . . . The trial court properly upheld Dietrick's claim of privilege.
>
> As to the Extent of the privilege, a problem might exist but for defendant's statement of the scope of her intended examination of Dietrick. . . . Defendant candidly states in her brief the testimony Dietrick could give—"what actually took place within the J. C. Penney's Sportswear Department at the time of the incident. . . ." This incident was the subject matter of the case, the corpus delicti. Dietrick claimed and the trial court upheld the privilege regarding this subject matter.

> We hold that under these circumstances, the trial court properly upheld the privilege as to the subject matter of the case. Had the court compelled Dietrick to testify about what actually took place within the J. C. Penney sportswear department at the time of the incident, it would have compelled her to place herself in the center of the alleged crime.

Id. at 501–02. Heard does make reference to prior filings that describe specific questions he wanted to ask Brown at trial. *See* Def's Br. at 28 (citing Brief (2/20/17); App. 70);[1] *see also* Motion (2/20/17) at 1–3; App. 65–67; Brief (2/20/17) at 2–7; App. 71. But all of those questions fall into one of two categories: either they go towards proving Brown was solely responsible for this murder (and are thus incriminating), or they go towards impeaching Brown's testimony (and are irrelevant if Brown does not testify about what happened). Logically, there is no question that Heard could have asked Brown that would have been "non-incriminating" while still retaining relevance to Heard's defense. Heard's defense was that Brown was the murderer, and any questions that would elicit answers that would advance that theory would be inherently incriminating. *McDowell*, 247 N.W.2d at 500–01. As such, the question of the scope of privilege is controlled by *McDowell*.

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[1] Heard also cites a document with proposed cross-examination questions. *See* Def's Br. at 28. That document was never filed, and it is not part of the record now before this Court on appellate review. *See* Iowa R. App. P. 6.801.

Heard cites to *United State v. Antelope* for the proposition that the Fifth Amendment "offers no protection" to anyone who "asserts a general intent to refuse to answer any questions at a court hearing." *See* Def's Br. at 30 (quoting *United States v. Antelope*, 395 F.3d 1128, 1134 (9th Cir. 2005)). But *Antelope* noted that a claimant "may simply refuse to make any statements that place him at risk" in "a pending or later criminal prosecution." *See Antelope*, 395 F.3d at 1134–35 (second excerpt quoting *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984)). Here, Brown's blanket assertion of privilege as to the subject matter *of this trial*—a murder in which Brown was at least an accessory—matched the contours of his potential exposure to criminal liability. *See McDowell*, 247 N.W.2d at 500–02; *United States v. McAllister*, 693 F.3d 572, 583–84 (6th Cir. 2012) (holding that witness "had a clear entitlement to claim his Fifth Amendment privilege because the danger of incrimination was apparent"); *People v. Dyer*, 390 N.W.2d 645, 648–49 (Mich. 1986) (upholding Johnson's blanket assertion of privilege against examination by the defendant because "answering any questions concerning the evening of defendant's arrest, even as to Johnson's presence at the scene of the crime, might have tended to incriminate Johnson"). This blanket assertion of privilege was proper.

Heard's argues that he should have been permitted to call Brown to stage a live invocation of Fifth Amendment privilege, and that this Court should overturn *Bedwell*, which adopted the holding from *Bowles*: "the jury is not entitled to draw any inferences from the decision of a witness to exercise his constitutional privilege *whether those inferences be favorable to the prosecution or the defense*." *See State v. Bedwell*, 417 N.W.2d 66, 69 (Iowa 1987) (quoting *Bowles v. United States*, 439 F.2d 536 (D.C. Cir. 1970)); Def's Br. at 34–37. Confronting Heard's criticisms will help explain the merits of the *Bedwell*/*Bowles* approach under any constitutional framework.

First, Heard questions the notion that "guilt may never be inferred from the exercise of Fifth Amendment privilege." *See* Def's Br. at 34–35 (citing Charles R. Nesson & Michael J. Leotta, *The Fifth Amendment Privilege Against Cross-Examination*, 85 GEO L.J. 1627, 1672 (1997)). Heard cites to Chief Judge Bazelon's dissent in *Bowles* and argues that "there is a qualitative difference in inferences to be drawn from a prosecutor's use of silence versus a defendant's [use]"—and to Heard, the relevant distinction is "the difference between an inculpatory versus exculpatory, which for constitutional purposes is the difference between night and day." *See* Def's Br. at 35–36 (citing

Bowles, 439 F.2d at 545 (Bazelon, C.J., dissenting). Heard overlooks the flagrant manipulation that his asymmetric rules would encourage:

> [T]he inference from the privilege can be manipulated by the defendant as well. Without the rule against drawing inferences from a witness's blanket invocation of the privilege against self-incrimination, any defendant with a friend could manufacture "reasonable doubt" in the minds of the jurors at no risk to the witness. For example, a defendant accused of burglary could call his comrade to the stand and ask if it were she, and not the defendant, who committed the burglary. The comrade would only have to respond, "I refuse to answer that question on the grounds that it would tend to incriminate me," and the jury would be left with the impression that she was the culprit (or at least with a reasonable doubt that the defendant was the culprit). Unlike a witness who testifies falsely on behalf of the defendant, the comrade who claims the privilege not to testify faces no liability—she has not admitted to any crime, nor can her testimony be effectively challenged as perjury.

Nesson & Leotta, *The Fifth Amendment Privilege*, 85 GEO. L.J.at 1644 (citing *United States v. Lacouture*, 495 F.2d 1237, 1240 (5th Cir. 1974)). Heard relies on this article, but it endorses the *Bowles* holding that "[a] party should not be allowed to call a witness, knowing the witness will make a blanket invocation of the privilege, simply for the effect that the invocation will have on the jury"—it focuses its critique on "different concerns" implicated "when a witness testifies fully on direct examination, then invokes the privilege against self-incrimination when faced with cross-examination." *Id.* at 1645, 1685; *see id.* at 1671–83.

Here, unlike the situations at issue in selective invocation cases, Brown's invocation did not leave behind "unconfrontable" evidence. The constitutional problems that arise when Sixth Amendment rights to confrontation/cross-examination of the prosecution's witnesses are frustrated by a selective invocation of Fifth Amendment privilege on *cross-examination* (after direct examination) are simply not present.

Heard's real complaint is that he was not allowed to draw an inference of Brown's guilt from his invocation—but such an inference from a potential accomplice's invocation would lack probative value.

> One basic reason supporting this rule—that reliable inferences from such conduct by a witness do not ordinarily follow—is exemplified by our case. The two most likely inferences to be drawn from Mrs. Coleman's claim of privilege are that she was involved in the importation scheme along with defendant Lacouture, or that she alone was guilty and Lacouture was an innocent dupe. One favors the defense, the other the prosecution; and one is as likely as the other. Others are conceivable but unlikely and irrelevant, such as that the witness was engaged in some unrelated criminal activity at the time which she wished to conceal. And as the *Bowles* court noted, a claim of Fifth Amendment protection is likely to be regarded by the jury as high courtroom drama and a focus of ineradicable interest, when in fact its probative force is weak and it cannot be tested by cross-examination. We have little difficulty in concluding that the trial court was within its discretion in excluding matter of such dubious probative value and high potential for prejudice.

Lacouture, 495 F.2d at 1240; *accord Bowles*, 439 F.2d at 541–42.

Other jurisdictions generally reach the same conclusion and reject the notion that inferences from Fifth Amendment invocations have probative value that would justify performative invocation at trial. *See, e.g.*, *United States v. Santiago*, 566 F.3d 65, 70 (1st Cir. 2009) (rejecting a similar claim and noting that "in ordinary circumstances, no relevant rational inference can be drawn about the underlying facts because the privilege can be claimed by an innocent person"); *Billings v. State*, 607 S.E.2d 595, 597 (Ga. 2005) (quoting *Davis v. State*, 340 S.E.2d 869, 876 (Ga. 1986)) ("[R]eliable inferences do not ordinarily follow from [an] invocation of the Fifth Amendment."); *Dyer*, 390 N.W.2d at 649 (quoting *People v. Diaz*, 296 N.W.2d 337, 341 (Mich. Ct. App. 1980)) (reaffirming holding that "the exercise of a witness's constitutional right to remain silent should not be used as evidence to support an inference for either side" because any such inference would be "wholly speculative" and "does not make the existence of any fact of consequence more probable or less probable"); *People v. Thomas*, 415 N.E.2d 931, 934 (N.Y. 1980) (explaining that invocation of privilege does not have "any real probative significance" because "refusal to testify could have been based upon considerations wholly unrelated to the crime at issue in the instant trial").

Heard claims that Wayne LaFave backs his argument that he "should be given the maximum possible opportunity to make his case" and, therefore, "should at least be given the opportunity to utilize whatever inference the jury will attach (instructions notwithstanding) to the witness's claim of privilege." *See* Def's Br. at 35–36 (quoting 6 Wayne LaFave, *Criminal Procedure* § 24.4(c) (4th ed. 2015)). But LaFave is decidedly measured on this; he ascribes that argument to other commentators. *See* LaFave, *Criminal Procedure* §24.4(c) n.43. Moreover, LaFave notes that ABA Standards for prosecutors and for defense counsel "refuse to draw such a distinction"—both standards warn not to "call a witness in the presence of the jury when counsel knows the witness will claim a valid privilege not to testify." *See id.* LaFave is similarly restrained in appraising that guidance: "Perhaps the refusal to treat prosecution and defense differently is based in part on the belief that either side can manipulate the inference from silence in its favor." *See id.* at n.44. That manipulation is possible because a blanket invocation of Fifth Amendment privilege does not help prove or disprove any particular fact in issue—it is not *relevant*. Staging a live invocation of the Fifth Amendment may tantalize jurors, but it provides no meaningful proof of any underlying fact at issue.

Second, Heard argues that raising an adverse inference from a Fifth Amendment invocation is not prejudicial. *See* Def's Br. at 36–37. Iowa cases have already recognized the potentially damning power of unwarranted inferences from Fifth Amendment invocations at trial. "When an alleged accomplice invokes the privilege in the presence of the jury, prejudice arises from the human tendency to treat the claim of privilege as a confession of crime, creating an adverse inference which an accused is powerless to combat by cross-examination." *See State v. Allen*, 224 N.W.2d 237, 241 (Iowa 1974); *accord Bedwell*, 417 N.W.2d at 69. This human tendency to speculate about reasons for invoking Fifth Amendment privilege makes this unfairly prejudicial to the adverse party (whether that is the State or the defendant) because "the jury is likely to place far too much emphasis upon an ambiguous invocation." *See State v. Robinson*, 715 N.W.2d 531, 556 (Neb. 2006) (quoting *United States v. Reyes*, 362 F.3d 536, 542 (8th Cir. 2004)). Unlike gruesome evidence that helps prove how the murder happened, "calling [Brown] to the stand in the face of his expressed intention to invoke his privilege against self-incrimination would have produced no relevant evidence, while inviting the jury to engage in unwarranted and impermissible speculation." *See Commonwealth v. Gagnon*, 557

N.E.2d 728, 737 (Mass. 1990); *see also State v. Bryant*, 523 A.2d 451, 455–56 (Conn. 1987) ("Reason and human experience indicate that inferences are certainly suggested by such a tactic; the danger inherent in this circumstance is that the inference or inferences drawn may have little, if any, juristic relation to the issues before the jury."); *State v. McGraw*, 608 A.2d 1335, 1339 (N.J. 1992) (quoting *State v. Karlein*, 484 A.2d 1355, 1358 (N.J. Super. Ct. Law Div. 1984)) ("While in theory the witness who invokes the Fifth Amendment produces no evidence whatsoever, the practical result is that inferences might be drawn which create a substantial danger of undue prejudice to the State and mislead the jury into findings not based on legitimate evidence."); *Horner v. State*, 508 S.W.2d 371, 372 (Tex. Ct. Crim. App. 1974) (finding that staging a live Fifth Amendment invocation "would tend to induce the jury to speculate on matters not in evidence and infer the existence of facts which could not be proved by the witness himself"); *State v. Rollins*, 188 S.W.3d 553, 568–69 (Tenn. 2006) (quoting *State v. Corrales*, 676 P.2d 615, 622 (Ariz. 1983)) (reaching the same result and noting "jurors tend to view a witness' invocation of the privilege as a clear confession of crime," even when unsupported by evidence). Such theatrics would give rise to undue prejudice and little else.

The remainder of Heard's challenge purports to discuss the Iowa Constitution, but it focuses on the singular example where any American court adopted the disfavored approach Heard proposes: *State v. Herbert*, where the Supreme Court of Appeals of West Virginia found "the circuit court erred in allowing McGuire to make a blanket assertion of the Fifth Amendment because he had no right to do so" after being granted immunity, and "the circuit court's decision not to make McGuire appear in front of the jury was error and violated the Defendant's constitutional right to compulsory process." *See Herbert*, 767 S.E.2d 471, 476–83 (W.Va. 2014); Def's Br. at 37–41. The dispute in *Herbert* was mostly focused on the failure to allow the jury to *view* McGuire because "[i]n self-defense cases, the physical stature and demeanor of a victim-witness is important evidence"—and, indeed, the court repeatedly told the jury McGuire refused to testify (which would moot the claim at issue here). *See Herbert*, 767 S.E.2d at 477–78, 483. But *Herbert* took pains to recognize a new constitutional right under the Sixth Amendment and the West Virginia Constitution, despite its inapplicability to the case at bar and "the overwhelming amount of the State's evidence" that mooted the issue through harmless error. *See id.* at 478–83; *accord id.* at 490–93 & n.1 (Loughry, J., dissenting).

Herbert is a cautionary tale about the chaos that can ensue when an appellate court abandons its obligation to "decide the case within the framework of the issues raised by the parties." *See Feld v. Borkowski*, 790 N.W.2d 72, 78 (Iowa 2010); *see also State v. Coleman*, 890 N.W.2d 284, 303 & n.3 (Iowa 2017) (Waterman, J., dissenting).

Heard incorporates a paragraph from *Herbert* that speculates that "[e]ven though juries are instructed to presume a defendant's innocence, they may still improperly infer a defendant's guilt when an important witness fails to testify." *See* Def's Br. at 38–39 (quoting *Herbert*, 767 S.E.2d at 480). But Iowa courts have always presumed that jurors follow the instructions and hold the State to its burden of proving the defendant's guilt beyond a reasonable doubt based on the evidence produced at trial—if anything, Iowa jurors would naturally penalize *the State* for any unexplained gaps in the evidence. *See, e.g.*, *State v. Gomez Garcia*, 904 N.W.2d 172, 183–84 (Iowa 2017) (citing *State v. Sanford*, 814 N.W.2d 611, 620 (Iowa 2012)). And *Herbert* jumps the shark when it suggests that it becomes *more* necessary to require a witness to invoke the Fifth Amendment in front of the jury "when the witness is a co-accused." *See Herbert*, 767 S.E.2d at 480. *Herbert* is a recipe for invalidating every single joint trial based on

the same impermissibly prejudicial inference that *Griffin* prohibited, half a century ago. *See Griffin v. California*, 380 U.S. 609, 614 (1965). Iowa courts have a strong interest in judicial economy, and any rule that would snuff out any hope of charging multiple defendants in a single indictment/information should be rejected out of hand. *See State v. Lam*, 391 N.W.2d 245, 249 (Iowa 1986) (citing *State v. Bair*, 362 N.W.2d 509, 511 (Iowa 1985)). Moreover, considering McGuire's conduct, it is absurd that *Herbert* remarks that the *Bowles* approach was the problem that "ma[de] it possible for an uncooperative witness to defy [the] trial court's authority." *See Herbert*, 767 S.E.2d at 480. McGuire was able to defy the trial court's authority in *Herbert* because he did not care if he was held in contempt or charged with a crime—*Herbert* provides no new factor that could motivate McGuire to care. *See id.* at 476–78. And the problem with *Herbert*'s laundry list of evidence with "a far more dramatic effect" than a live invocation of Fifth Amendment privilege is that all of those items are *probative*—unlike the invocation of privilege, which is not. *See id.* at 481. Nothing in *Herbert* explains how the invocation of privilege can be probative or what it can help to prove—which means *Herbert* abjectly fails to reckon with the animating logic of the majority approach. *See id.*

An overwhelming majority of states have endorsed *Bowles* and adopted similar approaches to this issue. *See, e.g.*, *State v. Henry*, 863 P.2d 861, 872–73 (Ariz. 1993); *People v. Dikeman*, 555 P.2d 519, 520 (Colo. 1976); *State v. Bryant*, 523 A.2d 451, 455–56 (Conn. 1987); *Apfel v. State*, 429 So.2d 85, 86–87 (Fla. Dist. Ct. App. 1983); *Billings v. State*, 607 S.E.2d 595, 597 (Ga. 2005); *People v. Myers*, 220 N.E.2d 297, 310–11 (Ill. 1966); *State v. Crumm*, 654 P.2d 417, 420–23 (Kan. 1982); *Clayton v. Commonwealth*, 786 S.W.2d 866, 868 (Ky. 1990); *State v. Berry*, 324 So.2d 822, 830 (La. 1975); *Commonwealth v. Gagnon*, 557 N.E.2d 728, 737 (Mass. 1990); *People v. Dyer*, 390 N.W.2d 645, 648–49 (Mich. 1986); *State v. Robinson*, 715 N.W.2d 531, 556 (Neb. 2006); *State v. McGraw*, 608 A.2d 1335, 1339 (N.J. 1992); *People v. Thomas*, 415 N.E.2d 931, 934 (N.Y. 1980); *Pavatt v. State*, 159 P.3d 272, 286 (Okla. Ct. Crim. App. 2007); *State v. Mitchell*, 487 P.2d 1156, 1161 (Or. Ct. App. 1971); *State v. Ramirez*, 936 A.2d 1254, 1265 (R.I. 2007); *State v. Hughes*, 493 S.E.2d 821, 823–24 (S.C. 1997); *Horner v. State*, 508 S.W.2d 371, 372 (Tex. Ct. Crim. App. 1974); *State v. Rollins*, 188 S.W.3d 553, 568–69 (Tenn. 2006); *State v. Travis*, 541 P.2d 797, 798–99 (Utah 1975); *State v. Heft*, 517 N.W.2d 494, 500 (Wis. 1994); *Porth v. State*, 868 P.2d 236,

240 (Wyo. 1994) ("All of the case law, however, is clear that the defense may not call a witness for the sole purpose of having the witness invoke his privilege against self-incrimination before a jury. There is little probative value in a witness's refusal to testify and a danger the jury will infer that it was the witness who committed the crime rather than the defendant."). That, itself, is not determinative. However, it provides ample persuasive support for the same reasoning that the district court offered in its order denying Heard's motion:

> Using the exercise of constitutional rights as a weapon, rather than a shield, is troubling. This approach is an invitation for jurisprudential mischief in the criminal process.
>
> Were the procedure sanctioned, any defendant could subpoena any known person of disrepute and force him or her to take the Fifth. There would be no way for the Court, or the jury, to assess the relevance of such an act. It would be evidence by innuendo, untested by the adversarial process. . . .
>
> The "Perry Mason moment" of a witness "taking the Fifth" before the jury is a misuse of that right that cannot be assuaged by a cautionary or curative instruction.

Ruling (4/26/17) at 2; App. 96. Both *Bedwell* and this ruling are in good company with other courts that discourage such distractions.

Heard argues that the Iowa Constitution favors his approach because Article I, Section 10 describes the right to compulsory process with language that differs from the Sixth Amendment. *See* Def's Br. at

39–40. In reality, there is no substantive textual difference. Article I, Section 10 gives the accused a right "to have compulsory process for his witnesses," *see* IOWA CONST. ART I, § 10, while the Sixth Amendment grants the right "to have compulsory process for obtaining witnesses in his favor." *See* U.S. CONST. amend. VI. Both use identical terms to describe the substance of the right: "compulsory process." Any minor textual difference can only pertain to disputes over *which witnesses* are within the scope of that right to compulsory process—this minor divergence provides no textual support for Heard's argument that he should be entitled to something beyond what "compulsory process" means in the context of the Sixth Amendment.

Heard also argues for a narrower conception of the protections against self-incrimination because "the Iowa Constitution does not expressly mention the right against self-incrimination"—which, when viewed alongside slight variations in language describing compulsory process in Article I, Section 10 of the Iowa Constitution, "would imply that our framers intended for a more expansive right to compulsory process and a less protective right against self-incrimination under the Iowa Constitution." *See* Def's Br. at 39–40. This cannot be true. The Iowa Supreme Court routinely cites *State v. Height* to illustrate

how the Iowa Constitution intends to enshrine the loftiest values and most expansive protections conceivable for "fundamental guarantees, like the right against self-incrimination." *See Coleman*, 890 N.W.2d at 286 (citing *State v. Height*, 91 N.W. 935, 937–38 (Iowa 1902)); *cf. State v. Baldon*, 829 N.W.2d 785, 811 (Iowa 2013) (Appel, J., concurring specially) ("In [*Height*], we held as a matter of state constitutional law that the privilege against self-incrimination was incorporated in the due process clause of article I, section 9 of the Iowa Constitution even though at the time the United States Supreme Court did not incorporate the Fifth Amendment against the states pursuant to the Due Process Clause of the Fourteenth Amendment."). Heard's claim that the Iowa Constitution disincludes/de-emphasizes the right against self-incrimination to diminish its strength or scope should be rejected as fiercely as if it would be if the State had said it.

Heard's final argument on the Iowa Constitution is a generic reference to Iowa's independent state constitutional jurisprudence. *See* Def's Br. at 40–41. But this Court "should not simply 'reflexively find in favor of any new right or interpretation asserted.'" *See State v. Storm*, 898 N.W.2d 140, 149 (Iowa 2017) (quoting *Commonwealth v. Gary*, 91 A.3d 102, 126 (Pa. 2014)). This argument has no value.

Heard's only real constitutional argument is about balancing of interests and rights at issue. *See* Def's Br. at 40–41. But this is just the same argument raised in the rest of the brief: that requiring Brown to take the stand to invoke his Fifth Amendment privilege before the jury would achieve the correct balance between those protections against self-incrimination and Heard's right to compulsory process. The State reiterates that such balancing will always favor the majority approach. Because such an invocation of privilege against self-incrimination is inherently prejudicial and not probative, balancing of those interests should find that no interest in compulsory process is served by allowing the defendant to put that invocation before the jury—and whatever wispy, marginal probative value might possibly emerge in fringe cases is dwarfed by the unfairness of permitting unilateral use of inferences that can never be tested or scrutinized through cross-examination. *See, e.g.*, *Dikeman*, 555 P.2d at 520 (quoting *State v. Smith*, 446 P.2d 571, 581 (Wash. 1968), *vacated in part on other grounds by Smith v. Washington*, 408 U.S. 934 (1972)) ("If the claiming of the privilege is not evidence which the prosecutor can use, there is no reason why it should be deemed to acquire probative value simply because a codefendant rather than the state seeks to utilize it.").

As a final aside, it is appropriate to consider the practical effects of the approach Heard proposes. *E.g.*, *Storm*, 898 N.W.2d at 155–56. Here, if Brown had invoked a Fifth Amendment privilege on the stand and if Heard had been allowed to draw inferences from that invocation to imply that Brown was the murderer, then Heard would have faced two unintended consequences of that strategy. First, the Court would have been far less likely to dismiss the State's alternative theory that Heard aided and abetted the murder when it crafted jury instructions, in light of Heard's inevitable argument urging the jury to use Brown's silence to infer that Brown was the shooter. *See* TrialTr.V6 p.68,ln.24–p.70,ln.16. As such, even if Heard could have proved that Brown was the shooter, the State would still use Heard's pre- and post-shooting conduct and inculpatory statements to establish Heard's participation. *See* TrialTr.V3 p.85,ln.17–p.87,ln.19; TrialTr.V4 p.49,ln.9–p.50,ln.7; TrialTr.V4 p.52,ln.4–p.53,ln.3; TrialTr.V4 p.55,ln.21–p.57,ln.10. Second, Heard would effectively be raising nearly identical inferences against himself, because he *also* invoked his Fifth Amendment right not to testify. *See* TrialTr.V6 p.51,ln.21–p.54,ln.11. And if Heard had weaponized those inferences against Brown, the State would be able to turn those very same inferences against Heard in response. *See,*

e.g., *United States v. Robinson*, 485 U.S.25, 33–34 (1988) ("It is one thing to hold, as we did in *Griffin*, that the prosecutor may not treat a defendant's exercise of his right to remain silent at trial as substantive evidence of guilt; it is quite another to urge, as defendant does here, that the same reasoning would prohibit the prosecutor from fairly responding to an argument of the defendant by adverting to that silence."). Thus, any advantage Heard could hope to glean from raising inferences that Brown was refusing to testify because he was the shooter would have inevitably been transformed into an albatross around his own neck.

Those side effects would eliminate any possible benefit that Heard could expect from forcing Brown to take the stand—but the cost borne by Brown and by the justice system would remain. Thus, Heard's approach could never prevail in any balancing of interests. This Court should reaffirm *Bedwell* and reject Heard's argument under both the federal and state constitutions.

III. The Weight of the Evidence Supported the Verdict.

Preservation of Error

Error was preserved. Heard raised this challenge in his motion for a new trial, and the trial court ruled on it. *See* Sent.Tr. p.2,ln.10–p.11,ln.1.

Standard of Review

The ruling denying the motion for new trial is reviewed for abuse of discretion. *See State v. Nitcher*, 720 N.W.2d 547, 559 (Iowa 2006) (quoting *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003)).

The trial court's discretion to deny a challenge to the weight of the evidence is only abused where "the evidence preponderates heavily against the verdict." *Reeves*, 670 N.W.2d at 202 (quoting *State v. Ellis*, 578 N.W.2d 655, 658–59 (Iowa 1998)). This standard "allows the court to grant a motion for new trial only if more evidence supports the alternative verdict as opposed to the verdict rendered." *State v. Ary*, 877 N.W.2d 686, 706 (Iowa 2016). Moreover, "[o]n a weight-of-the-evidence claim, appellate review is limited to a review of the exercise of discretion by the trial court, not of the underlying question of whether the verdict is against the weight of the evidence." *See Reeves*, 670 N.W.2d at 203.

Merits

"Unlike the sufficiency-of-the-evidence analysis, the weight-of-the-evidence analysis is much broader in that it involves questions of credibility and refers to a determination that more credible evidence supports one side than the other." *See Nitcher*, 720 N.W.2d at 559;

see also Reeves, 670 N.W.2d at 202. The trial court's discretion to deny a motion for a new trial is only abused where "the evidence preponderates heavily against the verdict." *See Reeves*, 670 N.W.2d at 202 (quoting *Ellis*, 578 N.W.2d at 658–59). That is not the case here.

Heard attacks the State's theory on his motive for committing this murder. *See* Def's Br. at 42–43. The State did not have to show *why* Hutchinson may have been about to snitch, or even that Heard's fears that Hutchinson would snitch had any basis in fact. Rather, the important fact was that Heard had *believed* Hutchinson would snitch. Findley testified that he said so. *See* TrialTr.V3 p.85,ln.17–p.87,ln.19; *cf.* TrialTr.V4 p.25,ln.17–p.29,ln.6. The State emphasized the context.

> A fully sufficient motive for murder, however, was presented by a witness with first-hand knowledge of Heard's statements about Hutchinson. Phil Findley, immediately after being summoned by Heard an hour before the murder, met with Heard in the Majors apartment bathroom. Heard was the leader of a group that did "licks" (i.e. armed robberies). Heard told Finley that Hutchinson was "snitching." For those who live a life of crime, there is no more compelling motive for murder.

See Resistance to Mot. for New Trial (6/21/17) at 4; App. 106. And Findley testified as to the circumstances of the shooting—Findley was standing next to Brown at the time and did not see a gun in Brown's hand when the shots were fired. *See* TrialTr.V3 p.94,ln.18–p.97,ln.14.

Heard ignores that testimony and argues that the evidence "pointed to Marco Brown as the trigger man, acting at the direction of Donald Stanley." *See* Def's Br. at 43–45. But Brown was visibly upset after the shooting—Keisha saw him crying. *See* TrialTr.V4 p.52,ln.1–3. Compare that to Heard, who told Keisha he "want[ed] to go back" to make sure that Hutchinson was not "alive and still breathing"—and then, Heard described pulling the trigger and shooting Hutchinson in clear, unequivocal admissions. *See* TrialTr.V4 p.52,ln.4–p.53,ln.3. Keisha also saw Heard taking off a rubber glove, after the shooting. *See* TrialTr.V4 p.50,ln.5–p.51,ln.2. Keisha's testimony was credible.

Keisha apparently thought that Stanley ordered the murder. *See* TrialTr.V4 p.102,ln.4–p.103,ln.15. Investigators spoke with Stanley and thought he was upset that someone had murdered Hutchinson. *See* TrialTr.V5 p.20,ln.15–p.23,ln.20; TrialTr.V5 p.70,ln.3–7. But even if Stanley had ordered Hutchinson's killing, the evidence would strongly suggest that it was Heard who carried out that order. *See* TrialTr.V3 p.94,ln.18–p.97,ln.14;TrialTr.V3 p.103,ln.16–p.104,ln.15; TrialTr.V4 p.52,ln.4–p.53,ln.3. Brown may have helped hide and/or destroy evidence after the fact, but that does not change the fact that Heard orchestrated this killing and pulled the trigger himself.

Heard mentions the lack of blood spatter on the sleeve of the black jacket he was wearing during the murder. *See* Def's Br. at 45. But expert witness testimony proved that when Hutchinson was shot in the back of the head, the bullet went through the hooded sweatshirt he was wearing—and that intervening material would extinguish any expectation of "back spatter" on the gun or the shooter's hand/arm. *See* TrialTr.V4 p.137,ln.11–p.138,ln.22; TrialTr.V6 p.83,ln.21–p.90,ln.22. While the fact that shots were fired in close proximity to Hutchinson helps explain why Heard felt it was necessary to wear a rubber glove, it does not provide any support for Heard's "back spatter" theory—which was argued at trial and rejected by both the jury and the court. *See* TrialTr.V4 p.50,ln.5–p.51,ln.2; TrialTr.V4 p.126,ln.15–p.128,ln.8; TrialTr.V7 p.55,ln.20–p.57,ln.25; TrialTr.V7 p.76,ln.7–p.79,ln.2.

Appellate courts recognize that district courts are vested with "wide discretion in deciding motions for new trial," primarily because they have the opportunity to observe testimony first-hand and can weigh credibility in a meaningful way. *See Ellis*, 578 N.W.2d at 659. In response to Heard's motion for new trial, the court did just that:

> I completely disagree with your evaluation of the evidence. I watched and listened to the same witnesses that the jury did. The witnesses were credible, believable.

> [. . .]
>
> The weight of the evidence here is adverse to your client. It shows that he committed a murder, that it was done with premeditation, that it was done with deliberation, that it was done with the specific intent to kill. Motive is not an element for the government, but clearly the motive was demonstrated in this case. This was a gang killing, in the Court's view, and someone was pushing back against the gang leader and paid the price.

Sent.Tr. p.11,ln.22–p.12,ln.16. The record supports that conclusion. *See* TrialTr.V3 p.85,ln.17–p.87,ln.19; TrialTr.V4 p.52,ln.4–p.53,ln.3; State's Ex. 57. Heard cannot establish the trial court abused its broad discretion in denying his motion for new trial. This claim must fail.

CONCLUSION

The State respectfully requests that this Court reject Heard's challenges and affirm his conviction.

REQUEST FOR NONORAL SUBMISSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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Dated: June 4, 2018

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