SUPREME COURT NO. 17-1075
POLK COUNTY NO. FECR217722

IN THE SUPREME COURT OF IOWA

STATE OF IOWA
Plaintiff-Appellee,

v.

KENNETH LEROY HEARD
Defendant-Appellant.

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

BRIEF FOR APPELLANT

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PROOF OF SERVICE & CERTIFICATE OF FILING

On June 13, 2018, I served this brief on the Applicant at his address at the Iowa State Penitentiary and all other parties by EDMS to their respective counsel:

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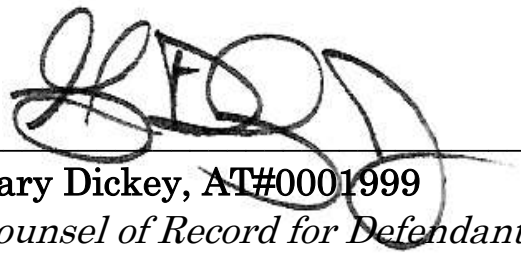
I further certify that I did file this proof brief with the Clerk of the Iowa Supreme Court by EDMS on June 13, 2018.



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ROUTING STATEMENT

This case presents a substantial question of first impression of whether a court, consistent with *Alleyne v. United States*, 570 U.S. 88 (2013), can impose a sentence of life imprisonment without the possibility of parole without the jury first determining beyond a reasonable doubt that the defendant was an adult at the time the crime was committed. Additionally, Kenneth Heard asks this Court to overrule the holding in *State v. Bedwell*, 417 N.W.2d 66 (Iowa 1987), that a criminal defendant cannot compel a witness to testify at trial following the witness's a blanket assertion of his right against self-incrimination to all questioning. Accordingly, retention of this case by the Iowa Supreme Court is warranted. Iowa R. App. P. 6.1101(2)(a),(c),(d), (f).

STATEMENT OF THE CASE

On April 4, 2008, the State of Iowa filed a one-count trial information against Kenneth Heard charging him with Murder in the First Degree in violation of Iowa Code sections 707.1 and 707.2. (App at 6). Specifically, the State alleged that Heard willfully and deliberated killed Joshua Hutchinson with premeditation and malice aforethought. (App. at 6). Heard pled not guilty. The case first came to trial in November of 2008, and the jury convicted Heard of first-degree murder. (App at 24). He was sentenced to life in prison without the possibility of parole. (App at 27).

Heard appealed. *State v. Heard*, 2010 WL 2090851 (Iowa Ct. App. May 26, 2010). He argued that his conviction was contrary to the weight of the evidence because the State's witnesses were not credible. *Id.* at *2. Additionally, he asserted that his trial counsel was ineffective for failing to request an instruction that accomplice testimony must be corroborated in order to support a conviction. *Id.* at *3. The court of appeals affirmed. *Id.* at *5-6.

Heard thereafter filed an application for postconviction relief in which he again claimed his trial counsel was ineffective. This time he contended that his trial counsel failed to investigate and offer evidence that another person committed the murder. (App. at 30). He also asserted that his trial counsel failed to investigate and present expert testimony explaining that blood spatter evidence would have been found on Heard's clothing if he fired the fatal gunshots. (App. at 30). The court found that Heard's counsel breached an essential duty in failing to investigate these two avenues of potential defenses, which was sufficient to undermine its confidence in the outcome of the trial. (App. at 50). Accordingly, the court granted Heard's postconviction relief application and ordered a new trial. (App. at 54).

The State elected to retry Heard on the first-degree murder charge. The evidence offered at the second trial largely overlapped the first trial but was not identical. The jury again returned a guilty verdict. (App. at 99). Heard filed various post-trial motions, which were denied by the district court. (App. at 110). The court again sentenced Heard to life in prison without

the possibility of parole. (App. at 110). Heard filed a timely notice of appeal. (App. at 112).

STATEMENT OF THE FACTS

On the morning of December 13, 2007, Joshua Hutchinson's body was found lying in the snow near an apartment complex on Center Street in Des Moines. (05/23/17 Trial Tr. at 18-19). The cause of death was multiple gunshot wounds. (05/24/17 Trial Tr. at 116). Hutchinson (a/k/a "J-Hood") was a member of a group called "3 in 3 out" also known as "Third World," which was alleged to have sold drugs and committed robberies together. (05/23/17 Trial Tr. at 81; 05/24/17 Trial Tr. at 26, 74-75). Other members included Kenneth Heard (a/k/a "KQ"), Marco Brown (a/k/a "Juice"), Phillip Findley (a/k/a "Self"), and Deland Stanley (a/k/a "DB"). (05/23/17 Trial Tr. at 80-84, 05/24/17 Trial Tr. at 23-26). Heard was viewed as the leader of the group and was considered "like brothers" with Hutchinson. (05/22/17 Trial Tr. at 159-60; 05/24/17 Trial Tr. at 33; 05/25/17 Trial Tr. at 57, 77-78). Stanley and Brown were best friends. (05/24/17 Trial Tr. at 74).

On December 12, 2007, Hutchinson was with Brown, Heard, Heard's girlfriend, Johnetta Daye, and Stanley's girlfriend—Jacquisha Majors. (05/23/17 Trial Tr. at 85; 05/24/17 Trial Tr. at 68; 05/30/17 Trial Tr. at 13-14). They spent the day at a friend's house smoking marijuana, listening to music, and planning a robbery. (05/24/17 Trial Tr. at 34-35). At one point, Stanley called Majors from jail and asked her to go over to Hutchinson's house to pick up some clothing and then onto her cousin's residence to pick up a bulletproof vest and shotgun—which she did. (05/24/17 Trial Tr. at 30-31, 35-36). Around midnight, they went to Majors's apartment. (05/24/17 Trial Tr. at 39). From there, Heard called Findley and told him to come to the apartment. (05/23/17 Trial Tr. at 84-85; 05/24/17 Trial Tr. at 41-42). Hutchinson, high from the marijuana, went into a bedroom and fell asleep in Majors' bed. (05/24/17 Trial Tr. at 41). Upon Findley's arrival, Heard met with him and Brown in the bathroom. (05/23/17 Trial Tr. at 85-86). Accordingly to Findley, Heard told them he was thinking about killing Hutchinson because Hutchinson was planning to rob him and was "snitching" to law enforcement. (05/23/17 Trial Tr. at 85-

87). Sometime later, Heard told Majors to wake Hutchinson up. (05/24/17 Trial Tr. at 43). Heard then asked Majors to drive him and Hutchinson to the staging area for the robbery while Brown and Findley followed in their car. (05/24/17 Trial Tr. at 43-44). Daye stayed back at Majors' apartment. (05/30/17 Trial Tr. at 15).

Heard directed Majors to the apartment complex on Center Street. (05/24/17 Trial Tr. at 45). He had her drive to the back of the parking lot to wait for Heard's cousin to pick them up from there. (05/24/17 Trial Tr. at 45). Hutchinson and Heard got out of the car and walked towards a picnic table near a wooded area located a short distance from the parking lot. (05/23/17 Trial Tr. at 92-93; 05/24/17 Trial Tr. at 46-47). Brown and Findley also got out of their car and followed. (05/23/17 Trial Tr. at 92). Hutchinson walked over toward a tree to urinate. (05/23/17 Trial Tr. at 93). While Findley was looking in another direction, he heard several gunshots. He saw Hutchinson's body fall to the ground, but he was not in position to see who fired the shots. (05/23/17 Trial Tr. at 94-99, 112).

Majors, still in the parking lot, heard three to four gun shots as she was backing out to leave. (05/24/17 Trial Tr. at 47). The next thing she saw was Brown slide across the back of Findley's car as they were running from the gun shots. (05/24/17 Trial Tr. at 47-48). As Findley drove off, Brown was in possession the gun used in the shooting. (05/24/17 Trial Tr. at 97; 05/25/17 Trial Tr. at 27). Majors also saw Heard come running back. (05/24/17 Trial Tr. at 47). He yelled at Majors to "open the door," and directed her to take him to a friend's house. (05/24/17 Trial Tr. at 47-48). Along the way, Heard called Findley on his cell phone to ask, "Are you cool?" (05/23/17 Trial Tr. at 98). Majors overheard Heard ask him "what they did with the gun." (05/24/17 Trial Tr. at 49).

Once at the friend's house, Heard changed out of his clothes and removed a rubber glove from his hand. (05/24/17 Trial Tr. at 449-50). Brown had Findley drop him off back at Majors' apartment where Daye was still waiting. (05/23/17 Trial Tr. at 99). According to Daye, Brown came into the apartment, changed his clothes, and put them in a bag because he was scared there would be gunpowder on them. (05/25/17 Trial Tr. at 38). Eventually,

Heard and Majors also returned to the apartment. (05/24/17 Trial Tr. at 51).

The next morning, Majors received a telephone call from a police officer informing her that her number was found in Hutchinson's cell phone. (05/24/17 Trial Tr. at 53). Majors told the officer she did not know of anyone that would have wanted to hurt Hutchinson. (05/24/17 Trial Tr. at 53). For the next couple of days after the shooting, Stanley kept calling Majors from jail to ask her what happened. (05/24/17 Trial Tr. at 58-59). Heard started talking about leaving town and asked Majors if she wanted to go with him to Minnesota. (05/24/17 Trial Tr. at 59-60). A few days later, Majors took Heard to his cousin's house in Des Moines, and that was the last time she saw him. (05/24/17 Trial Tr. at 61). The police eventually located Heard in Texas where he was arrested and brought back to Iowa to face a first-degree murder charge for Hutchinson's death. (05/25/17 Trial Tr. at 19).

Heard stood trial a second time in May of 2017. The jury found Heard guilty of first-degree murder, and he was sentenced to life in prison. This appeal followed.

ARGUMENT

I. HEARD'S SENTENCE OF LIFE WITHOUT PAROLE IS UNCONSTITUTIONAL BECAUSE THE JURY DID NOT MAKE A FINDING BEYOND A REASONABLE DOUBT THAT HE WAS AN ADULT AT THE TIME OF THE OFFENSE

Error Preservation

Heard's trial counsel did not object to his sentence of life without the possibility of parole. Nonetheless, "errors in sentencing may be challenged on direct appeal even in the absence of an objection in the district court." *State v. Lathrop*, 781 N.W.2d 288, 293 (Iowa 2010).

Standard of Review

A constitutional challenge to the legality of a criminal sentence is reviewed de novo. *State v. Louisell*, 865 N.W.2d 590, 595 (Iowa 2015).

Analysis

A. Applicable legal principles

The Sixth Amendment provides that those "accused" of a "crime" have the right to a trial "by an impartial jury." U.S. Const. amend VI. Similarly, the Iowa Constitution declares that

the "right of trial by jury shall remain inviolate." Iowa Const. art. I, § 9. The right to trial by jury, in conjunction with the right to due process, requires that each element of a crime be proved to the jury beyond a reasonable doubt. *United States* v. *Gaudin*, 515 U. S. 506, 510 (1995); *In re Winship*, 397 U. S. 358, 364 (1970); *see also Phillips v. Iowa Dist. Court for Johnson County*, 380 N.W.2d 706, 707-709 (Iowa 1986). Accordingly, any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 483 n.10 (2000). This is true for any fact that increases either the maximum or mandatory minimum penalty for a crime. *Alleyne v. United States*, 570 U.S. 99, 13 (2013).

B. Because Iowa prohibits the imposition of a sentence of life without parole for a youthful offender, a finding by the jury that Heard was an adult at the time of the offense was required

The district court sentenced Heard to "Life in Prison without the Possibility of Parole." (App. at 110); Iowa Code §§ 902.3, 902.9. In *State v. Sweet*, 879 N.W.2d 811 (Iowa 2016), however, the Iowa Supreme Court categorically banned sentencing "juvenile

offenders" to life without the possibility of parole under the Cruel and Unusual Punishment Clause of the Iowa Constitution. *Id.* at 839; Iowa Const. art. I, § 17. The line between juvenile and adult offenders is the age of eighteen. *State v. Lyle*, 854 N.W.2d 378, 403 (Iowa 2014). Thus, it necessarily follows under *Alleyne* that the jury was required to find beyond a reasonable doubt that Heard was an adult offender at the time of his offense in order for the district court to have imposed the sentence of life without parole. *Alleyne*, 570 U.S. at 117 (holding that imposition of a mandatory minimum on the basis of a fact found by the judge, rather than the jury, violates the Sixth Amendment"). Here, the State did not identify Heard's age in the trial information. (App. at 6). The court did not include Heard's age as an element of the first-degree murder marshalling instruction. (App. at 102). Nor did the court submit to the jury an interrogatory or special verdict form requiring it to finding beyond a reasonable doubt that Heard was an adult offender. (App. at 99). Consequently, the imposition of life without parole violates Heard's rights to a jury trial and due process under both the United States and Iowa Constitutions.

II. THE DISTRICT COURT'S REFUSAL TO COMPEL MARCO BROWN TO TESTIFY FOLLOWING THE BLANKET ASSERTION OF HIS RIGHT AGAINST SELF-INCRIMINATION VIOLATED HEARD'S RIGHTS TO COMPULSORY PROCESS AND DUE PROCESS

Error Preservation

Heard preserved error by filing a motion to compel Brown's testimony. (App. at 65). The district court ruled on Heard's motion and confirmed its belief that error had been preserved. (App. at 95); (05/19/17 Hearing Tr. at 36-37).

Standard of Review

Claim asserting the violation of a constitutional right are reviewed de novo. *State v. Russell*, 897 N.W.2d 717, 724 (Iowa 2017).

Analysis

At the second trial, his defense counsel laid out Heard's theory of defense in the opening statement. That is, the State's evidence could not reasonably rule out that Marco Brown carried out the murder at the behest of Deland Stanley because Hutchinson made a pass at Stanley's girlfriend and was stealing drugs from him. (05/22/17 Trial Tr. at 131-141). Notably, Brown

testified at Heard's first trial. Indeed, Brown's trial testimony served as the basis of the district court's postconviction relief ruling that granted Heard a new trial. In particular, the court faulted the cross-examination of Brown in three respects: (1) failure to question Brown about his mental illness; (2) failure to impeach him on his prior conviction; and (3) failure to impeach him by a prior inconsistent statement to Charles Webster and Albert Harrison. (App. at 40, 43, 44).

When Brown appeared for depositions in preparation for the second trial, he asserted his right against self-incrimination and refused to testify. (App. at 56). He further declared that he would similarly refuse to testify at trial. (App. at 56). Accordingly, Heard's counsel filed a motion to compel Brown's testimony at trial. (App. at 65). In the motion, Heard identified several aspects of Brown's anticipated testimony that would significantly bolster his theory that Brown carried out the murder:

- Brown's admission that he had the murder weapon immediately before and after the murder;
- Brown cleaned the gun of all finger prints, DNA, and gun residue after the murder;

- Brown hid the gun after the murder;
- Brown disposed of his clothing after the murder because he thought there may be incriminating evidence on it;
- Stanley Brown to "mouse" Hutchinson;
- Brown was considered a follower of Stanley;
- Brown, at the direction of Stanley, helped Majors collect Stanley's personal items from Hutchinson the morning of the murder;
- Brown was extremely nervous and sweating profusely after the murder;
- Brown told Jaquisha Majors to lie to the police the day after the murder;
- Brown admitted to Majors that he murdered Hutchinson; and
- Brown made an admission of guilt after the murder while incarcerated.

(App. at 65-66). In addition, Heard's counsel identified several way in which Brown's testimony would impeach his prior accounts as well as Phillip Findley's version of events. (App. at 66-67).

The court denied Heard's motion to Compel Brown's testimony. (App. at 95). Relying upon *State v. Bedwell*, 417 N.W.2d 66 (Iowa 1987), the court concluded that a jury is not

entitled to draw any adverse inference favorable to either party from a witness predetermined to invoke his or her right against self-incrimination. (App. at 95). The court explained that if found "troubling" the use of a witness's "exercise of constitutional rights as a weapon rather than a shield." (App. at 96). Such approach, the court reasoned, would invite "jurisprudential mischief in the criminal process." (App. at 96).

A. Applicable legal principles

This case requires the Court to resolve the conflict between two fundamental rights. On the one hand, a criminal defendant possesses the right to compulsory process to obtain witnesses in his favor. On the other hand, all individuals, not just the criminally accused, enjoy the right against self-incrimination.

A criminal defendant's right to compulsory process stems from the Sixth Amendment to the United States Constitution, which provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. Const, amend. VI. Similarly, article I, section 10 of the Iowa

Constitution affords the accused the right to "compulsory process for his witnesses." Iowa Const. art. I, § 10. The right to compulsory process includes the right to compel a witness's presence in the courtroom and the right to offer testimony of witnesses. *Russell*, 897 N.W.2d at 731. The Supreme Court has described the right to compulsory process as follows:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Taylor v. Illinois, 484 U.S. 400, 409 (1988). Along the same lines, the right to present a defense, which is essential to a fair trial, stems from the right to compulsory process." *State v. Simpson,* 587 N.W.2d 770, 771 (Iowa 1998). For this reason, the right to compulsory process is a "fundamental element of due process of law," and therefore, also embodied in the Due Process Clauses of the United States and Iowa Constitutions. *Washington v. Texas*,

388 U.S. 14, 19 (1967); *see also Simpson*, 587 N.W.2d at 771-72; U.S. Const. amends. V, XIV; Iowa Const. art. I, § 9.

The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V. While the Iowa Constitution does not expressly contain a provision against self-incrimination, Iowa court have recognized that such a right is fundamental to the "general guaranty of due process of law" found in article I, section 9. *State v. Height*, 117 Iowa 650, 659, 91 N.W. 935, 938 (1902). In *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964), the United States Supreme Court explained the purpose of the privilege:

> The privilege against self-incrimination registers an important advance in the development of our liberty-one of the great landmarks in man's struggle to make himself civilized. It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play

> which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load; our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent.

Id. at 55 (citations and quotations omitted). It extends not only to "answers that would in themselves support a conviction" but also to testimony that "would furnish a link in the chain of evidence needed to prosecute the claimant." *Hoffman v. United States*, 341 U.S. 479, 486 (1951). Not all questions, however, give rise to a Fifth Amendment claim of privilege. For example, the privilege does not apply to questions regarding a person's age, education, or medical history. *Sojic v. Karp*, 41 N.E.3d 888, 897-98 (Ohio Ct. App. 2015) ("Plaintiffs' counsel's questions regarding Karp's identity, family, and educational background are not facially incriminating and, based on the record, we find no suggestion that information regarding Karp's identity and educational background could lead to criminal charges"). Whether a questions poses a

sufficient hazard of incrimination to warrant Fifth Amendment protection is a matter for the court to decide as a matter of law. *Id.* at 897.

B. The district court erred in allowing Brown to make a blanket assertion of the right against self-incrimination

In his motion to compel, Heard requested the district court to require Brown to assert his right against self-incrimination on a question-by-question basis. (App. at 78-79). The court had previously directed Heard's counsel to submit proposed questions under seal to allow it to evaluate Brown's exposure to criminal liability. (01/03/17 Pretrial Motions Hr'g Tr. at 14). Counsel provided the court with seventy-seven questions, many of which had numerous sub-parts. (App. at 63). The majority of questions covered testimony that was not elicited in the initial cross-examination of Brown at Heard's first trial. (App. at 63). More importantly, a significant portion of the questions did not call for answers that would directly or indirectly inculpated Brown. (Def's Proposed Cross Exam Questions for Marco Brown). Nonetheless, the court allowed Brown to categorically assert his right against

self-incrimination and did not require him to answer any questions from Heard.

As the United States Supreme Court has made clear, the privilege against self-incrimination is "confined to instances where the witness has reasonable cause to apprehend danger from a direct answer." *Hoffman*, 341 U.S. at 486. "Basically, a witness may not claim his [F]ifth [A]mendment privilege unless he has reasonable cause to apprehend danger from a direct answer." *State v. Parham*, 220 N.W.2d 623, 627 (Iowa 1974). "The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination." *Hoffman*, 341 U.S. at 486. "It is for the court to say whether his silence is justified and to require him to answer if 'it clearly appears to the court that he is mistaken." *Id.* (citations omitted). "The 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." *Id.* at 487.

The district court lost sight of these core principles in refusing to require Brown to assert his privilege against self-incrimination on a question-by-question basis. "[T]he Constitution offers no protection to an individual who . . . asserts a general intent to refuse to answer any questions at a court hearing." *United States v. Antelope*, 395 F.3d 1128, 1134 (9th Cir. 2005). For this reason, "a blank refusal to answer any question is unacceptable." *United States v. Pierce*, 561 F.2d 735, 741 (9th Cir. 1977). As another state court has observed:

> This question by question determination of whether the witness may claim a Fifth Amendment privilege is the appropriate procedure to resolve the problem of a witness who is reluctant to testify because of potentially incriminating answers to questions asked on cross-examination. A trial witness other than the accused in a criminal prosecution may not claim a blanket Fifth Amendment immunity from giving relevant testimony simply because certain questions which may be asked on cross-examination might elicit incriminating answers. The witness should be required to answer those questions seeking to elicit relevant non-incriminating information in the witness' possession. If the witness is asked for incriminating information on cross-examination he may claim the Fifth Amendment privilege at that time.

Tennesee v. Dooley, 29 S.W.3d 542, 551 (Tenn. Crim. App. 2000). Thus, the district court's refusal to compel Brown to submit to any questioning violated Heard's right to compulsory process.

C. This Court should overrule *State v. Bedwell* to the extent that it categorically prohibits a defendant from questioning a witness in the presence of the jury who has indicated the intent to assert his or her privilege against self-incrimination

In *Bedwell*, the Iowa Supreme Court confronted the question of whether district court erred in refusing to require a potential defense to invoke his Fifth Amendment right in response to questioning in front of the jury. *Bedwell*, 417 N.W.2d at 67. The defendant was charged with second-degree burglary arising from the attempted theft of a television from an unoccupied home. *Id.* at 67-68. Bedwell's theory of defense was that his companion entered the residence alone and removed the television set. *Id.* at 68. Bedwell further contended that he gave no cooperation in the venture except to drive away and attempting to elude the pursuing police officer. *Id.* Prior to trial, the companion indicated, through counsel, that he intended to assert his Fifth Amendment privilege against self-incrimination if called to testify.

Id. at 69. In response, the trial court refused to permit Bedwell to call his companion as a witness. *Id.* With surprisingly little analysis, the Iowa Supreme Court affirmed the district court's refusal to allow Bedwell to examine his companion at trial. *Id.* Adopting the reasoning in *Bowles v. United States*, 439 F.2d 536 (D.C. Cir. 1970), the court held that a "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 of the defense*." *Id.*

The district court interpreted *Bedwell* as creating a categorical prohibition against any party calling a witness who intends to exercise his or her right against self-incrimination. In dicta, the Iowa Court of Appeals has adopted the same reading of *Bedwell*. *State v. Ellis*, 2011 WL 944428 at *7 (Iowa Ct. App. Mar. 21, 2011). As requested by Heard's trial counsel, this Court should overrule *Bedwell* for several reasons. (App. at 82).

First, the court's rationale for adopting the categorical rule is extraordinarily thin. For example, the opinion makes no mention of the right to compulsory process—let alone acknowledge the

tension between a defendant's due process rights and a witness's right against self-incrimination. *Bedwell*, 417 N.W.2d at 69. Nor does it consider society's "interest in preventing wrongful convictions." *State v. Cashen*, 789 N.W.2d 400, 407 (Iowa 2010), *superseded by statute*. Instead, the court's analysis consists merely of citing conflicting cases from other jurisdictions. *Bedwell*, 417 N.W.2d at 69. This sort of outsourcing calls into question *Bedwell's* precedential value.

Second, the *Bedwell* decision did not undertake any independent examination of the constitutional question under the Iowa Constitution.[1] Instead, the court adopted wholesale the Fifth Amendment analysis of the D.C. Circuit Court of Appeals in *Bowles.* Of course, the lockstep approach to interpreting similar constitutional provisions has fallen out favor. *Schmidt v. State*, ___ N.W.2d ___, 2018 WL 1440111 at *12 (Iowa Mar. 23, 2018) ("Because we 'jealously' safeguard our authority to interpret the Iowa Constitution on our own terms, we do not employ a lockstep

[1] Heard's counsel specifically asked the district court to disregard *Bedwell* in favor of an independent evaluation of the issue under the Iowa Constitution. (App. at 88-90).

approach to following federal precedent"). Accordingly, *Bedwell* should not be considered controlling on the issue as raised under article I, section 10 of the Iowa Constitution.

Lastly, the reasoning employed in *Bowles* decision, upon which the *Bedwell* relies, is suspect in several regards. For starters, the opinion of the *en banc* court of appeals drew two dissenting opinions questioning district court's handling of the defense witness. *Bowles*, 439 F.3d at 543-47 (Bazelton, Chief J. and Skelly Wright, J., dissenting). Further, the majority opinion omits any consideration of the defendant's right to compulsory process. *Id.* at 541-42. Rather, the holding in *Bowles* rests on two premises: (1) guilt may not be inferred from the exercise of the Fifth Amendment privileges; and (2) the "high courtroom drama" of a witness's invocation of the privilege may have a disproportionate impact on the jury's deliberation. *Id.* at 541.

Both premises have been the subject of much criticism. Some commentators have questioned *Bowles'* "constitutional notion" that guilt may never be inferred from the exercise of the Fifth Amendment privilege. Charles R. Nesson and Michael J.

Leotta, *The Fifth Amendment Privilege Against Cross-Examination*, 85 Geo. L.J. 1627, 1672 (1997). That view makes sense as it applies to a defendant because allowing the jury to infer guilt would constitute a penalty for exercising the constitutional right. *Id.* (citing *Griffin v. California*, 380 U.S. 609, 614 (1965)). That same is not true for a witness called by the defendant. "Because a witness is not on trial, . . . it makes no cognizable difference to her whether the jury believes she has committed a crime because she pled the privilege." *Id.* So long as the statements are not used against the witness at a subsequent trial, there is no penalty at all. As the dissent in *Bowles* points out, there is a qualitative difference in inferences to be drawn from a prosecutor's use of silence versus a defendant's. *Id.* at 545 (Bazelon, J., dissenting). A prosecutor uses a witness's refusal to answer incriminating questions to insinuate a defendant's guilt. *Id.* at 545 n.11. By contrast, when a defendant (like Kenneth Heard) "suggests that another person is a culpable party, the other's refusal to testify is merely being used a corroboration" of his theory of defense. *Id.* It is the difference between an

inculpatory versus exculpatory, which for constitutional purposes is the difference between night and day. On this point, Professor LaFave has further observed that a "defendant should be given the maximum possible opportunity to make his case, and since he lacks the power to grant the witness immunity and force him to testify, arguably he should at least be given the opportunity to utilize whatever inference the jury will attach (instructions notwithstanding) to the witness's claim of the privilege." Wayne R. LaFave, et al., *Criminal Procedure*, Vol. 6, § 24.4(c) at 522 (4th ed. 2015).

The notion that a jury will be unfairly prejudiced by a witness's assertion of his Fifth Amendment right has also been criticized. Nesson and Leotta, 85 Geo. L.J. at 1673-74. "Evidence is unfairly prejudicial when it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions of a case." *State v. Neiderbach*, 837 N.W.2d 180, 202 (Iowa 2013). But, just because an item of evidence is powerful

does not mean it is also prejudicial—let alone unfairly prejudicial. *Id.* Indeed, the potential drama flowing from Brown's refusal to answer questions at trial is several standard deviations less powerful than the State's presentation of photographs from Hutchinson's autopsy along with a close-up of the gunshot wound to his head. (App. Vol. II at 8, 10, 12).

D. The Court should apply a different framework under article I, section 10 of the Iowa Constitution

In his motion to compel, Heard asked the district court to rely upon article I, section 10 of the Iowa Constitution to adopt the framework employed by the West Virginia Supreme Court of Appeal. (App. at 88-90). In *West Virginia v. Herbert*, 767 S.E.2d 471 (2014), that court considered the appeal of a defendant who claimed to have acted in self-defense when he deliberately shot a man twice in the back and, in the process, accidently shot an eighty-year-old girl. *Id.* at 475. The alleged aggressor survived the shooting, but he indicated before trial that he would refuse to testify. *Id.* at 476. He not only refused to testify, but he also stated, "I plead the Fifth." *Id.* at 478. The trial court interpreted

this statement as the invocation of his right against self-incrimination and granted him immunity from prosecution. *Id.*

On appeal, the defendant argued that the trial court's failure to force the witness to invoke the Fifth Amendment privilege in front of the jury violated his Sixth Amendment right to compulsory process. *Id.* The court held that "in a criminal trial, when a non-party witness intends to invoke the constitutional privilege against self-incrimination, the trial court shall require the witness to invoke the privilege in the presence of the jury." *Id.* at 479. Additionally, the "constitutional privilege against self-incrimination may only be invoked when a witness is asked a potentially incriminating question." *Id.*

In arriving at its holding, the court noted that "the United States Supreme Court has not ruled on the issue, meaning that the states have discretion on how to approach this issue under the federal Fifth Amendment and respective state constitutions." *Id.* at 480. The court also rejected the reasoning in *Bowles*:

> Our reading of [*Bowles*] is that it impeded a defendant's fundamental right to present a complete and strong defense, a principle which is embodied in the Compulsory Process Clause of both the Sixth

> Amendment of the U.S. Constitution and Article II, Section 14 of the West Virginia Constitution. When the right to compulsory process is curtailed, a defendant's ability to counter the prosecution's case is diminished. Even though juries are instructed to presume a defendant's innocence, they may still improperly infer a defendant's guilty when an important witness fails to testify—particularly if defense counsel, in opening statement refers to this person as a witness to the events that occurred.

Id. As applied to the facts of the case, the court concluded that the trial court's decision not to make the witness "appear in front of the jury was error and violated the Defendant's constitutional right to compulsory process." *Id.* at 483.

Several reasons support the adoption of the *Herbert* framework under article I, section 10 of the Iowa Constitution. First, the textual difference between the Compulsory Process Clauses of the United States and Iowa Constitutions suggests that defendants have more protection under our state constitution. Under article I, section 10, a criminal defendant has the right to "compulsory process for his witnesses" whereas the Sixth Amendment affords the same defendant the right to compulsory process only for "obtaining witnesses in his favor." *Compare* U.S. Const. amend. VI *with* Iowa Const. art. I, § 10. It also bears

repeating that the Iowa Constitution does not expressly mention the right against self-incrimination. Taken together, the textual differences 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.

Second, this approach takes into consideration both the right to compulsory process as well as the right against self-incrimination. As the court in *Herbert* emphasized, the "constitutional right against self-incrimination does not extend to prevent the physical appearance of a person at trial." *Herbert*, 767 S.E.2d at 479. But, the right to compulsory process "is a fundamental right, and excluding a defense witness from the jury's presence would impinge on this fundamental right for reasons outside of the defendant's control." *Id.* at 480-81. "Allowing inferences from the invocation of the privilege to be used as impeachment will serve the purposes of our trial system." Nesson and Leotta, 85 Geo. L.J. at 1683. "Such inferences will advance the search for truth, ensure fairness to defendants, affirm

the public's confidence in our trial system, and facilitate the role of the trial as community catharsis." *Id.*

Lastly, the framework is consistent with our understanding that the "Iowa Constitution affords individuals greater rights than does the United States Constitution." *Schmidt*, ___ N.W.2d at ___; 2018 WL 144011 at *12. "As Iowans, we are deservingly proud of a long history of rejecting incursions upon the liberty of Iowans, particularly because we have so often arrived to the just result well ahead of the national curve." *State v. Short*, 851 N.W.2d 474, 507 (Iowa 2014)(Cady, Chief J., concurring specially). Consistent with these principles, the Court should overrule *Bedwell* and replace it with the rule announced in *Herbert*.

III. HEARD'S CONVICTION MUST BE SET ASIDE BECAUSE THE JURY'S VERDICT WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE

Error Preservation

Error was preserved by the adverse ruling on the defense motion for new trial, which was made pursuant to Iowa Rule of Criminal Procedure 2.24(2)(b)(6, asserting that the verdict was contrary to the weight of the evidence. (App. at 110)("Defendant's

Motion for new trial is DENIED"); (06/23/17 Sentencing Hr'g Tr. at 3-14).

Standard of Review

Review is for abuse of discretion. *State v. Nitcher*, 720 N.W.2d 547, 559 (Iowa 2006).

Analysis

A motion for new trial asserting a verdict is contrary to evidence under Iowa Rule of Criminal Procedure 2.24(2)(b)(6) should be granted only if, after weighing the evidence and considering the credibility of witnesses, the court concludes the verdict is "contrary to the weight of the evidence" and a miscarriage of justice may have occurred. *State v. Ellis*, 578 N.W.2d 655, 658-59 (Iowa 1998). The "weight of the evidence" refers to a determination that "a greater amount of credible evidence supports one side of an issue or cause than the other." *Id.* at 658.

The State's theory centered on the alleged existence of the "3 in 3 out" gang, and the suggestion that three gang members were required for initiation, and therefore, three people were required

to take you out. From there, the State pointed to the presence four people from the gang were at the murder scene with only three people leaving as evidence that this was a gang-related hit job. The inference to be drawn was that Heard's plan to commit a robbery was simply a ruse to lure Hutchinson into a secluded to be murdered for snitching to law enforcement and stealing from him. The problem with this theory is it was not corroborated by credible evidence. None of the prosecution's witnesses testified as to why Hutchinson was allegedly going to rob Heard and Stanley or snitch to the police. In closing arguments, the State contended that Hutchinson was going to snitch to the police regarding the alleged "licks" that Heard had committed, no evidence was elicited from any of the witnesses at trial to support this theory.

All of the credible evidence, on the other hand, pointed to Marco Brown as the trigger man, acting at the direction of Deland Stanley. Indeed, Jacquisha Majors told law enforcement after the killing that she thought Stanley ordered Hutchinson's murder. (05/24/17 Trial Tr. at 102). Her opinion was based on the uncontroverted evidence was that Stanley was upset at

Hutchinson for stealing drugs and making a pass at his girlfriend.[2] To add to that, Stanley openly bragged that he could order Brown to murder someone, and he would get away with it because he was mentally ill. (05/25/17 Trial Tr. at 41, 79). Indeed, shortly prior to the murder, Stanley specifically directed Brown to "mouse" Hutchinson the next time he saw him. (05/25/18 Trial Tr. at 40-41). And, Brown's subsequent course of conduct was consistent with that direction. The gun used to murder Hutchinson belonged to Stanley, and Brown was the person who left the scene with the murder weapon. (05/24/17 Trial Tr. at 62-63). He wiped the gun to destroy any trace evidence before hiding it in his father's garage. Brown also destroyed the clothes he wore at the time of the murder for fear that they would contain forensic evidence of his involvement. The coup de gras was the unimpeached testimony from an Albert

[2] A few weeks before the murder, Hutchinson sent Stanley's other girlfriend, Laura Markle, a letter expressing his interest in starting a relationship with her. (05/25/17 Trial Tr. at 81-82)(App. Vol. II at 14). When Stanley learned of the letter, he became very extremely upset at Hutchinson. In addition to the letter, Stanley was also upset that Hutchinson had stolen drugs him. (05/24/17 Trial Tr. at 82; 05/25/17 Trial Tr. at 39-40, 83).

Harris who overheard a conversation at the Polk County Jail in which Brown told Heard, "I know you didn't do nothing man. Just let me play this crazy shit, and then I've got you." (05/30/17 Trial Tr. at 6).

The lack of evidence inculpating Heard is equally as compelling. The State offered no evidence tying Heard to the murder weapon. The only eyewitness who testified, Phillip Findley, admitted that he did not see Heard shoot Hutchinson and did not know who committed the murder. (05/23/17 Trial Tr. at 112-13; 05/24/17 Trial Tr. at 10-11). Law enforcement recovered the black Carhartt jacket that Heard had been wearing at the time of Hutchinson's death. (05/25/17 Trial Tr. at 13-14, 24-25). The defense called blood spatter expert, Michael Howard, who gave his opinion that the wound to Hutchinson's head created blood spatter. (05/30/17 Trial Tr. at 40-41). He further testified that he would expect the spatter to have landed on the sleeve of the person who fired the shot to the head. (05/30/17 Trial Tr. at 44-45). Yet, law enforcement did not recover any forensic evidence from Heard's jacket to tie him to Hutchinson's murder.

The above facts clearly indicate that the evidence presented by the defense is more credible than the prosecution's evidence. The district court, therefore, abused its discretion in denying Heard's motion for new trial on this basis. Consequently, Heard's murder conviction must be vacated and the case remanded to the district court for a new trial.

CONCLUSION

For the reason set forth above, Kenneth Heard, requests this court reverse his conviction and remand the case to the district court for a new trial. Alternatively, Heard requests the court to vacate the portion of his sentences that imposes a life sentence without the possibility of parole.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellant requests to be heard in oral argument.

COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's proof brief was $17.25, and that that amount has been paid in full by me.

CERTIFICATE OF COMPLIANCE

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